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Interpretation of Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights

Abdi Jibril Ali[*]

Abstract

Economic, social and cultural rights are guaranteed under the African Charter on Human and Peoples' Rights. As the Charter is relatively younger than similar human rights treaties at regional and global levels, it has incorporated experiences existing at the time of its conception and adoption. The Charter also brought new development to the international human rights law. Indivisibility is its hallmark since it guarantees all human rights in the same treaty without giving preference to one category of rights over the others in terms of the corresponding state obligations and institutional framework. In particular, the Charter does not contain the concept of progressive realisation, a concept common to other economic, social and cultural rights. The Charter also departs from other treaties as it guarantees fewer economic, social and cultural rights. The African Commission on Human and Peoples' Rights is one of the organs monitoring the implementation of the Charter. It is interesting to examine how the Commission has approached the interpretation of economic, social and cultural rights under the Charter in light of its unique features. These features of the Charter are discernible when the text of the Charter is read in light of its drafting history and compared with other treaties, particularly with the International Covenant on Economic, Social and Cultural Rights. This article argues that through the Commission's interpretation changes have been introduced to the Charter, affecting its unique features. The Commission has done this through the cases it has decided and the declarations, guidelines, principles and resolutions it has adopted.

Key terms: Implied rights, immediate obligations, indivisibility of human rights, progressive realisation

Introduction

The African Charter on Human and Peoples' Rights (African Charter or Charter),[1] the main human rights treaty of the African Union, establishes standards and mechanisms for the regional promotion and protection of human rights in Africa. As

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[1] Adopted 27 June 1981 & came into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).

a continuation of the human rights project, the African Charter was built on the global experiences and benchmarked regional mechanisms in the Americas and Europe. The Charter adds new features: it unites all human rights (civil, collective, cultural, economic, political and social rights) in a single binding treaty. In particular, it places economic, social and cultural rights on the same footing with civil and political rights in terms of formulation of the rights, corresponding state obligations and mechanisms of supervision. In these respects, the Charter has more similarities with the International Covenant on Civil and Political Rights (ICCPR)[2] than with the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3]

The Charter significantly departs from the ICESCR with regard to general state obligations and rights guaranteed. Unlike the ICESCR, the Charter does not require progressive realisation of economic, social and cultural rights to the maximum of available resources despite a proposal to that effect during its drafting.[4] Rather, the Charter was understood as imposing immediate obligations in relation to all rights. Moreover, the Charter does not guarantee as many rights as the ICESCR does. It omits important social rights such as the right to food, the right to water, the right to housing, and the right to social security.

The African Charter establishes the African Commission on Human and Peoples' Rights (African Commission or Commission) to monitor the implementation of the rights guaranteed in the Charter. The Commission has the mandate to promote, protect and interpret these rights. The African Court on Human and Peoples' Rights (African Court or Court) complements the protective mandate of the Commission. Both the Commission and the Court interpret the Charter. This article deals with the Commission's interpretation of economic, social and cultural rights guaranteed under the Charter. As a relatively young institution, the African Court has yet to develop its jurisprudence in this area. For this reason, this article focuses on the interpretation of the Commission.

The article argues that the African Commission has interpreted the Charter to harmonise it with the ICESCR. The harmonisation exercise affects the fundamental features of the Charter. The Commission has made the harmonisation through two major changes to the Charter. One of these changes concerns the introduction of progressive realisation obligation into the Charter. The article will discuss the

[2] Adopted 16 December 1966, entry into force 23 March 1976, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171.

[3] Adopted 16 December 1966, entry into force 3 January 1976, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3.

[4] cf ICESCR, Art 2(1), which provides that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

concept of progressive realisation in section one, following this introduction. The section will explore how the concept has found its way into the Charter by examining the drafting history of the Charter and the Commission's jurisprudence.

The other change made to the African Charter relates to the introduction of rights that are not expressly recognised. The Charter does not expressly recognise some rights such as the right to privacy, which is traditionally regarded as belonging to the civil and political rights category. However, the changes introduced by the Commission pertain only to rights usually regarded as economic, social and cultural rights. The second section will first identify economic, social and cultural rights omitted from the Charter and the reasons for the omissions. The section will then investigate how the Commission has introduced the omitted rights into the African Charter.

The African Commission has made these changes through interpretation of the Charter. In any interpretive exercise, the decision to adopt a particular alternative among other options should be supported by reasons. Although the Commission does not clearly articulate reasons for its interpretation, some justifications can be implied from its jurisprudence. The third section will attempt to extrapolate the Commission's justifications for its line of interpretation and search for additional explanations for the changes brought to the Charter by the Commission.

Irrespective of whether the justifications are convincing or not, the Commission's interpretation has consequences for both the rights holders and the duty bearers. The Commission's interpretations cannot be dismissed out rightly as irrelevant. There are some benefits in it. There are also risks. The fourth section will pinpoint these benefits and risks particularly from the perspective of the rights holders. The section will, metaphorically, place the benefits on one side of the scale and the risks on the other side to identify whether the scale tilts to one side or the other. The article will close by drawing conclusions.

1. Progressive Realisation

Progressive realisation refers to the gradual implementation of economic, social and cultural rights. It denotes an obligation to continuously improve the provision of economic, social and cultural rights.[5] It is based on the assumption that the full realisation of these rights takes long time because of scarcity of resource.[6] The concept implies that state parties to a human rights treaty can delay their obligation of fully realizing the rights. They cannot, however, delay their obligation to start the implementation which leads to immediate partial fulfilment that will gradually

[5] MANISULI SSENYONJO, ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW 59 (Hart Publishing 2009).

[6] Lillian Chenwi, *Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance*, 46 DE JURE (2013) 742, 744.

constitute full realisation of the rights. While the concept of progressive realisation is usually provided in human rights treaties that guarantee economic, social and cultural rights, it is omitted from the text of the African Charter.

1.1. Omission of progressive realisation

An enquiry of how the African Charter treats the concept of progressive realisation should obviously start with an examination of its texts according to the Vienna Convention on the Law of Treaties.[7] Article 1 of the Charter provides that "States parties to the Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them." This provision might have been an appropriate place to enshrine the concept of progressive realization because most human rights treaties usually incorporate the concept in clauses that provide for general state obligations.[8] Article 1 applies to all rights guaranteed in the Charter because there are no separate provisions of state obligations relating to different categories of Charter rights. This provision, however, does not contain any requirement to the effect that state parties should progressively achieve full realisation of the recognised rights. Neither does it condition the enjoyment of these rights on availability of resources. The text of the Charter is unequivocally clear that the concept of progressive realisation is omitted. Thus the enquiry may continue beyond the text.

Chronologically, the African Charter came late in the proliferation of human rights instruments globally. The ICESCR had already been in force when the Charter was adopted in 1981 and 13 African states had already ratified the ICESCR at the time of adopting the Charter.[9] In particular, the two states (Senegal and The Gambia) that played an important role in the preparation and adoption of the Charter were already parties to the ICESCR by 1978.[10] Moreover, the American Convention on Human Rights could have provided regional benchmark.[11] Then, one may wonder why the African Charter did not follow the path taken by the ICESCR and the American Convention on Human Rights. In searching for an answer, recourse can be

[7] Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969) (VCLT), Art 31.

[8] Compare ICESCR, Art 2(1); Convention on the Rights of Persons with Disabilities, UN Doc.A/61/611, adopted 13 December 2006, entry into force 3 May 2008, 2515 UNTS 3, art 4(2); Protocol of San Salvador, Art 1.

[9] See status of ratification of the ICESCR <http://indicators.ohchr.org/> accessed 27 August 2016.

[10] FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 160 (2007, OUP).

[11] Adopted 21 November 1969, entry into force 18 July 1978, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969), Art 26, which provides that:
The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

made to the preparatory work of the Charter and the circumstances of its conclusion.[12]

Indeed, the ICESCR and the American Convention on Human Rights were the basis for drafting the African Charter. Kéba Mbaye, a Senegalese jurist then Vice-President of the International Court of Justice and Chairperson of the legal experts committee drafting the African Charter, submitted to the experts a proposed draft which was "largely drawn from the provisions of the [ICESCR] and the American Convention on Human Rights."[13] Mbaye's draft contains almost a verbatim reproduction of Art 2(1) of the ICESCR (the progressive realization provision) as article 3 of his draft African Charter. The draft stipulates that:

> States Parties undertake to take steps, individually and through international co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Charter by all appropriate means, including particularly the adoption of legislative measures.[14]

From the texts of Art 2(1) of the ICESCR, Mbaye omitted the requirement of taking steps through international assistance. He replaced the word 'covenant' with 'Charter'. Otherwise, Mbaye's proposed article 3 of the Draft African Charter was the same with Art 2(1) of the ICESCR.

In addition, Mbaye kept the distinction between economic, social and cultural rights and civil and political rights by providing them under different chapters.[15] He also prescribed different monitoring mechanisms. Under Art 14, Mbaye's draft requires state parties to report "on the measures which they have adopted and the progress made in achieving the observance" of economic, social and cultural rights while requiring judicial protection of civil and political rights under Art 32.

However, the committee of experts did not accept Mbaye's proposal with regard to progressive realisation. As it is abundantly clear from the experts' draft of the African Charter produced after their meeting in Dakar, the drafters not only excised the requirement of progressive realization but also eliminated the distinction kept between the two categories of rights and their monitoring mechanisms.[16] The

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[12] VCLT, Art 32.

[13] Draft African Charter on Human and Peoples' Rights, prepared for the Meeting of Experts in Dakar, Senegal from 28 November to 8 December 1979, by Kéba Mbaye, CAB/LEG/67/1 (hereafter Mbaye's draft), reproduced *in* HUMAN RIGHTS LAW IN AFRICA 1999 65 - 77 (Christof Heyns ed., 2002).

[14] Mbaye's draft, Art 3.

[15] Ch I (Arts 5 - 15) of Mbaye's draft Charter deals with economic, social and cultural rights while ch II (arts 16 - 32) provides for civil and political rights. Heyns, *Supra* note 13.

[16] Preliminary draft of the African Charter prepared during the Dakar Meeting of Experts at the end of 1979, CAB/LEG/67/3/Rev. 1, reproduced *in* Heyns, *Supra* note 13, at 81 - 91.

ministerial conferences that considered the draft Charter did not reintroduce progressive realisation or adopt different monitoring mechanisms.[17]

The indivisibility of rights was a central theme during the drafting process. In his opening speech, President Senghor instructed the drafters that:

> We are certainly not drawing lines of demarcation between the different categories of rights. We are not grading these either. We wanted to show essentially that beside civil and political rights, economic, social and cultural rights should henceforth be given the important place they deserve.'[18]

In line with Senghor's instruction, the drafters reported that "[e]conomic, social and cultural rights were given the place they deserved" in the Charter.[19] That is, they placed economic, social and cultural rights on the same footing as civil and political rights as opposed to other global and regional human rights treaties that arguably accorded them lesser importance. Therefore, the Charter departs from the orthodoxies of the era.[20] Some even argue that the Charter attaches more importance to economic, social and cultural rights than to civil and political rights.[21]

In this respect the Charter represents an African conception of human rights because it establishes conceptual and conventional unity of all human rights.[22] The originality may have resulted from the fact that the Charter is a compromise among African states themselves and a common position towards international law. As the Charter itself declares allegiance to the Movement of Non-Aligned Countries, Africa did not subscribe to either camp of the Cold War.[23] If the Western capitalist states emphasised civil and political rights as opposed to socialist states that prioritised economic, social and cultural rights at the time of drafting the Charter,[24] a neutral approach to human rights would treat all rights in the same way. But that does not mean that there was a uniform economic system across the African continent. The unity of all human rights under the Charter can be understood as a compromise between socialist and capitalist African countries that participated in the

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[17] Rapporteur's Report, CAB/LEG/67/Draft Rapt. Rpt (ll) Rev 4, reproduced *in* Heyns *Supra* note 13, at 94 - 105.

[18] Address delivered by Leopold Sedar Senghor, President of the Republic of Senegal, at the opening of the Meeting of African Experts preparing the draft African Charter in Dakar, Senegal 28 November to 8 December 1979, reproduced *in* Heyns *Supra* note 13, at 78 - 80.

[19] *Ibid.*

[20] Chidi Anselm Odinkalu, *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights* 23 HUMAN RIGHTS QUARTERLY 327, 337 (2001).

[21] EI-Obaid Ahmed EI-Obaid & Kwadwo Appiagyei-Atua, *Human Rights in Africa: A New Perspective on Linking the Past to the Present* 41 MCGILL LAW JOURNAL 819, 846 (1996); Odinkalu *Supra* note 20, at 337.

[22] EVA BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY 119 (Martinus Nijhoff Publishers 2001).

[23] African Charter, Preamble, para 9.

[24] KITTY ARAMBULO, STRENGTHENING THE SUPERVISION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THEORETICAL AND PROCEDURAL ASPECTS 17 (Intersentia 1999).

negotiation of its text.[25] Its departure in this regard from global and other regional human rights treaties can also be understood as an attempt by newly independent African states "questioning mainstream international law."[26]

1.2. The African Commission's understanding of the textual omission

A piece of evidence on how the African Commission understands the omission of progressive realisation from the African Charter can be found in one of its statements. Umozurike, in his capacity as the Chairperson of the Commission, emphasised that "[the] Charter requires that all of [economic, social and cultural] rights and more should be implemented *now*."[27] He underscored that the Charter requires immediate implementation. That is, the Charter does not allow states to postpone their obligations - a view contrary to what the concept of progressive realisation entails. Other members of the Commission also echoed this view.[28] Based on his interview with some members of the Commission in 2009, Yeshanew reports that the Commissioners believe that "the obligations of states relating to the economic, social and cultural rights in the [African] Charter are immediate."[29]

In its case law, the Commission does not expressly employ the phrase "immediate obligation". But its decisions essentially imply that the Charter imposes immediate obligations. In *Free Legal Assistance Group and Others v Zaire*, the Commission held that the government's failure "to provide basic services such as safe drinking water and electricity and the shortage of medicine" violates the right to health.[30] The Commission did not examine whether the respondent state had the necessary resources or whether it needed time to mobilise those resources to provide for safe drinking water, electricity and medicine. It is difficult to imagine that the Commissioners did not know that generating electricity, building water facilities and purchasing medicine not only require huge resources but also time; no hydroelectric power can be built over night, for instance. Rather, the aforementioned holding of the Commission shows the Commission's conviction that the Charter provides for immediate obligations. As a result, the mere fact that there was no electricity, safe drinking water, and medicine was enough to attribute state responsibility.

In *Purohit and Another v The Gambia,* which was decided in 2003, the Commission examined the detention of persons with mental disabilities and held that:

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[25] Odinkalu, *Supra* note 20, at 330.

[26] Brems, *Supra* note 22, at 93.

[27] Presentation of the 3rd Activity Report, by the Chairman of the Commission, Professor U. O. Umozurike to the 26th Session of the Assembly of Heads of State and Government of the OAU (9 - 11 July 1990), reproduced in DOCUMENTS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 202 - 203 (R Murray & M Evans eds., Hart Publishing 2001). Italics added.

[28] Odinkalu, *Supra* note 20, 349 - 350.

[29] SISAY ALEMAHU YESHANEW, THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: THEORY, PRACTICE AND PROSPECT 251 (Intersentia 2013).

[30] (2000) AHRLR 74 (ACHPR 1995), para 47.

> [T]he scheme of the [Lunatics Detention Act] is lacking in terms of therapeutic objectives as well as provision of matching *resources* and programmes of treatment of persons with mental disabilities, a situation that the Respondent State does not deny but which nevertheless falls short of satisfying the requirements laid down in Articles 16 and 18(4) of the African Charter.[31]

Because of the respondent state's failure to provide a mental illness scheme with resources, the Commission found violations of the right to health (Art 16) and measures of protection for persons with disabilities (Art 18(4)).

In *Gunme and Others v Cameroon* (*Southern Cameroon* case), the Commission examined, among others, an alleged violation of the right to development due to economic marginalisation and lack of economic infrastructure in part of Cameroon and held that "[t]he lack of such resources, if proven would constitute violation of the right to development."[32] Although the Commission did not find violation, it confirmed that lack of resource constitutes violation. The finding of no violation was based on explanations and statistical data showing "allocation of development resources in various socio-economic sectors" contrary to the allegation of the complainants.[33]

In *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (*Ogoniland* case), the Commission examined an alleged violation of several economic and social rights in Nigeria due to exploitation of oil reserves in Ogoni land without regard to the health and environment of the Ogoni people.[34] While explaining that all rights generate "the duty to respect, protect, promote, and fulfil", the Commission observed that "[the ICESCR], for instance, under Article 2(1) stipulates exemplarily that States 'undertake to take steps…by all appropriate means, including particularly the adoption of legislative measures.'"[35] One expects a reference to Art 2(1) to be in full, including the concept of progressive realisation. The Commission, however, excluded the relevant phrase of the provision (i.e. "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights"). Nor did it discuss the concept in canvassing state obligations even with regards to the duty to fulfil. Apparently, the Commission used the quotation to emphasise that states should take steps and identify means of taking those steps. The undertaking to take steps even under the ICESCR is an immediate obligation.[36] Therefore, the Commission's reluctance to refer to the

[31] (2003) AHRLR 96 (ACHPR 2003), para 83. Italics added.

[32] (2009) AHRLR 9 (ACHPR 2009), para 205.

[33] *Southern Cameroon case*, para 206.

[34] (2001) AHRLR 60 (ACHPR 2001).

[35] *Ogoniland* case, paras 44 & 48.

[36] CESCR, General comment No. 3: The nature of States parties' obligations (Art. 2, para. 1, of the Covenant) (hereafter 'General Comment 3'), E/1991/23 (1990), para 2.

concept and its emphasis on taking steps instead can be read as an interpretive strategy adopted on purpose in eschewing the concept of progressive realisation.

The Commission's view that the Charter provides for immediate obligations has been supported by a number of scholars. Odinkalu, for example, submits that "the obligations that state parties assume with respect to economic, social and cultural rights are clearly stated as of immediate application."[37] Ouguergouz, who later became a judge and Vice-President of the African Court, argues that "States parties are legally bound to ensure that the individual immediately enjoys these rights."[38] To Olowu, "in the absence of any textual inference to the contrary, the spirit and letters of economic, social and cultural rights provisions connote immediate implementation under the African Charter."[39]

1.3. Introduction of 'progressive realization'

The African Commission has avoided using either the terms 'progressive realisation' or its substance for a long time even with regard to the right to health under Art 16 whose wording is understood as an exception to the Charter's requirement of immediate obligation.[40] Viljoen argues that the Commission decided to qualify the right to health with 'available resources' in *Purohit and Another v The Gambia* but suggests that the case should not be the basis for applying the qualification of 'available resources' to the 'unqualified' right to education.[41] Relying on the same case, Yeshanew argues that "the African Commission read the 'progressive realization' qualification" into Art 16 of the Charter.[42]

Indeed, the Commission referred to 'available resources' in *Purohit and Another v The Gambia* when it held that:

> [H]aving due regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on part of States party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.[43]

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[37] Odinkalu, *Supra* note 20, at 349.

[38] FATSAH OUGUERGOUZ, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN RIGHTS AND SUSTAINABLE DEMOCRACY IN AFRICA 200 (Nijhoff 2003).

[39] DEJO OLOWU, AN INTEGRATIVE RIGHTS-BASED APPROACH TO HUMAN DEVELOPMENT IN AFRICA 58 (Pretoria University Law Press 2009).

[40] Viljoen, *Supra* note 10, at 217; Odinkalu, *Supra* note 20, at 349; Ouguergouz, *Supra* note 38, at 200; Yeshanew, *Supra* note 29, at 254.

[41] Viljoen, *Supra* note 10, at 217; *Purohit and Another v The Gambia*, para 84.

[42] Yeshanew, *Supra* note 29, at 254.

[43] *Purohit and Another v The Gambia*, para 84.

However, the case is more of a confirmation of immediate obligation than an introduction of progressive realisation for a number of reasons. First, the Commission did not use the 'best attainable' language of Art 16, which is the basis for commentators to regard the provision as an exception to the immediate obligation requirement.[44] Second, the Commission emphasised immediate obligations as it did in the *Ogoniland* case. It underscored the obligation to take steps and the prohibition of discrimination, which are immediate obligations even under the ICESCR.[45] Third, the Commission found violation of Art 16 because of the respondent state's failure to provide resources to the mental health scheme. Finally, the respondent state did not argue that its failure was due to a lack of resources.

The Commission used the phrase 'progressive realisation' in the *Southern Cameroon* case decided in 2009. The Commission held that the "respondent state is under obligation to invest its resources in the best way possible to attain the *progressive realisation* of the right to development, and other economic, social and cultural rights."[46] It seems that the Commission introduced the terms inadvertently because it did not clearly articulate its holding; nor did it provide reasons for its decision. Surprisingly, it was not dealing with an alleged violation of economic, social and cultural rights. Rather, it was examining the right to development, which does not fall under economic, social and cultural rights according to the Commission's classification of rights. Even when a violation of the right to education resulting from the respondent state's conduct of "underfunding and understaffing primary education" was alleged, its finding of no violation was not based on lack of resources. But the case does evidence the Commission's use of the terms in its case law.

The wholesale importation of the concept has been made through what the Commission calls soft law instruments.[47] Even before deciding the *Southern Cameroon* case, the Commission used the terms 'progressive realisation' in the Pretoria Declaration adopted in 2004.[48] The Declaration requires state parties to prepare "National Action Plans, which set out benchmark indicators for the progressive realisation of social, economic and cultural rights."[49] In a language similar to Art 2(1) of the ICESCR, the Declaration calls upon the state parties to give full effect to economic, social and cultural rights "by using the maximum of their resources."[50] As it was the case in the decision of the *Southern Cameroon* case,

[44] See Viljoen, *Supra* note 10, at 217; Odinkalu, *Supra* note 20, at 349; Ouguergouz, *Supra* note 38, at 200; Yeshanew, *Supra* note 29, at 254.

[45] General Comment 3, paras 1 & 2.

[46] *Southern Cameroon case*, para 206. Italics added.

[47] See Soft Law, available at <http://www.achpr.org/instruments/> accessed 8 July 2016.

[48] Resolution on Economic, Social and Cultural Rights in Africa, 36th Ordinary Session, Dakar (7 December 2004).

[49] Pretoria Declaration, para 11(iv).

[50] *Ibid.*, para 2.

the Commission did not provide any justification for the incorporation of the notion of progressive realisation in the Declaration.

An elaborate introduction of the concept occurred in 2011 when the Commission adopted the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights (Nairobi Principles) which expressly declare that the concept of progressive realisation is applicable to economic, social and cultural rights under the African Charter.[51] In the Preamble, the Nairobi Principles list a number of instruments from which the inspiration has been drawn but their contents show that they are mere transplantation of the interpretative approach under the ICESCR.

In terms of approach, the Commission differs from the Committee on Economic, Social and Cultural Rights (CESCR), which interprets and monitors the implementation of the ICESCR. The CESCR started from the text of the ICESCR and carved immediate obligation out of the notion of progressive realisation provided under Art 2(1) of the ICESCR. The CESCR states that "the obligation [under Art 2(1)] differs significantly from that contained in Art 2 of the [ICCPR] which embodies an immediate obligation."[52] Still, it identified from Art 2 of the ICESCR immediate obligations to take steps and to guarantee rights without discrimination.[53] From the ICESCR's overall objective of establishing clear obligations for state parties, it identified some state duties largely understood as immediate obligations, namely, prohibition of retrogressive measures and minimum core obligations.[54] The CESCR convincingly proceeded to establishing clarity in state obligations without abandoning its contextual foundations.

On the contrary, the African Commission does not have similar texts to work with. Art 1, the general obligation provision of the Charter, is similar to Art 2 of the ICCPR which is understood both by the Human Rights Committee and the CESCR as enshrining immediate obligations.[55] The Commission admitted that "the African Charter does not expressly refer to the principle of progressive realisation."[56] Had the Commission proceeded from the texts, it would have ended up declaring that the Charter, like the ICCPR, provides for immediate obligations. That being the case, the Commission could not find particular provisions of the Charter from which the concept can be implied.

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[51] The Commission reported the adoption of the Nairobi Principles in its Thirty-first Activity Report to the Executive Council of the AU, EX.CL/717(XX).

[52] General Comment 3, para 9.

[53] General Comment 3, paras 1 - 2.

[54] General Comment 3, paras 9 - 10.

[55] Human Rights Committee, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted on 29 March 2004 (2187th meeting), CCPR/C/21/Rev.1/Add.13 (26 May 2004), paras 5 & 14.

[56] Nairobi Principles, para 13.

The Commission's view largely converges with that of the CESCR with regard to the meaning and content of the concept. However, the relationship between 'progressive realisation' and 'available resources' is not straight forward in the ICESCR. The scarcity of resources or lack of available resources can be taken as the main reason for the requirement of progressive realisation. Emphasising time as another important factor, the CESCR observed that: "The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in *a short period of time*."[57]

The concept refers to 'realisation over time' as opposed to immediate obligations.[58] The implication is that the full realisation takes time even if there is no limitation of resources. This appears sound to common sense as, for instance, a school or a hospital cannot be built and staffed overnight even if a state has sufficient financial resources; planning and construction of such a project take a long time let alone training of teachers or medical professionals.

The Commission's definition, albeit circular, clearly combines both factors: resource availability and time. It defines progressive realisation as "[t]he obligation to progressively and constantly move towards the full realisation of economic, social and cultural rights, *within the resources available to a State*, including regional and international aid."[59] It adds that "States must implement a reasonable and measurable plan, including set[ting] achievable benchmarks and timeframes, for the *enjoyment over time* of economic, social and cultural rights."[60]

However, the Commission omits optimal resource utilisation element from its definition. That element is clear from the ICESCR's requirement that a state party should take steps "to the maximum of its available resources."[61] Central to this requirement is not only avoiding resource wastage but also producing the best possible outcome. Instead, the Commission uses the phrase "within the resources available to a State" which implies that it does not incorporate a requirement for optimal utilisation of resources into its definition.[62] Thus avoiding resource wastage does not seem to fall within the purview of the Commission's definition. The question of how states use their resources is particularly relevant to Africa since the low implementation of economic, social and cultural rights is usually attributed to mismanagement of resources.[63] The reason why the Commission chose to omit this

[57] General Comment 3, para 9. Italics added.

[58] *Ibid.*

[59] Nairobi Principles, para 13. Italics added.

[60] Nairobi Principles, para 14. Italics added.

[61] ICESCR, Art 2(1).

[62] Compare Pretoria Declaration, para 2.

[63] Mashood A. Baderin, *The African Commission on Human and Peoples' Rights and the Implementation of Economic, Social and Cultural Rights in Africa, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 142 (Mashood A. Baderin & Robert McCorquodale eds., OUP 2007).

element from its definition is subject to speculation: it could be an inadvertent omission or a deliberate strategic decision intended to avoid the technical complexity of assessing whether resources are put to maximum use or not.

2. Expansion of Recognised Rights

The African Charter is said to have adopted a minimalist approach.[64] In fact, the standard one adopts to measure the qualities of the Charter is important. Since the Charter guarantees fewer economic, social and cultural rights than the ICESCR does, it could be deemed minimalist. On the contrary, as it guarantees more economic, social and cultural rights than its regional counterparts — the American Convention on Human Rights and the European Convention on Human Rights — it can be characterised as a maximalist human rights treaty. Commentators usually take the ICESCR as a point of reference for praising or condemning the Charter. Similarly, the Commission relies on the ICESCR to expand the substantive scope of the Charter as discussed in the following subsections.

2.1. The Charter's defect

As alluded to in the introductory part of this article, the African Charter omitted some economic, social and cultural rights such as the right to an adequate standard of living for oneself and one's family, including adequate food, clothing and housing, and to the continuous improvement of living conditions, the right to be free from hunger, the right to social security, including social insurance.[65] Moreover, rights such as the right to work and the right to education recognized in the Charter are missing some elements.[66] The Charter has been compared with the ICESCR and criticised as defective for these omissions.[67] While amending the Charter and adopting an additional protocol were considered among possible solutions, interpretation is a preferred way of fixing the defects.[68]

The criticism against the African Charter for omitting some rights misses some important points. First, the fact that the omitted rights are identified in comparison with the ICESCR implies that the ICESCR is a perfect flawless human rights treaty to which others should conform. Critics ignore those objections to economic, social and cultural rights as human rights are partly based on the differences between the ICESCR and the ICCPR. That is, the ICESCR is defective when compared to ICCPR. Second, the critics fail to recognise that their proposal was considered during drafting of the Charter but jettisoned in the end. As discussed above, all of

[64] Viljoen, *Supra* note 10, at 215.

[65] Compare ICESCR, Arts 9 and 11.

[66] African Charter, Arts 15 & 17.

[67] J Oloka-Onyango, *Beyond the rhetoric: reinvigorating the struggle for economic and social rights in Africa,* 26 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 1 51 (1995); Yeshanew, *Supra* note 29, at 266.

[68] Yeshanew, *Supra* note 29, at 270.

the rights, which are now missing from the Charter, were included in Mbaye's draft with sufficient details that was similar to the provisions of the ICESCR.[69] The drafters, for one reason or another, had to make a judgment and select some rights. However, the criteria used for selection are not clear.[70] The bipolar political climate in which the ICESCR was adopted should always be born in mind. Third, the critics assume that the contexts in which the ICESCR and the African Charter were adopted were identical.

The African contextual reality, both political and economic, should not be ignored. The African leaders did not have the political commitment to human rights, which have been considered matters of internal affairs. That can be inferred from the Charter of the Organisation of African Unity (OAU) that makes no reference to human rights but emphasises non-interference in the internal affairs of states.[71] Human rights abuses that left more than 100,000 persons dead in Uganda did not prevent the election of Amin as the Chairperson of the OAU in 1975, few years before the adoption of the African Charter.[72] That provides an indication that human rights were of little concern for African leaders at the time.

The political reality on the ground was not friendly to human rights and the drafters were aware of that. The fear that the African leaders would not accept the Charter or at least delay its adoption was, in fact, reasonable. The Chairperson of the Drafting Committee expressed that fear when he stated that: "The concise and general formulation adopted by the authors of the preliminary draft with respect to economic, social and cultural rights is in line with the concern to spare our young states too many but important obligations."[73] Apparent from this statement is the strategy adopted to sell the Charter to the African leaders. The aim of the drafters was to appease the leaders that they were not undertaking too many obligations.[74]

The Chairperson's statement also indicates the drafters' concern about the African economic contexts within which economic, social and cultural rights would be realised. It appears that some choice had to be made since the 'young' states would not be able to implement all economic, social and cultural rights. Therefore, only a few economic, social and cultural rights were selected for inclusion in the Charter. In other words, some rights were prioritised.

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[69] Mbaye draft, Arts 6 - 13.

[70] Yeshanew, *Supra* note 29, at 241.

[71] Charter of the OAU, Art III. Under Art II, the Charter refers to the UDHR and the UN Charter for guidance in conducting international cooperation.

[72] KOFI OTENG KUFUOR, THE AFRICAN HUMAN RIGHTS SYSTEM: ORIGIN AND EVOLUTION 24 (Palgrave Macmillan 2010).

[73] Rapporteur's Report on the Draft African Charter, OAU Doc CAB/LEG/67/Draft Rapt.Rpt. (II) Rev.4, para 13, Heyns, *Supra* note 13, at 95 - 96.

[74] Viljoen, *Supra* note 10, at 215.

The omission of the progressive realisation from the Charter was accompanied by the recognition of fewer rights than the ICESCR guarantees. This is, it is submitted, a compromise made to maintain the indivisibility of rights. The logic, it seems, is that the economic contexts of the 'young' states do not allow the immediate realisation of many rights. Hence, the need to spare them from 'too many but important obligations.'[75]

2.2. The Commission's fix

The African Commission started introducing additional rights, which were originally omitted from the Charter almost from the beginning of its operation. In 1989, the Commission adopted the Guidelines for National Periodic Reports that heavily relied on international human rights law, including the ICESCR.[76] These guidelines require states to report on the right to adequate standard of living, such as the right to food and the right to adequate housing under the right to health (article 16) and the rights related to the family (Art 18).[77] The right to social security is also included under the right to health.[78] The Commission also requires reports on elements of rights missing from the Charter. For example, state parties should report on trade union rights under the right to work although the Charter does not expressly guarantee that aspect of the right.[79]

In the 2004 Pretoria Declaration, the Commission adopted the view that access to the minimum essential food and 'to basic shelter, housing and sanitation and adequate supply of safe and potable water' are part of the right to health.[80] The Declaration provides that the African Charter implies recognition of the right to shelter, the right to basic nutrition and the right to social security when the economic, social and cultural rights expressly guaranteed are read together with the right to life and respect for human dignity.[81] Here, the Commission modified its position in the 1989 Guidelines. While it acknowledges that these rights are not expressly guaranteed under the Charter, it goes beyond the right to health and refers to the right to life and the right to inherent human dignity as the sources of other economic, social and cultural rights.

In 2011, the Commission identified a combination of expressly guaranteed rights from which it derived each right omitted from the Charter in the Nairobi Principles. For example, it derived the right to housing from a combination of the right to

[75] Rapporteur's Report, *Supra* note 67.

[76] Guidelines for National Periodic Reports, Introductory para 6.

[77] *Ibid.*, part II paras 31 - 33.

[78] *Ibid.*, part II paras 17 - 19.

[79] *Ibid.*, part II paras 10 - 14.

[80] Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res.73 (XXXVI) 2004 (Pretoria Declaration), para 7.

[81] Pretoria Declaration, para 10.

property, the right to health and the protection of the family.[82] Similarly, the Commission implied other rights omitted from the Charter, including the right to food, the right to water, and the right to social security, from a range of expressly recognised rights.[83] The content of the rights read into the Charter mirrors the content of the rights guaranteed under the ICESCR as developed by the CESCR. The Commission also adopted State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines), which require states to report on economic, social and cultural rights omitted from the Charter.[84]

The case law of the Commission shows a similar trend. In its oft-cited *Ogoniland* case decided in 2001, the Commission read into the Charter the right to housing and the right to food.[85] It held that "the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing."[86] The destruction of Ogoni houses and villages, obstruction, harassment, beating, and killing of citizens trying to rebuild their ruined homes "constitute massive violations of the right to shelter."[87]

In the same case, the Commission accepted the complainants' argument that "the right to food is implicit in the African Charter, in such provisions as the right to life (Art 4), the right to health (Art 16) and the right to economic, social and cultural development (Art 22)."[88] It identified three minimum core state duties: the duty to refrain from destroying or contaminating food sources, the duty not to allow private actors from destroying or contaminating food sources, and the duty not to "prevent peoples' efforts to feed themselves."[89] The Commission found Nigeria in violation of the right to food because the government had failed to carry out all three minimum duties.[90]

In *Sudan Human Rights Organisation and Another v Sudan* (*Darfur* case) decided in 2009, the Commission examined an alleged violation of several Charter rights due to the conflict in Darfur.[91] The Complainants relied on the Commission's decision in the *Ogoniland* case and submitted that there was a violation of the right to housing. Instead, the Commission found that the eviction or demolition of victims' houses violates the right to property; that the destruction of homes is a violation of the

[82] Nairobi Principles, para 77.

[83] *Ibid.*, paras 81, 83, and 87.

[84] Tunis Reporting Guidelines, Thirty-first Activity Report (2011).

[85] (2001) AHRLR 60 (ACHPR 2001).

[86] *Ogoniland* case, para 60.

[87] *Ibid.*, para 62.

[88] *Ibid.*, para 64.

[89] *Ibid.*, para 65.

[90] *Ibid.*

[91] (2009) AHRLR 153 (ACHPR 2009).

right to health; and that evicting the victims violates the right to family life.[92] However, it did not find violation of a separate right to housing. Similarly, it did not find a violation of a separate right to food although it found violation of the right to life, the right to health and the right to development from which it derived the right to food in the *Ogoniland* case.

From two communications decided in 2015, it appears that the Commission's jurisprudence has bifurcated.[93] In *Nubian Community v Kenya*, the Commission examined discrimination against the Nubian Community in obtaining nationality and the consequence of such discrimination on the enjoyment of other rights including the right to work, the right to health, the right to education and protection of the family.[94] It found a violation of the right to property resulting from an eviction without provision of alternative housing.[95] In addition, it found violation of the right to health and the right to protection of the family.[96] However, in line with the *Darfur* case, it did not find violation of a separate right to housing.

On the other hand, in *Mbiankeu Geneviève v Cameroon*, the Commission found violation of the right to housing in line with its decision in the *Ogoniland* case.[97] The complainant, a French national of Cameroonian origin living and working in France, and her husband acquired a plot of land for building a residential house. As the development of the land began with the construction of a hut on it, another person who claimed the land destroyed the hut and assaulted and chased away the complainant's husband. As the complainant's husband obtained the land from a fraudulent seller, he could not obtain another plot of land as a replacement or the monies invested on it. Although the family was not living in Cameroon, the Commission found a violation of the right to health and protection of family because they intended to establish a home. The Commission has found that:

> By destroying or allowing the destruction of the hut, the Respondent State and its employees destroyed or at least frustrated the project to realise the right to adequate housing. In the circumstances of the case, the Commission is of the view that such acts constitute a violation of both the provisions of Articles 16 and 18 of the African Charter and the right to adequate housing arising therefrom following a combined interpretation.[98]

These cases show not only an inconsistency in the Commission's jurisprudence but also the absurdity of its findings. Sudanese families' homes were destroyed as a result

[92] *Darfur* case, paras 205, 212, & 216.

[93] Communication 317/2006, the *Nubian Community in Kenya v. the Republic of Kenya* and Communication 389/10, *Mbiankeu Geneviève v Cameroon*, Thirty-eighth Annual Activity Report.

[94] *Nubian Community v Kenya*, para 168.

[95] *Ibid.*, para 165.

[96] *Ibid*, para 168.

[97] Communication 389/10, *Mbiankeu Geneviève v Cameroon*, 38th Activity Report.

[98] *Ibid.*, para 124.

of the conflict in Darfur and families were left without shelter. In Kenya, an eviction left stateless Nubian families homeless. Loss of shelter did not result in a violation of the right to housing in both cases. In contrast, the Commission found violation of the right to housing in *Geneviève v Cameroon* although there was no loss of shelter. The facts of the *Ogoniland* case, at least on the issue of shelter, are similar to the facts both in *Darfur* and in *Nubian Community* cases because loss of shelter is the common denominator in all three cases. However, the Commission's finding in *Geneviève v Cameroon* goes far beyond the *Ogoniland* case and, in essence, led to the conclusion that an automatic violation of the right to housing results from a violation of the right to property, at least where property relates to residential house or land on which such a house is going to be built.

3. Justifications

The strength of the justifications supporting a particular interpretation of the African Charter or any international human rights treaty for that matter is obviously important to generate the required acceptance. The reasons for choosing a particular interpretation over a range of other alternatives must persuade at least 'the relevant interpretive community' as Tobin calls it.[99] The Commission's justification for its interpretation seems to fit into the principle of systemic integration. Lack of resources or conditions of underdevelopment can also be another reason. Both justifications are examined below.

3.1. Systemic integration

Systemic integration is a general principle of treaty interpretation, which requires construction of treaties in accordance with general international law because treaties are the creatures of international law.[100] The principle is incorporated in the Vienna Convention on the Law of Treaties.[101] It is also applied by international courts.[102]

The adoption of this principle requires harmonious interpretation of the African Charter with international human rights treaties. The African Charter seems to have adopted the systemic integration principle by authorising the Commission to "draw inspiration from international law on human and peoples' rights" under Art 60. The Charter also provides for the role of general international law in its interpretation under Art 61. The Commission should draw inspiration from international human rights law and should take into consideration general international law.

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[99] John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARVARD HUMAN RIGHTS JOURNAL 1 (2010).

[100] Campbell Mclachlan, *The principle of systemic integration and article 31(3) (c) of the Vienna Convention*, 54 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 279, 280 (2005).

[101] VCLT, Art 31(3) (c).

[102] See *Al-Saadoon and Mufdhi v the United Kingdom*, no. 61498/08, judgment of the European Court of Human Rights, 2 March 2010, para 126.

The Commission relies on its power to draw inspiration under Arts 60 and 61 of the Charter to justify its introduction of the concept of progressive realisation into the Charter. It proclaimed that:

> While the African Charter does not expressly refer to the principle of progressive realisation this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter in accordance with articles 61 and 62 [*sic*] of the African Charter.[103]

The same justification applies to the introduction of the rights into the Charter although the Commission does not clearly state that. The reason is that the instruments in which the Commission introduced these rights generally refer to Arts 60 and 61 of the Charter. These provisions are referred to as "the lighthouse directing the course followed and determining the substance included" in the Guidelines for National Periodic Reports.[104] In the Preamble to the Nairobi Principles, the Commission acknowledges that it has drawn inspiration from almost all human rights instruments and works of human rights organs. Because of their relevance to economic, social and cultural rights, the influence of the ICESCR and the CESCR's interpretation is clearly visible from the formulation and contents of the rights read into the Charter.

The Commission's justification appears relevant given that the majority of states parties to the African Charter are also parties to the ICESCR and other treaties that require progressive realisation and provide for rights omitted from the Charter.[105] However, it is important to note that the Charter's departure could have also been justified on the ground of the *lex specialis* maxim: "[t]he principle that special law derogates from general law."[106] The principle provides that "if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former."[107] In cases of conflict of norms, "it is the role of *lex specialis* to point to a set of considerations with practical relevance: the immediate accessibility and contextual sensitivity of the standard."[108]

The African Charter, a regional instrument, can be considered *lex specialis* in regard to universal human rights treaties such as the ICESCR.[109] The Charter can be seen as providing practical relevance to the African socio-economic contexts. Therefore, it

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[103] Nairobi Principles, para 13.

[104] Guidelines for National Periodic Reports, para 6.

[105] Most African states are also parties to ICESCR, CRC, and CRPD. See ratification status at https://treaties.un.org.

[106] The maxim provides that *lex specialis derogat lege generali*. Marti Koskenniemi, *Report of the Study Group of the International Law Commission on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, 13 April 2006, para 56.

[107] *Ibid.*, para 56.

[108] *Ibid.*, para 87.

[109] *Ibid.*, para 98.

can be submitted that the Charter takes precedence over the universal human rights treaties even in cases of conflict provided that the latter are not pre-emptory norms of international law.

3.2. Resources and underdevelopment

Resources by their nature are scarce. The scarcity of resources is closely related to the concept of progressive realisation. The underlying assumption is that lack of resources, at least partly, prevents the immediate full realisation of economic, social and cultural rights. Hence, the progressive realisation of economic, social and cultural rights. For that matter, it is ideological differences based on the issue of resource that split the Universal Declaration of Human Rights into two separate treaties.

The African Commission acknowledges lack of resources as the major challenge. In *Purohit and Another v The Gambia*, the Commission held that 'millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty.'[110] Because of poverty the African states are incapable of providing "the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right."[111] The Commission espoused a similar view with regard to the right to development. In the *Southern Cameroon* case, the Commission held that "the realisation of the right to development is a big challenge to the respondent state, as it is for state parties to the Charter, which are developing countries with scarce resources.'[112] Despite this trend in the case law, the Commission has not raised scarcity of resources as its justification for introducing progressive realisation in the Nairobi Principles.

On the other hand, commentators usually acknowledge that the Charter requires immediate implementation of economic, social and cultural rights but argue that such implementation would not be practical due to lack of resources or under development in Africa. Umozurike argues that the inclusion of economic, social and cultural rights in the African Charter as "progressive development is more realistic than as definite rights to be immediately enjoyed" because "the possibility of achievement seems to be beyond the capability of most African states at present."[113] Similarly, Mbazira argues that "[i]t is important that the socio-economic rights in

[110] *Purohit and Another v The Gambia*, para 84.

[111] *Ibid.*

[112] *Southern Cameroon case*, para 206.

[113] U OJI UMOZURIKE, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 95 (Martinus Nijhoff Publishers 1997). See also EVELYN A ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURES 144 (Martinus Nijhoff Publishers 1996); VOO NMEHIELLE, THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE, AND INSTITUTIONS 124 (Martinus Nijhoff Publishers 2001).

the African Charter be realised progressively due to the underdevelopment of most African countries."[114]

4. Benefits and Risks of the African Commission's Interpretative Approach

The African Commission has introduced the concept of progressive realisation and additional rights into the Charter. To do so, it has heavily relied on its mandate to draw inspiration from international law, which includes the ICESCR and the work of the CESCR. The changes made to the Charter are so fundamental that they appear amendments to the Charter. Therefore, it is submitted, the African Commission has rewritten the African Charter. Of course, the Charter is not an immutable holy scripture. However, advantages and disadvantages should be weighed in the process of developing it. The following subsections examine and evaluate the benefits and risks that come with the changes or the rewriting.

4.1. Benefits

One of the benefits of the Commission's approach is its extension of protection in theory. It seems that the possibility of claiming protection has been expanded. The African Charter has been subjected to criticisms for omitting "the rights to social security, the right to an adequate standard of living, and freedom from hunger."[115] "[T]he Charter remained silent on some of the most pressing socio-economic needs of Africa's predominantly rural impoverished communities."[116] Therefore, interpreting the Charter as implying other rights extends at least in theory its protection to those in need.

Reading rights into the Charter is also advantageous in enhancing the indivisibility of human rights. Indivisibility is often brought up in arguments against tendencies whereby civil and political rights are distinguished from economic, social and cultural rights and given higher status in terms of recognition and enforcement. In this sense, the Charter recognises indivisibility of rights. On the other hand, it can be submitted that the African Charter divides economic, social and cultural rights into two categories: those guaranteed in the Charter and those omitted from it. The rights recognised in the Charter *a priori* are given a higher status no matter how rational the motive may be. In this sense, the Charter divided and ranked economic, social and cultural rights. Therefore, the Commission eliminated the distinction and upheld their indivisibility when it read other rights into the Charter.

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[114] Christopher Mbazira, *Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty years of Redundancy, Progression and Significant Strides*, 6 AFRICAN HUMAN RIGHTS LAW JOURNAL 333, 341 (2006).

[115] Oloka-Onyango, *Supra* note 67, at 51.

[116] Viljoen, *Supra* note 10, at 215.

The way in which rights are implied into the Charter also confirms indivisibility, interrelatedness and interdependence of rights. The Commission disregarded the traditional division of rights into generations when it read additional rights into the Charter. For example, the Commission considers that the right to food is implicit in the right to life (civil right), the right to health (social right), and the right to development (collective/group right).[117] Other implied rights are also connected to more than one traditional category.[118]

Finally, introducing progressive realisation into the Charter in line with the ICESCR and its interpretation by the CESCR integrates the African Charter into the global system of which it is a part. That will enable the Commission to benefit from the work of the CESCR or other similar human rights organs. However, this benefit comes at a cost dear to the African Charter in particular but also to the normative development of economic, social and cultural rights in general, as discussed below.

4.2 Risks

The changes made to the Charter also come with some risks. One of the risks is undermining the indivisibility of human rights through the introduction of progressive realisation for only economic, social and cultural rights. The African Charter has been acclaimed for according the same treatment to all categories of human rights.[119] It allows the Commission to emphasise in its jurisprudence that economic, social and cultural rights are "indivisible, interdependent and interrelated with other human rights."[120] The Commission has espoused this view in a number of ways.

First, the Commission takes into account this principle when it draws inspiration from international human rights law. In *Purohit and Another v The Gambia*, the Commission referred to the Vienna Declaration and emphasised that it takes into account the principle that "all human rights are universal, indivisible, interdependent, and interrelated" when it accepts arguments based on international human rights instruments.[121] Second, the Commission finds that the same actions or omissions result in violations of multiple rights that traditionally fall in different categories.[122] For example, the Commission found that forced eviction and destruction of property constitute cruel and inhuman treatment, and a violation of

[117] Nairobi Principles, para 83; *Ogoniland* case, para 64.

[118] Nairobi Principles.

[119] Viljoen, *Supra* note 10, at 214.

[120] Manisuli Ssenyonjo, *Analysing the economic, social and cultural rights jurisprudence of the African Commission: 30 years since the adoption of the African Charter*, 29 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 358, 396 (2011).

[121] *Purohit and Another v The Gambia*, para 48.

[122] *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000); *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998), para 112.

the right to health.[123] Finally, the Commission identified the same levels and types of state obligations for all human rights in the *Ogoniland* case.[124]

However, it seems, the African Commission has changed this distinctive feature of the African Charter. In the Nairobi Principles, the Commission has declared that States parties to the African Charter have progressive obligation with regard to economic, social and cultural rights. Consequently, the Commission makes a distinction between civil and political rights on the one hand and economic, social and cultural rights on the other hand in terms of corresponding state obligations.

The Commission also risked its credibility in at least two ways. First, the Commission compromised its consistency and predictability by contradicting its earlier approach. As discussed above, the Commission professed the indivisibility of rights. It has taken the view that the Charter provides for immediate obligations. Now it adopts contrary views by introducing progressive realisation and treating economic, social and cultural rights in a different way.

Second, the Commission casts doubt on the quality of its expertise. The Commission heavily relies on the work of the CESCR when it deals with economic, social and cultural rights. In principle, there is nothing wrong with that and the Commission has indeed the mandate to do so. Because its mandate springs from the Charter, the Commission should make the necessary adaptation to dovetail the lessons it learns from the CESCR (and other similar organs) with the Charter's context. The African regional context is obviously the *raison d'être* of the Charter and cannot be ignored in any interpretive exercise. Therefore, if the Commission interprets the Charter by introducing a concept new to the Charter such as progressive realisation, it must do so in such a way that the concept is adapted to maintain intact the Charter's central features such as the indivisibility of rights. Otherwise, it runs the risk of being perceived as an organ that lacks the required expertise to distinguish the contextual difference of the ICESCR from that of the Charter or as an organ that has no ability to understand the Charter's nuanced approach.

The Commission undermined its authority by failing to provide convincing reasons. In the *Southern Cameroon* case, the Commission adopted a sweeping statement that a "state is under obligation to invest its resources in the best way possible to attain the progressive realisation of the right to development, and other economic, social and cultural rights."[125] For so holding, it did not provide any reason at all. When the concept was adopted in the Nairobi Principles, the Commission relied on Arts 60 and 61 of the Charter. That is, it introduced the concept because other human rights treaties include it. The Commission does not bother itself to show how the Charter is identical or at least similar to those treaties in this respect. All of these factors,

[123] *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009), paras, 164 & 212.

[124] (2001) AHRLR 60 (ACHPR 2001), para 44.

[125] *Southern Cameroon case*, para 206.

namely, consistency, predictability, expertise and reasoned decisions, have implications for the legitimacy of the Commission.[126]

The Commission's approach also poses a risk of further marginalisation to economic, social and cultural rights. The Commission has already been criticised for neglecting these rights in its activities.[127] In its promotional activities, the Commission has focused on civil and political rights and "paid lip service to economic, social and cultural rights."[128] It received very few economic, social and cultural rights cases despite the fear that it would be flooded with such cases.[129]

Now, the Commission has not only introduced progressive realisation but also adopted a separate reporting guidelines that do not apply to other rights.[130] There is a probability that facts, which once constituted a violation of the Charter according to the standards adopted in the Commission's jurisprudence, may not constitute a violation any more. The Commission has sent out a clear message that the bar has been raised.

In Africa, "poor governance and economic mismanagement rather than lack of resources" is identified as a problem for low implementation of economic, social and cultural rights.[131] It is a truism that resources are scarce everywhere in the world. Instead, how resources are used is central to the realisation of economic, social and cultural rights. That is why international monitoring mechanisms such as the African Commission are established to hold states accountable through international law.[132] Generally states are often in bad faith in relation to their human rights obligations.[133] Introducing progressive realization might encourage states to invoke lack of resources for their failure to comply with these obligations. Some states might view this as an opportunity to act in bad faith.

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[126] See MAGDALENA SEPÚLVEDA CARMONA, NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 91 (2003); Laurence R Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 THE YALE LAW JOURNAL 273, 284 (1997); Jean d'Aspremont and Eric De Brabandere, *The Complementary Faces of Legitimacy in International Law: the legitimacy of origin and the legitimacy of exercise*, 34 FORDHAM INTERNATIONAL LAW JOURNAL 190, 215 (2011).

[127] Viljoen, *Supra* note 10, at 417.

[128] Sibonile Khoza, *Promoting Economic, Social and Cultural Rights in Africa: The African Commission holds a seminar in Pretoria*, 4 AFRICAN HUMAN RIGHTS LAW JOURNAL 334, 334 (2004).

[129] U O Umozurike, *The Protection of Human Rights under the Banjul (African) Charter on Human and People's Rights*, 1 AFRICAN JOURNAL OF INTERNATIONAL LAW 65, 81 (1988), cited in Oloka-Onyango, *Supra* note 67, at 52.

[130] Tunis Reporting Guidelines.

[131] Baderin, *Supra* note 63, 142; Shedrack C Agbakwa, *Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights*, 5 YALE HUMAN RIGHTS AND DEVELOPMENT JOURNAL 177, 195 (2002).

[132] Viljoen, *Supra* note 10, at 215.

[133] Eva Brems, *Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration*, 4 EUROPEAN JOURNAL OF HUMAN RIGHTS 447, 462 (2014).

The Commission allows state parties to invoke scarcity of resources as a defence for their failure. However, such a defence is not available to states with regard to civil and political rights. The Commission seems to reject the idea that the enforcement of rights, even the enforcement of those arising under private law of tort, contract and property is expensive and depend on taxpayers' money.[134] Despite the fact that the realisation of civil and political rights requires resources, the Commission conditioned only economic, social and cultural rights on availability of resources. As a result, the Commission has given an incentive to states to prioritise civil and political rights over economic, social and cultural rights in the allocation of their resources.[135] In turn, this would marginalise the protection of economic, social and cultural rights.

Finally, the Commission exposed itself to an accusation of illegitimate usurpation of treaty-making power.[136] By introducing rights into the Charter, the Commission went beyond the initial agreement of states parties to the African Charter, which like any other treaty is based on consent.[137] In this respect, the Commission's mandate can be contrasted with that of the African Court. The Court has the power to apply the provisions of the African Charter and any other relevant human rights treaties ratified by respondent States.[138] That is, the Court has the power to find violations of those rights read into the Charter under other international treaties, including the ICESCR. However, the African Commission lacks such clear mandate.

Conclusion

This article has argued that the African Commission has made two major changes while interpreting the African Charter. The Commission has introduced the concept of progressive realisation into the Charter. It has also read into the Charter additional rights originally omitted from the Charter. Progressive realisation is one of the main technical factors underlying the division of human rights into two separate treaties. As a result, the African Charter avoided the concept and adopted an alternative approach. Therefore, the changes made by the Commission are so fundamental that they appear amendments to or rewriting of the Charter.

In its interpretation exercise, the Commission has not taken into consideration the drafting history of the Charter. Neither has it justified its interpretation on changes in circumstances. It has failed to adapt lessons from other human rights organs to the African Charter and its contexts. Consequently, the Commission's interpretation

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134 STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (Norton 1999).

135 See Eva Brems, *Human Rights: Minimum and Maximum Perspectives*, 9 HUMAN RIGHTS LAW REVIEW 349, 366 (2009).

136 Viljoen, *Supra* note 10, at 328.

137 *Ibid.*

138 African Court Protocol, Art 7.

runs more risks than benefits. The Commission has extended the protection of the Charter to some rights at the cost of compartmentalising the Charter and marginalising all economic, social and cultural rights. Its inconsistency, unpredictability and questionable professional expertise undermine its own legitimacy.

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Making Space for Non-Liberal Constitutionalism in Free Speech: Lessons from a Comparative Study of the State of Free Speech in Ethiopia and Thailand[†]

Mesenbet Assefa (PhD) [*]

Abstract

Just as Bruce Ackerman posited the rise of constitutional democracies in the world, Fareed Zakaria outlined a chilling aspect of it in the name of the parallel rise of illiberal democracies. The rise of illiberalism in emerging democracies can best be demonstrated in their draconic stance on free speech. In particular, in States such as Ethiopia and Thailand, the protection afforded to freedom of expression is markedly different from the protection of freedom of expression in liberal societies. Both Thailand and Ethiopia formally embrace liberal constitutional norms including freedom of speech. Nevertheless, both States continue to fall far behind in terms of the protection afforded to political speech in liberal democracies. Although the manifestations of the illiberal impulses in these States may vary, they demonstrate functional equivalence in terms of the similarities of how they respond to speech related offences. Despite these illiberal tendencies, however, there is also an interesting normatively appealing constitutional structure of these polities. The basic and underlying ideals of their normative constitutional architecture rest on a non-liberal model of constitutionalism which is distinct from the liberal model of constitutionalism. Both Ethiopia and Thailand provide interesting comparative study of free speech in non-liberal polities. The independent existence of both States and their distinctive historical contingencies help to illuminate the embedded socio-political, historical and ideological factors that inform their stance on free speech. This article argues that a non-liberal constitutionalism in free speech can be defended taking into account the various historical contingencies and political realities of both states. However, the article posits that this normative constitutional architecture has to be compatible with common principles of free speech norms drawn from international and comparative law. By doing so, it tries to explain discourses in non-liberal constitutionalism and the various historical and socio-political factors that drive such normative constitutional architecture.

Key terms: Free Speech, Non-Liberal Constitution, *Lèse-majesté*, Ethiopia, Thailand

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Introduction

Bruce Ackerman's optimistic outlook in *'the rise of world constitutionalism'* outlined the growing acceptance of constitutional democratic system of government in many States which *inter alia* embodies the protection of fundamental human rights and a system of judicial review.[1] Ackerman also highlights the increasing recognition of constitutions as fundamental law of States in many polities since the end of the Second World War. This is evident both in liberal and illiberal polities that embrace the idea of constitutionalism.[2] Most of these States' constitutions not only define the structure of power and functions of State institutions, but also provide for the protection of fundamental human rights and freedoms including freedom of expression.[3]

Nevertheless, the initial optimism in the triumph of liberal constitutionalism in the world began to be increasingly challenged as a new wave of illiberal democracies began to emerge. Just as Bruce Ackerman posited the rise of constitutional democracies in the world, Fareed Zakaria outlined a chilling aspect of it, in the name of the parallel *rise of illiberal democracy*.[4] While the thesis that the last man at the end of history may eventually embrace a liberal constitutional democratic State could still be plausible, the nature of polities that lack the fundamental precepts of liberal constitutionalism has become readily apparent.[5]

According to Zakaria, the recurrent problem of many emerging democracies has been the lack of consolidating liberal democratic constitutionalism. He points out that sustainable democracy and development of States requires not only democracy as understood in the sense of conducting regular elections, or the formal recognition of fundamental rights but rather the lack of consolidating liberal constitutionalism-

[1] Bruce Ackerman, *The Rise of World Constitutionalism* 83 VA. L. REV. 771 (1997).

[2] The idea of non liberal or illiberal constitutionalism was originally proposed by Graham Walker, *The Idea of Nonliberal Constitutionalism* 39 ETHNICITY AND GROUP RIGHTS 155 (1997). For more recent discussions see Li-Ann Thio, *Constitutionalism in Illiberal Polities*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 133 (M Rosenfled and A Sajo eds., OUP, 2012). Li notes that Illiberal polities are varied and competing, which include many forms: illiberal, pre-liberal, non-liberal, or semi-liberal societies. *see* p. 134. Various forms of mixed polities that combine liberal and illiberal characters have also been discussed and include, "hybrid regime", "semi democracy", "virtual democracy", "electoral democracy", "pseudo democracy", "illiberal democracy", "semi-authoritarianism", "soft authoritarianism", "electoral authoritarianism" and Freedom House's "Partly Free" States, *See* Steven Levitsky and Lucan Way, *The Rise of Competitive Authoritarianism*, 13 JOURNAL OF DEMOCRACY 51 (2002)).

[3] Empirical studies show that more than 97% of the constitutions that were in force since 2006 have formally recognized the right to freedom of expression as a basic human right; *see* in this regard David S. Law and Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1200 (2011).

[4] Fareed Zakaria, *The Illiberal Rise of Democracy*, 76 FOREIGN AFFAIRS 22 (1997).

[5] See FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

democracy in substance.[6] In most emerging democracies, beyond conducting regular elections the fundamental precepts of a liberal constitutional democracy such as rule of law, separation of powers, and the protection of basic liberties of speech, assembly, religion, and property are significantly lacking.[7]

The most recent account of such taxonomy of illiberal polities is Mark Tushent's idea of *authoritarian constitutionalism*.[8] Tushent argues that, "authoritarian constitutionalism may best be defined by attributing moderately strong normative commitments to constitutionalism - not strategic calculations - to those controlling these nations".[9] According to Tushnet, what characterizes illiberal polities is their inability to observe the principles of constitutional democracy and the prospects of ensuring limited government in its exercise of power.[10] Although illiberal polities have a *modest normative commitment*[11] to ensure liberal constitutional values including freedom of expression, they continue to be significantly constrained in the full observance of fundamental freedoms including freedom of expression.[12]

While it is true that the rise of this illiberalism is a global phenomenon, in few emerging democracies such as Ethiopia and Thailand, the restrictions placed on freedom of expression in particular on core political speech has been one of the most troubling in recent decades.[13] Both States use discursive legal tools that make it impossible to demarcate the contours of political speech from speech that has serious

[6] President Barrack Obama's remark referring to the problem of democracy and constitutionalism in Africa, during his historic visit as the First Seating Head of State of the United States to the African Union and Ethiopia on 28 July 2015, available at <https://www.whitehouse.gov/the-press-office/2015/07/28/remarks-president-obama-people-africa> 2015 (accessed on 15 August 2015).

[7] Zakaria *supra* note 4, at 22.

[8] Mark Tushnet, *Authoritarian Constitutionalism,* 100 CORNELL LAW REVIEW 391 (2015).

[9] *Ibid.,* at 397. Tushnet also classifies his theory of authoritarian constitutionalism into two sub-categories. Absolutist constitutionalism which has no constitutional limits to what the government can do but is not despotic; and mere rule of law constitutionalism characterized by observance of core rule of law publicity, prospectivity, and generality but is not fully normatively constitutionalist, *See* p. 415-21.

[10] *Ibid., at* 394. *See* also CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM**:** ANCIENT AND MODERN 20-21 (Cornel University Press 1940).

[11] Emphasis added.

[12] Tushnet, *supra* note 8.

[13] Until very recently, Ethiopia was ranked as the fourth most censored country in the world only next to Eritrea, North Korea and Saudi Arabia, See CPJ 10 Most Censored Countries (2015) <https://cpj.org/2015/04/10-most-censored-countries.php> (accessed on 20 March 2016). Regarding Thailand See Statement of the Office of the High Commissioner for Human Rights Press Briefing on Thailand and Mali (11 August 2015) , available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16310&LangID=E> (accessed 10 Sep 2015).

and imminent threats to the national security and public order of these polities.[14] Although these seemingly *ad hoc* illiberal impulses of these polities seem to be of a temporary nature, the normative constitutional architecture of non-liberal polities is more resilient to change than one would like to admit.[15] Beyond a descriptive account of the manifestation of the illiberal impulses of these polities, few attempts have been made to explore a principled normative constitutional divergence of non-liberal polities from the liberal ones.

There are three fundamental factors that call for the exploration of the distinctive normative constitutional architecture of non-liberal polities such as Ethiopia and Thailand, in the particular context of free speech. First, there is an unnecessary characterisation of non-liberalism as a negation of liberalism and a belief that it has little significance for constitutionalism in free speech. This seemingly liberal arrogance emanates from the belief that liberal constitutionalism represents the highest form of normative constitutional development.[16] While this is true to a certain extent, the paper will try to demonstrate that this is not usually the case. Non-liberal normative constitutionalism distinct from the liberal model is defendable and might even be contemplated as an appropriate system of constitutional democracy.[17] The skepticism that non-liberal constitutionalism may give pretext to the unfettered power of dictators should not rule out a conception of constitutionalism distinct from the liberal model.[18] Moreover, we have to bear in mind that liberal constitutionalism has its own discontents - its covert forms of social exclusion; its reductive approach to knowledge; and those who criticize its notion of "individual autonomy rights as a form of naive and homogenizing universalism," that "unmask[s] the ethnic and moral "neutrality" of the liberal state as a covert form of coercion."[19]

Second as much as non-liberalism evokes anxiety from the liberal camp, liberalism itself evokes as much anxiety to non-liberals. In fact a persistent political rhetoric, if not normative, that one observes from the non-liberal camp is a rejection of the notion of liberalism and its more extreme variant, i.e. neo-liberalism.[20] In new

[14] Here I use the term discursive to describe the highly elusive nature of the crimes which makes it difficult to articulate the meaning and legal scope of the legal rules applicable which negates with the fundamental principle of certainty and predictability of criminal law.

[15] I use the term non-liberalism in preference to illiberalism as it captures the value neutral nature of a constitutional discourse distinct from the liberal model.

[16] Bruce P. Frohnen, *Is Constitutionalism Liberal?*, 33 CAMPBELL L. REV. 529, 533 (2011).

[17] Graham Walker, *The Mixed Constitution after Liberalism*, 4 CARDOZO J. INT'L & COMP. L. 311, 316 (1996).

[18] Walker, *supra* note 2, at 171.

[19] *Ibid.*, at 157.

[20] In this regard scholars and political elites from the non-liberal South position themselves as persistent objectors of liberalism and neo-liberalism. This has often served as a motivation to challenge the existing international economic order which does not take their interests seriously. While the call for a New International Economic Order (NIEO) has faded over the years, third world nationalism as an

emerging democracies such as Ethiopia and Thailand the rejection of the possibility to develop a non-liberal constitutional discourse can give impulses for discarding the very idea of constitutionalism and the generic virtues associated with it.[21] Moreover, liberals who are ready to contemplate a non-liberal constitutionalism usually find themselves between 'a rock and a hard place' in dealing with regimes with non-liberal constitutionalism.[22] They are cautious to prescribe any normative or institutional arrangement for these polities for fear of being seen as ethnocentric.[23] Consequently, accommodating non-liberal constitutionalism brings an ease - a compromise between defenders of liberal constitutionalism and those of non-liberal constitutionalism in dealing with normative and institutional problems associated with non-liberal polities.

Thirdly, exploring the possibilities of constructing a principled application of non-liberal constitutionalism offers possibilities for constitutional borrowing of liberal norms through the methodology of normative universalism. The increasing internationalisation of constitutional norms including freedom of expression and the development of common principles in the regulation of speech across societies have clearly demonstrated that free speech norms have transnational resonance. Accommodating a principled non-liberal constitutionalism enhances this possibility by pacifying the anxieties of non-liberal polities. Because of the above factors, it is imperative to explore the possibilities of looking into possible avenues for bridging the notional gap between liberal constitutionalism and non-liberal constitutionalism. It is with this understanding that the article sets out to explore the contemporary challenges to free speech in non-liberal polities, taking the case study of Ethiopia and Thailand.

1. Defining Non-Liberal Constitutionalism

In order to provide a framework for the subsequent discussions on non-liberal normative constitutionalism in free speech in Ethiopia and Thailand, it would be helpful first to disentangle the notional divergence between liberal constitutionalism and non-liberal constitutionalism. Admittedly, the conceptual disjuncture between liberal constitutionalism and non-liberal constitutionalism is very difficult to grasp as liberal constitutionalism itself, in rights discourse including free speech, is as varied as the non-liberal one. In the case of free speech for example, the normative constitutional architecture of liberal societies varies from a militant democracy

aspect of that political struggle still feeds the political ideology of non-liberal states such as Ethiopia and Thailand.

[21] This is particularly apparent when one looks at the constitutional discourse in Ethiopia where the government has consistently positioned itself as anti-liberal west. The notions of developmental state theory and its political counterpart, revolutionary democracy continue to be its ideological driving forces (see discussion in Sub-section 3.3 in this regard).

[22] Frohnen, *supra* note 16, at 533.

[23] *Ibid*.

approach with a reasonable limitation on free speech in Germany to a more complete protection of free speech in the United States. Nevertheless, despite these differences in the margins, the fundamental normative constitutional architecture of liberal societies is distinctively different from non-liberal ones.

Liberal constitutionalism is usually defined as a negation of non-liberalism. It presupposes the principle of self-government, rule of law, limits on the exercise of government power and the protection of basic freedoms including freedom of speech. Yet, all these important virtues of a liberal democratic society are not the fundamental precepts that typically distinguish liberal constitutionalism from its counterpart, non-liberal constitutionalism.[24] Two principal factors distinguish liberal normative constitutionalism from a non-liberal one. First it is based on the principle of *normative individualism,* which makes the rights of individuals and the autonomy of the human person as paramount in its constitutional dispensation.[25] Second, the precepts of a neutral State are deeply rooted in its principle of justice and vision of the good society.[26]

On the contrary, a normative conception of non-liberal constitutionalism does not make individual rights and autonomy the highest political aspirations or norms of the polity. It rather emphasizes on community norms emanating from ethnicity, culture, religion, history and the like. A non-liberal constitutionalism unlike a liberal one also advocates for a more proactive State power requiring it to structure a substantive vision of what the good life should look like by promoting some favorable pattern of life while demoting others.[27]

Nevertheless, despite these unique features of a non-liberal model of constitutionalism, the cultural embeddedness of this model of constitutionalism undeniably prompts illiberal impulses by restraining individual freedom in its effort to maintain a particularly favoured form of life and attitude in the larger society.[28] Therefore, it is evident that the protection afforded to fundamental freedoms including free speech, and the fundamental precepts of limited government, rule of law and basic democratic values are lacking in non-liberal constitutionalism. Thus, while legal and political reforms are needed in these polities, a principled application of the methodology of normative universalism by acknowledging non-liberal constitutionalism can be a useful method of striking a balance between cosmopolitan ambitions of human rights with local peculiarities.[29]

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[24] *Ibid*., at 529.

[25] Emphasis added.

[26] Walker, *supra* note 17, at 315.

[27] *Ibid*.

[28] *Ibid*.

[29] See in this regard Sujit Choudhry, *Migration in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., OUP 2011); where he argues that the migration of

2. Ethiopia and Thailand as Important Case Studies

The study of normative constitutionalism in Ethiopia and Thailand is useful to understand the nature of non-liberal polities and the different manifestations of their illiberal impulses in particular, in the context of understanding the nature of normative constitutionalism in free speech. The first significant element is the increasing shrinking of free political speech in both States which demonstrates the existence of functional equivalence in comparative constitutional law study.[30] Although the silencing of dissent and political speech is apparent in many States, Ethiopia and Thailand, as will be demonstrated in this article, are some of the few countries where serious questions on the State of free speech have been raised by rights groups and UN agencies in more recent times.[31] Ethiopia and Thailand, after initially gaining a momentum towards democratic transition have begun a reversal of that process in almost the same period of watershed political events in both countries.[32] Both States continue to use discursive legal tools to silence their political opponents in an effort to maintain the political power of the governing elites and maintain their vision of national identity.

Ethiopia's democratic set back decisively began in the aftermath of the 2005 general elections, when the governing party, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), began to launch a major crack down on political activists and human rights defenders.[33] In similar vein, Thailand's democratic reversal began in the aftermath of the 2006 coup, which led to incessant and polarized political battle between the Red Shirts (supporters of former Prime Minister Thaksin Shinawatra) and his opponents, the Yellow Shirts.[34] This rise of illiberalism in both States is particularly manifested in the area of freedom of

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constitutional ideas is taking increasingly cosmopolitan character, despite the many caveats involved in comparative constitutional law inquiry.

[30] On the significance of functional equivalence in comparative constitutional law study, see Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 371 (Mathias Reimann and Reinhard Zimmermann eds., OUP 2012). See also *R Hirschl, The Question of Case Selction in Comparative Constitutional Law*, 53 THE AMERICAN JOURNAL OF COMPARATIVE LAW 125 (2005).

[31] Although it is true that the appointment of Prime Minister Abiy Ahmed, has brought significant political concessions, the fundamental ideological principles of the EPRDF including the notion of revolutionary democracy and the developmental state doctrine have been endorsed by the party as its driving principles even after the appointment of Prime Minister Abiy Ahmed.

[32] According to Freedom House, Ethiopia is categorized as totally unfree (6 point score) while Thailand is partly free (with a 4 point score). *See* FREEDOM HOUSE, FREEDOM IN THE WORLD (2014).

[33] John W Harbeson, *Ethiopia's Extended Transition*, 16 JOURNAL OF DEMOCRACY 144 (2005); Terrence Lyons, *Ethiopia in 2005: The Beginning of a Transition?, CSIS Africa* Notes (2006).

[34] *See* Patrick Jory, *Karl Popper and Thailand's Political Crisis: The Monarchy as the Problem for an 'Open Society'*, *in* THE OPEN SOCIETY AND ITS ENEMIES IN EAST ASIA: THE RELEVANCE OF THE POPPERIAN FRAMEWORK (Gregory CG Moore ed., Routledge 2014).

expression where they continue to use draconic measures which have significantly limited political speech and suffocated the democratic space.[35]

Another important factor for exploring normative constitutionalism in free speech in Ethiopia and Thailand is their cultural distinctiveness. A distinguished scholar on Ethiopia, Christopher Clapham, notes that Ethiopia is more akin to Thailand than it is to the rest of the African continent.[36] Ethiopia is a 'lone state' which has little cultural resemblance to most of its African neighboring States.[37] In the words of Samuel Huntington "[h]istorically, Ethiopia has existed as a civilization of its own… [o]nly Russian, Japanese and Ethiopian Civilizations, all three governed by highly centralized imperial authorities, were able to resist the onslaught of the West and maintain meaningful independent existence."[38] This independent existence has created very distinctive historical and cultural contingencies which feed and sustain its national identity. Similar to Ethiopia, Thailand has existed as the only South East Asia independent kingdom that did not fall under European colonialism in its entire history.[39] According to Leyland and Harding, this independent existence has been a *sine quanon* factor that determined many aspects of the identity, assumptions, and orientation of the modern Thai state.[40]

The independent existence of the two countries under strong aristocratic rule has significantly shaped many aspects of their social and political organisation and national identity, all of which have relevance for the study of freedom of expression in both states.[41] These elements of convergence are important in studying the constitutional protection of free speech in both States which can enlighten our understanding on the nature of normative constitutionalism in non-liberal polities. Beyond looking at the contemporary challenges of freedom of expression in these polities, the study could also provide normative and institutional arrangements that should be taken to promote openness while at the same time maintaining the national identities of these States by pacifying some of their anxieties.

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[35] *See* Freedom House, *supra* note 32; See also INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (IFHR), RESTRICTIONS ON FREEDOM OF EXPRESSION THROUGH THE LÈSE-MAJESTÉ LAW IN THAILAND (2009). Regarding Ethiopia *See*, Gedion T. Hessebon, *An Apologetics for Constitutionalism and Fundamental Rights: Freedom of Expression in Ethiopia* (LLM Thesis, Central European University, 2009). Amnesty International, *Dismantling Dissent: Intensified Crack Down on Free Speech in Ethiopia* (2011); FREEDOM HOUSE, FREEDOM IN THE WORLD (2015).

[36] Christopher Clapham, *Ethiopian Development: The Politics of Emulation*, 44 COMMONWEALTH & COMPARATIVE POLITICS 137 (2006).

[37] SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 136 (Simon and Schister 1996).

[38] *Ibid.*, at 5.

[39] PETER LEYLAND AND ANDREW HARDING, THE CONSTITUTIONAL SYSTEM OF THAILAND: A CONTEXTUAL ANALYSIS 9 (Hart Publishing 2011).

[40] *Ibid.*

[41] *Ibid.*

2.1. Free speech and the rise of illiberalism in Ethiopia

The manifestation of the illiberal impulses of non-liberal polities is demonstrated by the strong stance that they have in regulating political speech. This is particularly manifested in the area of regulating hate speech. Although there are instances of other areas of speech regulation that have serious impact on political speech, the issue of hate speech regulation resonates as a significant element of its normative constitutional architecture which is rooted in protecting ethnic minorities and communitarian interests. Articulating the normative architecture of non-liberal societies Li Ann Thio notes that the contours of political speech in these societies are largely shaped by concerns to maintain ethnic and religious harmony. Similarly, in the case of Ethiopia one finds a strong stance in regulating hate speech to maintain the peaceful coexistence of its ethnic federal arrangement.

The case of *prosecutor v Hailu Shawel et al* arose in the context of the political crisis that ensued following the contested 2005 national election in Ethiopia.[42] Since taking power in 1991, EPRDF had largely won the national elections undisputedly, although serious concerns on whether these elections were 'free and fair' continued to be raised. The 2005 general election witnessed one of the most contested elections in the political history of Ethiopia. The results of the election showed a major setback for the EPRDF and a significant electoral victory for the major opposition political party, the Coalition for Unity and Democracy (CUD). The CUD won all the 23 parliamentary seats for Addis Ababa City Administration and all opposition political parties including CUD won more than 179 out of the 547 seats of the national parliament. Despite these, the opposition claimed that it won the elections and accused the government of vote rigging. International election observers also confirmed the occurrence of vote rigging and widespread electoral irregularities.[43] In the aftermath of the election, protesters demonstrated in the streets of Addis Ababa, to which security forces responded heavy-handedly leading to the death of more than 200 individuals.[44]

The political crisis following the election led to the imprisonment of CUD leaders, members of the civil society and individuals that were believed to be involved in inciting violence and attempting to overthrow the government and the constitutional order. It should be pointed out that much of the political debate during the election focused on important policy issues with little incidence of

[42] *Federal Public Prosecutor v. Hailu Shawel et al*, Federal High Court, Criminal Case Number 43246/99 (September 2007).

[43] VOA, Africa: *2005 Ethiopian Election: A Look Back*, (16 May 2010), available at: <https://www.voanews.com/a/article-2005-ethiopian-election-a-look-back-93947294/159888.html> (accessed 15 April 2016).

[44] *See* BBC News, Ethiopian Protesters 'Massacred', [<http://news.bbc.co.uk/1/hi/6064638.stm>] (accessed 10 March 2016).

incitement to genocide or hate speech.[45] Nevertheless, there were instances where speech that closely resemble hate speech or hate rhetoric was used in the political campaign leading to the general elections as well as in the immediate aftermath of the elections. As Iginio Gagliardone notes, the 2005 general elections in Ethiopia demonstrated "the fundamental juncture when the tension between politics, ethnicity, and the media, including new media, became evident".[46] This is yet another demonstration of the fact that the incidence of hate speech increases when political stakes are high such as during elections, economic crisis, poverty and periods of high unemployment.[47] Yared Legesse Mengistu argues that hate speech employed during the 2005 elections has some resemblance to the hate speech that was employed in the Rwandan Genocide.[48] This is, however, too much of a stretch. As will be shown in the subsequent discussion, much of the political debate was measured and could not in any way resemble the situation during the Rwandan Genocide.

In the case of *prosecutor v Hailu Shawel et al,* the indictment for the crime of incitement to genocide related to speech made by the leaders and members of the CUD during the election campaigns in 2005. The evidence presented in the Federal High Court particularly focused on a speech made by Bedru Adem, one of the prominent leaders of CUD, in Assela town, located in the regional State of Oromia. In his speech addressed to a large audience he made the following speech, "the power of the Federal Government is totally in the hands of Tigrayans and the EPRDF; and thus they should be shoved back to their former turf by the united power of the people".[49]

In making the case for the crime of incitement of genocide, the prosecutor tried to establish that some of the violence and loss of life that happened in the aftermath of the elections were attributed to the hate speech employed by the opposition.[50] The prosecutor also tried to indicate that as a result of the speech two houses of individuals who were ethnic Tigrayans were burnt and another Tigrayan was beaten and injured.[51]

The case of *Prosecutor v Elias Gebru Godana* is another case which demonstrates the difficulty of limiting political speech and protecting communitarian interests in

[45] See Lyons, *supra* note 33.

[46] I. Gagliardone, *New Media and the Developmental State in Ethiopia*, 113 AFRICAN AFFAIRS 33 (2014).

[47] I. Gagliardone *et al, Mapping and Analyzing Hate Speech Online: Opportunities and Challenges for Ethiopia*, WORKING PAPER 9 (Oxford, 2014).

[48] Yared L. Mengistu, *Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws, in* THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 361 (M Herz and P Molnar eds., Cambridge University Press 2012).

[49] *Ibid*., at 364.

[50] *Ibid*.

[51] Hessebon *supra* note 35, at 25.

states with a non-liberal constitutional structure. Elias was a journalist and editor of *Enqu* magazine who was prosecuted for incitement to hatred.[52] Although the indictment of Elias was for incitement to hatred rather than incitement to genocide, the case illustrates the complex issues involved in the regulation of hate speech and incitement to hatred, as well as incitement to genocide in multi-ethnic and multi-religious State such as Ethiopia. It also demonstrates the precarious position of journalists and political commentators in the context of the political statements they make in such complex socio-political and legal environment. Because of this it would be helpful to analyze the legal basis of the prosecution's evidence for incitement to hatred in the context of the legal limits of permissible political speech. Elias was charged with violation of Art 257 (e) of FDRE Criminal Code.[53] The details of his charge indicate that he was accused of attempting to destroy the unity of the people of Ethiopia by trying to instil hatred and conflict in the public in violation of the Criminal Code.[54] The specific charges related to an article written in *Enqu* magazine on its March 2012 issue. In the article titled "Whose and to whom are the statutes built and being built?" he asks readers questions including, "the Oromo people came to Ethiopia in the 16th Century, should we remind them that they are our new neighbours? Whose country are they going to secede from?[55] They should remember the contract and obligation they entered with Emperor Gelawdiwos".[56] The article further reads:

> the resistance and obstacle caused by those who claim to be Oromos to the effort by Emperor Menelik to strengthen the country that was weakened was unexpected and a betrayal. If they [those who claim to be Oromo] say that they are not Ethiopians they could have had the right to leave the country and go to the place where they came from. But instead, they said that they will remove their hosts [Ethiopians] who received them as guests and tried to overtake them. ...In this regard, the acts that Emperor Menelik allegedly committed, even if true, what choice did he has, unless we are unable to think? What is the injustice of this act? [57]

The case demonstrates the very complex and difficult nature of determining the contours of political speech and those that can be categorized as hate speech or incitement to hatred or incitement to genocide. The historical factors and simmering

[52] In this regard *see* also *Prosecutor v Elias Gebru Godana*, Federal High Court, File No 552/06 (20014).

[53] FDRE Criminal Code (2004). Art 257(e) reads:

> Whosoever, with the object of committing or supporting any of the acts provided under Articles 238-242,246-252 [offenses against the state]: launches or disseminates, systematically and with premeditation, by word of mouth, images or writings, inaccurate, hateful or subversive information or insinuations calculated to demoralize the public and to undermine its confidence or its will to resist […] is punishable up to 10 years of imprisonment.

[54] *Prosecutor v Elias Gebru Godana, supra* note 52.

[55] *Ibid.*

[56] *Ibid.*

[57] *Ibid.*

ethnic tensions in the country are manifest because of the perceived marginalization of the Oromos that constitute 35% of the population as the largest ethnic group in the country.[58] Oromo activists have argued that the Abyssinian culture (which represents the northern Christian dominated part of Ethiopia) is dominated by the Amhara and Tigrayans which has left much of the political, economic and cultural claims of the Oromo to the periphery. Moreover, more radical Oromo nationalists also perceive the campaign of 'integration' of the different regions and ethnic groups to the Ethiopian Empire by Emperor Menelik by the end of the 19th Century as a campaign of 'extermination' and even 'genocide'.[59] These sensitivities of political minority groups can trigger anger and resentment to statements that on face value appear normal and within the boundaries of political speech.

It is important to note that the prosecution's case rested not only on the expression *per se* but also demonstrated that some violent act occurred as a result of the speech. First, the prosecutor argued that the article included expressions which demoralized the Oromo people and undermined their Ethiopian identity.[60] Second, the prosecutor established that violence broke out as a result of the speech. In corroborating the evidence, the prosecution showed a letter from Jimma University, located in Oromia Regional State, where student protesters broke windows and other related property worth 39, 408 Birr.[61] Although there is no indication that the violence was caused by reading the article in which the charges against the accused are based, the prosecution's case clearly rested on this fact. The prosecution's evidence seems to demonstrate that any criminalization of hate speech should be construed as incitement to hatred and discrimination, which has the potential to cause violence. In many ways, the emerging jurisprudence on hate speech as well as general incitement law in Ethiopia and prosecutorial patterns clearly demonstrate that Ethiopian law favours a normative understanding that makes speech proscriptions to be contingent on a demonstration of the likelihood of the occurrence of a violent act. However, Yared Legesse Mengistu argues that Ethiopia's law on hate speech is dogmatically over-reliant on the truth of alleged facts rather than a demonstration of the likelihood of violence.[62]

The above cases clearly indicate that in States like Ethiopia where ethnic identity has become the defining feature of the body politic, its effort to regulate and contain radical nationalist and ethnic nationalist expressions is justified by its particular socio-political context. However, providing an appropriate normative framework on the limits of political speech and defining the meaning and scope of what constitutes

[58] See R Lefort, *Things Fall Apart: Will the Centre Hold* (Open Democracy, 19 November 2016), available at <https://www.opendemocracy.net/ren-lefort/ethiopia-s-crisis> (accessed December 15 2016).

[59] *Prosecutor v Elias Gebru Godan, supra* note 52.

[60] *Ibid.*

[61] *Ibid.*, See Annex of the list of property destroyed.

[62] Mengistu *supra* note 48, at 369.

incitement to genocide and incitement to hatred is important. As Susan Benesch rightly notes, defining the appropriate contours of what constitutes incitement to genocide and incitement to hatred would help to guard against the repression of legitimate political speech and its vitality to the democratic process.[63] This is particularly important in Ethiopia and many other African States where the general understanding that the violence and genocide in Rwanda was fueled by the incitement by the media has provided the political legitimacy to impose broad restrictions on political speech.[64] In this regard, the body of law on incitement to genocide under international and comparative law can provide significant normative insight in determining the boundaries of political speech and incitement law. Given the significance of international and comparative law in resolving the legal challenges involved in the regulation of free speech, Ethiopian courts can draw important insights by looking into this body of law in determining the contours of political speech in the context of incitement to genocide.

2.2. The *lèse-majesté* law and the silencing of political dissent in Thailand

Historically, the use of *lèse-majesté* laws can be traced to the French aristocratic tradition. Until the middle of the 18th century, strong absolute monarchical rule had created a strong legal apparatus to protect the monarchy as an institution and the king.[65] After the introduction of *Code Michaud* of 1629 by the recommendation of Cardinal Richelieu, the *lèse-majesté* law was extended to include offences against the church and defamatory statements on political matters.[66] Since its inception the *lèse-majesté* was directed at rival political elites in order to control political power.[67] Similarly, in the case of Thailand, although the *lèse-majesté* law was seemingly adopted to protect the reputation of the monarchy, anti-royalism has been used as a powerful political tool to dominate political power and galvanize public support in Thai society.

Generally, the Monarchy is a respected institution in Thailand. King Bhumibol Adulyadej, who has been head of State for more than 70 years is the longest serving monarch in the world and exerts a significant influence in Thai society. The king symbolizes the Thai nationhood and stands as the central element of the Thai 'civic religion' of 'nation, monarchy, and religion'.[68] The King as head of State is not only

[63] S. Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VIRGINIA JOURNAL OF INTERNATIONAL LAW 488 (2008).

[64] J. Simon, *Of Hate and Genocide: In Africa Exploiting the Past*, COLUMBIA JOURNALISM REVIEW 9 (2006).

[65] D. Streckfuss, *Kings in the Age of Nations: The Paradox of lèse-majesté as Political Crime in Thailand*, 37 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 447 (1995).

[66] *Ibid.*

[67] *Ibid.*, at 446-47.

[68] Leyland and Harding *supra* note 39, at 32.

revered by Thai society but also a subject of extreme sensitivity.[69] As a result, the institution of the monarchy and the king are vigorously protected by law from any criticism. The 2007 Constitution of Thailand reads: ''[T]he King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action".[70] It is interesting also to note that, despite the recent coup of May 2014 by the National Council for Peace and Order (NCPO) which abrogated the entire constitution of 2007, Chapter 2 of the Constitution which relates to the power of the monarchy and the status of the King is left untouched.

One of the major challenges that significantly constrained the protection of the right to freedom of expression in Thailand has been the *lèse-majesté* law, which criminalizes any criticism against the monarchy. Section 112 of the Thai Criminal Code, which falls under offences of national security stipulates "[w]hoever defames, insults or threatens the King, Queen, the Heir-apparent or the Regent, shall be punished (with) imprisonment of three to fifteen years."[71] It is noteworthy to emphasize that the offence of *lèse-majesté* is not treated as a case of defamation or libel but as serious national security issue which entails severe legal consequences leading to imprisonment of up to fifteen years. Beyond its legal implications, conviction for *lèse-majesté* is considered as cultural treason committed against Thainess. Moreover, unlike most jurisdictions, where a victim of a defamatory statement will lodge complaints, the law of *lèse-majesté*, because of its very conception as a national security issue, can be subject to prosecution by complaint from any person or by the prosecution's initiative.[72]

Political historians trace the first use of the *lèse-majesté* case in Thailand during the reign of King Chulalongkorn (1868-1910). When the King became displeased with the political comments made by a prominent journalist T.V.S. Wannapho, he ordered his imprisonment, making him the first political prisoner in the history of Thailand.[73] In modern history of Thailand, the first important *lèse-majesté* case is usually cited as the *Wira Musikaphong* case.[74] The case is significant because it typifies the way how the law of the *lèse-majesté* has been used as a political tool to muzzle and eliminate political opponents. The case was about a political speech made by Mr Wira, who was a member of a Democratic Party, known for its opposition to the military. During his election campaign, he made a speech in which he compared himself to a prince in the context of criticizing a political opponent. Part of his political speech included the following:

[69] *Ibid.*, at 238.

[70] Constitution of Thailand (2007), Section 8.

[71] Penal Code of Thailand (1957).

[72] *See* IFHR, *supra* note 35.

[73] Robert F Martin, *Freedom of Expression in Southern Asia-Political Realities and Cultural Expectations: Freedom of Speech in Thailand*, 20 FREE SPEECH YEARBOOK 1 (1981).

[74] Streckfuss, *supra* note 65, at 449.

> If I were a prince now, I would not be standing here, speaking, making my throat hoarse and dry …I would be drinking some intoxicating liquors to make myself comfortable and happy.[75]

He was later charged with the offence of the *lèse-majesté*. It was argued that his metaphorical reference was directed at the king depicting him as lazy and one who does not care about the deplorable conditions of the poor.[76] Although Wira proclaimed his innocence and affirmed his loyalty to the king, the public exposure of the issue forced the military officials to galvanize popular protests which ultimately led to his prosecution. He was initially acquitted by a provincial court but later found guilty of the crime of *lèse-majesté* by an appellate court and sentenced to six years imprisonment.[77]

The case of Sulak Siravaksa, a social activist and scholar and his repeated prosecution for anti -royalists sentiments has been one of the most publicized in the history of Thailand. Although he himself is a royalist, his ardent criticism of the *lèse-majesté* law and some of his opinions on the role of the monarchy in Thai society has led him to five different *lèse-majesté* charges since 1984. Although he has not been convicted of *lèse-majesté*, he has been continuously harassed and arrested in order to silence his views on the monarchy.[78]

In the *Da Torpedo* case, Ms Daranee, a political activist and member of the United Front for Democracy against Dictatorship (UFDAD), was charged for three counts of violations of insulting the king and queen under the *lèse-majesté* law. The major aspect of her speech concerned a political speech made in 2008 in which she criticized the 2006 coup, the military leaders and their conservative allies. In her speech she also reiterated a widely held public view that the monarchy was behind the 2006 military coup that ousted Thaksin Shinawatra from power.[79] Ms Daranee was sentenced to eighteen years imprisonment under the *lèse-majesté* law.

In more recent times, the application of the *lèse-majesté* law has been more pronounced with greater coverage and intensity.[80] According to Strafuckus, until 2011 it is estimated that there were more than 170 political prisoners convicted on *lèse-majesté* charges.[81] According to Jory, the conviction rate for *lèse-majesté* offences

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[75] *Ibid*., at 458.

[76] Leyland, *supra* note 39, at 241.

[77] *Ibid., at* 451.

[78] See Renowned Royalist Sulak Sued for lèse-majesté for Defaming ancient king (Prachatai, 17 Oct 2014), available at: <http://www.prachatai.com/english/node/4416>, see also King With King declining Health, Future of Monarchy in Thailand is Uncertain, available at: <http://www.nytimes.com/2015/09/21/world/with-king in-declining-health-future-of-monarchy-in thailand-is-uncertain.html?_r=0>

[79] Harding and Leyland, *supra* note 39, at 243.

[80] Amnesty *supra* note 35.

[81] Streckfuss *supra* note 66, at 205.

is also almost 100%.[82] The political pressure involved and the very nature of the crime as a discursive political crime make it almost impossible to raise defenses or deny the allegations.[83]

Since the beginning of the coup, NCPO has publicly stated that the top priority of the authorities is to prosecute critics of the monarchy.[84] Reports indicate that hundreds of individuals have been investigated for *lèse-majesté*, most of whom have been prosecuted under the military and criminal courts of Thailand.[85] NCPO has used *lèse-majesté* law in record number of prosecutions and jail terms.[86] *Lèse-majesté* offences can entail a sentence of as long as fifteen years.[87] Multiple offences of *lèse-majesté* law, including postings made in facebook, can lead to fifteen years imprisonment for each count. Recently, a military court sentenced Pongsak Sriboonpeng to sixty years in prison for committing the *lèse-majesté* offence, reduced later to 30 years in prison for pleading guilty.[88] This makes it the highest and harshest sentence recorded in the history of Thailand for a *lèse-majesté* offence.[89] The onslaught and crack down on free expression is particularly apparent in the context of new online media platforms such as facebook.

To conclude, the *lèse-majesté* law as currently understood by the courts of Thailand significantly departs from the regulation of defamation laws in many democratic States. It has been applied in such a way that any expression which does not have any effect on the reputation of the king or the monarchy can still fall under Art 112 of the Thai Penal Code. More importantly, the normal defences available in defamation cases such as the defence of truth are not available for the crime of *lèse-majesté*. This questions Thailand's international commitment under Art 19 of the ICCPR which provides for the right to freedom of expression. Despite the growing criticism from rights groups and the UN Office of the High Commissioner for Human Rights to amend or abolish the law, there has not been any legislative reform to this effect.[90] It should also be recalled that international and comparative law on free speech clearly establishes that core political speech made in the

[82] *Ibid.*

[83] *Ibid., at* 205.

[84] Human Rights Watch World Report, 535 (2015).

[85] *Ibid.*

[86] Reuters Special Report, *Thai Junta Hits Royal Critics with Record Jail Time*, (3 Sep 2015), available at: <http://www.reuters.com/article/2015/09/04/us-military-convictions-thailand-special-idUSKCN0R400X20150904> (accessed 12 Sep 2015).

[87] *see* Sec.112 of Penal Code of Thailand (1957).

[88] BBC News, *Thai Courts Give Record Jail Terms for Insulting King* (7 August 2015), available at: <http://www.bbc.com/news/world-asia-33819814> (accessed 25 Sep 2015).

[89] *Ibid.*

[90] See OHCHR Press Briefing on Thailand and Mali (11 August 2015), available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16310&LangID=E> (accessed 10 Sep 2015).

democratic process, in particular in relation to public officials, should be given more heightened scrutiny in the application of defamation laws. One also notes that in the US constitutional dispensation, defamation of public officials can be established only if it can be shown that a speaker made reckless disregard of the truth of his statements.[91]

It should, however, be noted that given the wider respect that the monarchy enjoys in Thai society, it can be argued that possibilities for accommodating limitations on freedom of expression can be imposed through the *lèse-majesté* law. Historically the Thai monarchy as an autochthonic institution has evolved as a deep cultural element of Thai society. Because of this, it can be contemplated that the protection of the monarchy through defamation laws can be justified. It should also be recalled that, the institution of the monarchy in liberal democracies such as in the UK and Japan, has certain legal protections even if the law has rarely been used.[92] Nevertheless, the *lèse-majesté* law should only be invoked for a direct personal attack on the personality of the king or the institution of the monarchy. Moreover, the normal defences available for defamation cases such as the defence of truth should be available to a defendant. Given the increasing decriminalisation of defamation laws in many countries, possibilities for exploring non-penal measures should also be considered.

3. Exploring the Illiberal Impulses of Non-Liberal Constitutionalism in Free Speech

The preceding discussions on constitutionalism in free speech in non-liberal polities clearly show that the protection afforded to freedom of expression, in particular to core political speech is markedly different from liberal democratic societies. There are legal, socio-political, cultural and historical factors that explain the normative constitutional divergence in the protection of freedom of expression between liberal and non-liberal polities.

In her account of the soft constitutionalism in transitional democracies and non-liberal States, Li-Ann Thio emphasizes on the importance of looking into "nonbinding, deliberately created constitutionally significant norms" that form the soft laws of these States.[93] In what Thio describes as a 'positivist version of realism' she argues that the marginal role that courts and legal rules play in transitional and non-liberal democracies requires looking into the soft law - the ideological and socio-political factors that have significant role in "ordering constitutional relationships"

[91] *New York Times Co. v. Sullivan* 376 US 254, 84 S. Ct [1964].

[92] Article 19, *Impact of Defamation Law on Freedom of Expression in Thailand* (2009).

[93] Li-Ann Thio, *Soft Constitutional Law in Non-Liberal Asian Constitutional Democracies*, 8 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 766 (2010).

and normative conceptions in these States.[94] She notes that soft constitutional law in transitional democracies, because of its conceptual fluidity, has inherent fuzziness and lacks the certainty and accuracy when compared to legal norms. But she argues that "[w]hat [soft constitutional law] forsakes in terms of conceptual clarity, it gains in terms of capturing constitutional realities accurately".[95] Mark Tushnet similarly notes that a more nuanced understanding of constitutional norms can best be drawn by studying how high politics influences the conception of constitutional values in States.

In the case of Ethiopia and Thailand, the factors that explain their illiberal impulses are varied and may require further research. However, certain important common factors can be discerned which inform their stance on freedom of expression and typically characterize their non-liberal normative constitutionalism more broadly.

3.1. A Culture of respect

Some of the perplexing contemporary challenges to free speech in Ethiopia and Thailand discussed in the preceding sections of the paper cannot be answered by purely normative or institutional discussions. A significant factor that clearly manifests itself in their stance on free speech is their shared cultural contingencies. This is particularly informed by their aristocratic past, where monarchs ruled these nations with absolute political power and where any form of dissent to the ruler was seen as treason. In the case of Ethiopia the famous saying "you cannot plough the sky, neither can you sue the king" has been a deeply held cultural element of Ethiopian society.[96] It should also be noted that the 1955 Constitution of Ethiopia clearly states that the authority of the Emperor is absolute and that his dignity is inviolable. Although Ethiopia's transition to a Republic in 1974 has transformed many aspects of its social and political organisation, its aristocratic past which existed for millennia clearly has a significant influence in its stance on free speech and its democratic trajectory. The political culture of Ethiopia has been characterized by strong leaders typified by a personality cult with little constraints over personal power or willingness to compromise on dissenting views.[97]

Similarly, Thailand's national identity has been largely influenced by the monarchy. Robert Martin, noting the challenges of freedom of expression in Thai political culture has observed that Thai constitutionalism in freedom of expression is seriously hampered by a culture of respect for personality than a commitment to any political philosophy or a deeper understanding of the values of free expression. This culture of respect in Thai society has also been a significant factor for the influence

[94] *Ibid*. *See* also M. Palmer, *Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution*, 54 AMERICAN JOURNAL OF COMPARATIVE LAW 87, 589 (2006).

[95] Thio, *supra* note 93, at 769.

[96] See Hessebon, *supra* note 35.

[97] *Ibid*.

of the monarchy as an important aspect of the national identity of Thailand. The Thai culture commonly known as *krengjai*, encourages modesty and respect towards other people. The public expression of opinions challenging authority is considered confrontational which is uncharacteristic of Thainess. Social scientists argue that these personal values have significant influence in the political behaviour and their attitude towards normative values such as freedom of expression.[98]

It should be recalled that this conclusion while not unique to the nature of non-liberal constitutionalism in States such as Ethiopia and Thailand, is more pronounced when it comes to these polities. Ronald Krotoszynski, comparing the free speech tradition of the United States, and those of Germany and France, notes that the latter's emphasis on dignity and the consequential over-protection to hate speech and their general approach to civility norms stems from "a culture of respect that democratized aristocratic forms of politesse and protected these interests through civil and criminal law".[99] Clearly cultural contingencies play a significant role in the current understanding of freedom of expression in many societies. Nevertheless, the culture of respect that resulted from a deeply hierarchical aristocratic society in Ethiopia and Thailand continues to have a more profound afterlife in their normative constitutionalism in free speech than in the case of most liberal societies.

3.2. The emphasis on communitarian norms

As indicated in the introductory part of this article, one of the most significant normative constitutional structures of non-liberal constitutionalism is its emphasis on group or communitarian values than individual rights. The fact that constitutionalism in non-liberal States gives emphasis to group rather than individual rights has a political undertone which implies that individual rights including freedom of expression do not form the normative core of their constitutional architecture.

In the case of Ethiopia, the ethnic federal constitutional arrangement overtly emphasizes on the protection of group identities rather than individual rights. At face value the constitution embraces both liberal individual rights and the rights of nations, nationalities and peoples.[100] Nevertheless, there are deeply embedded ideological factors that seem to feed a commitment to protect group rights than individual rights. The political elites of the current governing party, EPRDF, believe that the old Ethiopia they knew was dominated by *a* specific ethnic group's political power and culture. Historically the Amhara aristocracy had a significant

[98] Martin, *supra* note 73, at 5-6.

[99] RONALD KROTOSZYNSKI, THE FIRST AMENDMENT IN CROSS CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 135 (2009, New York University Press).

[100] *See* Arts 14 to 44 of FDRE Constitution.

political influence in shaping the national identity of the Ethiopian nation. Thus, at least at a political level, there was a clear desire by many other ethnic groups to exert their cultural identity in the newly reconstituted Ethiopian State by protecting minority ethnic groups under the federal arrangement of the Constitution.

In order to achieve this, they crafted a constitution which markedly favours the protection of ethnic groups over any other liberal democratic value including freedom of expression. The overall political legitimacy and State structure rests on the rhetoric of the protection of ethnic groups. In this regard it should be noted that the Ethiopian Constitution is one of the few constitutions in the world which provides for the right to secession of ethnic groups from the State.[101] This overt emphasis on communitarian or group rights has a political undertone which seems to undermine the protection of individual rights including freedom of expression.

This does not play out only at the political level but also normatively. The government has at times used hate speech expressions to silence political expressions as evidenced in the aftermath of the 2005 national election. The members of CUD, the then major opposition political party including the party leader Eng. Hailu Shawel and 130 other members of the party were charged with incitement to genocide.[102] Although the charges were later dropped, hate speech has continued to be one of the major contentious issues which can have a chilling effect on political speech.

In the case of Thailand, while many point out that the 'Asian values' debate is less pronounced, most scholars point out that its stance on individual rights including free speech is significantly influenced because of its emphasis to a collective identity of the Thai State.[103] Thailand's national constitutional identity has been shaped by the collective pride in being Thailand - land of the free.[104] Although, the State usually pacifies claims of self rule by ethnic minorities wary of ethnic tensions, the political culture has been significantly influenced by the collective identity of being Thai than the protection of individual rights including freedom of expression. In this regard Robert Martin notes:

> The sources of Thai national apathy toward freedom of speech (and politics in general) lies deep in political traditions and cultural expectations which provide the average citizen a stable economy, a reassuring sense of place in society, a vast degree of personal freedom and pride in the fact that Thailand -- land of the free--has never been subjugated by a foreign power.[105]

[101] *Ibid.*, Art 39.

[102] *Federal Public Prosecutor v. Hailu Shawel et al, supra* note 42.

[103] Martin, *supra* note 73.

[104] *Ibid.*

[105] *Ibid.*, at 3.

This communitarian distinctive independent existence had profoundly shaped the national identity of the Thai State, which undermines individualized notions of rights including freedom of expression.

On balance, one could argue that given the political reality of both Ethiopia and Thailand which gives greater emphasis on communitarian norms, accommodating group rights/communitarian norms in non-liberal constitutionalism is appropriate. In fact critics of liberal constitutionalism point to the hyper-individualised notions of rights which have decimated the importance of communitarian norms and their social significance.[106] Pioneering libertarians such as Locke not only emphasized on individual freedom but also the community as fundamental to the good life.[107] Modern libertarians have also openly expressed their growing anxiety on the decline of community values in liberal societies.[108] Accordingly, accommodating non-liberal constitutionalism in free speech requires acknowledging this political reality and cultural contingency. The implications for example can be that there should be greater flexibility in the regulation of hate speech which takes into account their social context and political reality.

3.3. The Developmental State: the anti-thesis of the neutral State

Bertolt Brecht's most quoted aphorism "grub first, then ethics" best describes the recurrent ideological notion of the developmental State. Following the success of South East Asian economies and the support garnered by prominent economists including Mustaqh Khan, Dani Rodrik, Howard Stein and Joseph Stiglitz, the developmental State ideology has dominated the political economic landscape of most third world countries.[109] While the developmental State doctrine may appear an economic model largely dependent on State driven economic development, crucially, it is a political program. Political commentators point out that the developmental State ideology only makes passing reference to liberal democratic values such as respect for human rights including freedom of expression.[110]

Driven by the developmental State ideology, the fundamental political ideology of Ethiopia and Thailand rests on achieving sustained economic growth.[111] This

[106] *See* Frohnen *supra* note 16.

[107] Brian Tierney, *Historical Roots of Modern Rights: Before Locke and After*, *in* RETHINKING RIGHTS: HISTORICAL, POLITICAL, AND PHILOSOPHICAL PERSPECTIVES 34, 40-43 (Bruce P. Frohnen and Kenneth L. Grasso eds., Univ. of Missouri Press 2009).

[108] *See* Frohnen, *supra* note 16.

[109] Sarah Vaughan, *Revolutionary Democratic State-Building: Party, State and People in the EPRDF's Ethiopia*, 5 JOURNAL OF EASTERN AFRICAN STUDIES 619,623 (2011).

[110] Adrian Leftwich, *Bringing Politics Back in: Towards a Model of the Developmental State*, 31 JOURNAL OF DEVELOPMENT STUDIES 400-427 (1995).

[111] *Ibid*. Although there has been a major political shift in terms of the political orientation of the party under the new Prime Minister, Abiy Ahmed, the ruling party, EPRDF, has reiterated its developmental state policy in its general congress held in 2018.

position has a political undertone which implies that a functional democratic system can only be established after reaching a certain level of economic development.[112] The developmental State theory has its appeals because of the realities of economic poverty that for so long has characterized much of the third world including Ethiopia and Thailand. It is true that the form and nature of how the notion of the developmental State ideology is applied in Ethiopia and Thailand could vary to a certain degree. It should also be pointed out that economically Thailand is more advanced than Ethiopia. However, the fundamental tenets of the developmental State ideology are identical.[113]

Proponents of the developmental State theory argue that significant economic development and poverty reduction have been achieved by repudiating the standard norms, practices and expectations of liberal democracies. East Asian political leaders, notably Lee Kwan Yew questioned and argued against the significance of a freedom of expression and the media for securing development or social harmony.[114] This interventionist vision of organizing society is markedly different from the notion of the neutral state, which serves as the organizing principle of liberal constitutionalism. The notion of the neutral state adopts a pacifist approach towards State power by preferring to be a neutral arbiter by allowing the market of goods and ideas to decide what the good life of the society should look like.[115]

This clash of values underlying the fundamental principles organizing and constituting the State creates normative divergence in liberal and non-liberal constitutionalism. In the context of freedom of expression, the ideology of the developmental State which forms one of the most significant organizing principles of Ethiopia and Thailand had important implications on their stance on freedom of expression. The ideology of the developmental State is defined by weak and subordinate civil society and political repression as key elements of its organizing principles. In an effort to maintain a stable and fast economic development, it presupposes that freedom of expression and a strong independent media can be counterproductive to its ambitious 'wish to catch up with the west'. Leftwich observes that the suppression of freedom of expression and civil society in general has been one of the key factors for the "constitution and continuity of developmental States."[116]

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[112] For a general discussion on constitutionalism and economic realities of states *See* Arun Thiruvengadam and Gedion Hessebon, *Constitutionalism and Impoverishment: A Complex Dynamic*, *in* OXFROD HANDBOOK ON COMPARATIVE CONSTITUONAL LAW (Michael Rosenfeld and Andras Sajo eds., OUP 2012).

[113] See Leftwich, *supra* note 110.

[114] *Ibid*.

[115] Catriona McKinnon and Dario Castiglione, *Introduction: Reasonable Tolerance*, in THE CULTURE OF TOLERATION AND DIVERSE SOCIETIES: REASONABLE TOLERANCe 2 (Catriona McKinnon and Dario Castiglione eds., 2003).

[116] *See* Leftwich, *supra* note 110, at 418.

Clearly, it can be observed that non-liberal States such as Ethiopia and Thailand seem to embrace two contradictory vision of the good society. On one hand, they formally embrace liberal constitutional norms including the freedom of speech. On the other hand, their deeper ideological reason for organizing the State through the developmental State ideology negates their commitment to ensure the protection of basic democratic principles including the freedom of expression.

Conclusion

The study of contemporary challenges to free speech in non-liberal polities such as Ethiopia and Thailand is important to understand the manifestations of the illiberal impulses of these polities with a principled study of non-liberal constitutionalism. Crucially, however, it helps to articulate the reasons for their departure from the liberal model of constitutionalism in free speech and the opportunities to explore normative universalism in free speech. This article has tried to shed light on some of the contemporary challenges to free speech in Ethiopia and Thailand as a demonstration of this normative divergence between liberal and non-liberal constitutionalism. Understanding the nature of non-liberal constitutionalism both in law and high politics can also provide better opportunities for a more receptive attitude to liberal constitutional norms including free speech by accommodating some of their political realities and cultural contingencies.

Nevertheless, it should be admitted that in non-liberal polities such as Ethiopia and Thailand, the protection afforded to freedom of expression has been one of the most draconic in recent times. In the case of Ethiopia, the Anti-Terrorism Proclamation, in particular the prohibition of incitement to terrorism has had a significant effect in silencing political dissent and diminishing the vitality of free expression in the democratic process. Similarly, in Thailand, the use of the *lèse-majesté* law has had a similar effect. The discursive nature of these crimes makes it impossible to determine the contours of political speech from those that have serious and imminent threat to the national security of these states.

Thus, while acknowledging their political realities and cultural expectations, both Ethiopia and Thailand need to recognize the significance of freedom of expression by complying with the basic principles of free speech drawn from international and comparative law. In this regard comparative law in free speech can offer important lessons by drawing common principles on the regulation of speech which could have transnational resonance. By doing so, non-liberal constitutionalism can be validated as a defendable normative constitutional architecture by demonstrating that the political realities and cultural contingencies of States can be accommodated without compromising the cosmopolitan ambitions of human rights norms including free speech.

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The Innocence Problem in the Context of the Proposed Plea Bargaining in Ethiopia

Alemu Meheretu[*] *& Alebachew Birhanu*[**]

Abstract

This article investigates the innocence problem in the context of the newly proposed plea bargaining in Ethiopia focusing on some specific features of the Ethiopian criminal justice system. It argues that the innocence problem of plea bargaining would be further exacerbated by such specific features of the criminal justice system as huge power asymmetry between adversaries, prolonged pre-trial detention, poor conditions of detention centres, weak fact-finding capacity, and scanty guarantees against wrongful convictions. Further, the article contends that the safeguards instituted against the innocence problem are likely to fall short of shielding the innocent from wrongful convictions.

Key terms: The innocence problem, wrongful conviction, plea bargaining, Criminal Justice Policy, Ethiopia.

Introduction

Plea bargaining, which involves charge or sentence concessions in exchange for the defendant's guilty plea, pervades criminal justice systems of diverse legal traditions. With a view to address efficiency related problems of the Ethiopian criminal justice system, a criminal justice policy which embraces plea bargaining, among others, has been adopted in 2011.[1] This is yet to have a legislative footing in the upcoming criminal procedure law, the draft of which mirrors the policy in this regard. Following the adoption of plea bargaining at a policy level, a former Supreme Court judge observed:[2]

> Ethiopia is a latecomer to plea bargaining. As such, we have many opportunities to learn from the experience of other countries. So, we need to exploit this ... we need also to consider our context …

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[1] See the FDRE Criminal Justice Policy, 2011.

[2] Interview with Judge 11, held on 17/04/2012 as cited in Alemu Meheretu, Introducing Plea Bargaining in Ethiopia: Concerns and Prospects, (PhD Thesis, University of Warwick, UK, 2014).

Nonetheless, Ethiopian reformers seem content with importing at a policy level unlimited plea bargaining, a model of plea bargaining typical in common law adversarial jurisdictions. This model is characterized by the fact that it leaves considerable discretion to the prosecution, the types and natures of concession and sentencing differentials are unregulated.[3] In general, the version adopted by Ethiopia has, *inter alia*, the following salient features:[4] it applies to any crime; it recognizes all forms of plea bargaining (fact, charge and sentence bargaining), it grants the prosecution exclusive power to plea bargain with almost unfettered discretion; it leaves sentence differentials[5] unregulated; and it does not recognize *ex ante* judicial review of the decision to plea bargain.

At the origin, although it triumphs for its efficiency gains, this form of plea bargaining attracts all sorts of criticisms including but not limited to wrongful convictions (commonly known as *the innocence problem)*, differential treatment of similarly situated defendants, problems relating to lenient punishment, and other due process concerns.[6] In emulating this model, Ethiopian policy makers seem to be simply affected by what A. Watson labels as *transplant bias*:[7]

> [o]ften the foreign rules are borrowed without investigation into whether the rules are the best possible or even appropriate. The main causes of this transplant bias are …: the general high standing of the donor system; the general high prestige, apart from its law, of the donor state …; and the accessibility — for instance, in writing or in a code — of the law to be borrowed.

This Article singles out the *innocence problem* as an inherent problem to the system of plea bargaining, in general and as it applies to the proposed version of plea bargaining in Ethiopia, in particular and investigates it in the context of some key specific features of the Ethiopian criminal justice system. It also appraises the substantive and procedural guarantees designed to fend off the innocence problem. Accordingly, it employs a thorough analysis of policy documents (the FDRE

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[3] For more on this, see Alemu Meheretu, *The Proposed Plea Bargaining in Ethiopia: How it fares with Fundamental Principles of Criminal Law and Procedure*, 10(2) MIZAN LAW REV. (2016).

[4] *See* Articles 219, 221 and 230 of the FDRE Draft Criminal Procedure Code, as was valid in 2017 and section 4.5.4 of the FDRE Criminal Justice Policy, 2011, p. 36. For more discussions see, Alemu Meheretu, *supra* note 3, at 411-413.

[5] 'Sentencing differential' refers to the difference between trial sentence and plea bargaining sentence.

[6] S. Schulhofer, *Plea Bargaining as Disaster*, 101(8) YALE L. J. 1979 (1992); STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (Oxford University Press, 2012); Penny Darbyshire, *The Mischief of Plea Bargaining and Sentencing Rewards*, CRIMINAL LAW REVIEW *895* (2000); Douglas Smith, *The Plea-Bargaining Controversy* 77(3) JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 949-968 (1986); Guidorizzi, Douglas, *Should We Really Ban Plea Bargaining? The Core Concerns for Plea Bargaining Critics*, 47 *EMORY L. J.* 753 (1998).

[7] *See* A. Watson, *Legal Change, Sources of Law and Legal Culture*, 131 U. PENNSYLVANIA L. REV. 1121, 1147 (1983).

Criminal Justice Policy; herein after the *ECJ Policy* and the 2017 proposed Criminal Procedure Code, being the main targets), laws and comparative literature drawn from foreign jurisdictions. As plea bargaining is yet to be formally implemented in Ethiopia, there is no available data to support or refute the innocence problem.[8] Hence, the Article is necessarily a prospective one addressing the proposed variant of plea bargaining in light of some salient specific contexts of the Ethiopian criminal justice system.

The Article starts with a discussion of the innocence problem as an inherent problem that accompanies the institution of plea bargaining in general. The second section details the specific features of the Ethiopian criminal justice system that may contribute to and exacerbate the innocence problem. The third section reviews the guarantees that are put in place against the innocence problem in the proposed plea bargaining law in Ethiopia. The last section concludes the Article.

1. The Innocence Problem in General

The need to manage caseload and enhance efficiency of criminal justice systems prompted many jurisdictions to experiment various policy options. Prominent among these policy alternatives is the use of plea bargaining; albeit it attracted intense debate among the academia and practitioners alike. While proponents try to defend and justify the institution of plea bargaining in terms of, among others, efficiency and autonomy,[9] detractors blame it as inimical to constitutional principles, morality and fair trial guarantees.[10]

Although, plea bargaining may deliver efficiency gains, albeit at the cost of fairness and accuracy, it remains a subject of controversy in many respects.[11] Leaving cost-

[8] Indeed, even if plea bargaining is applied, it is impossible to empirically test the innocence problem with studies of this nature. For that matter it is a daunting task to collect data on the extent of the innocence problem for any large scale study. That is why many researches try to establish it indirectly by examining the probability of conviction or acquittal of plea bargain defendants had their case been tried at trial. Others simply avail of the data generated through DNA exonerations, which is limited to only few categories of crimes suitable to DNA analysis. The technology is currently unavailable in Ethiopia.

[9] *See* for example Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101(8) YALE L. J. 1969 (1992) (defending plea bargaining based on autonomy and efficiency rationales); Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 (4) YALE L. J. 683, 685 (1975) (arguing that plea bargaining respects 'humans dignity by protecting the right of every adult to determine what he shall do and what may be done to him'); Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 603 (2005).

[10] Stephanos, *supra* note 6; Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1364-71, 1384 (2000) (contending that plea bargaining unfairly punishes virtually everyone who insists upon trial).

[11] For more on this, see generally *supra* note 6 and note 9.

benefit calculus of plea bargaining aside, this Article investigates its treatment of innocents – the irresistible pressure it may put on them to plead guilty to a crime they did not commit, a phenomenon commonly referred to as *the innocence problem.*[12]

Although many agree that plea bargaining creates the innocence problem,[13] some proponents argue that the innocence problem is unrealistic or exaggerated at best. They surmise that plea bargaining is an option. Thus, innocent defendants can reject it and proceed to trial expecting an acquittal.[14] Yet the above claims seem to miss out the context in which plea bargaining operates and erroneously assumes that defendants possess real freedom of choice over their plea decisions. In the presence of coercive sentence differentials, power and interest imbalance between the prosecution and the defendant, possible pressures from the prosecution and their attorney, and other structural problems, innocents would find it difficult to forgo what plea bargaining offers them.

On the other hand, some proponents deny the innocence problem exists claiming that "...inaccurate guilty pleas are merely symptomatic of errors at the points of arrest, charge, or trial - not at the point of plea bargaining"[15] and thus can be well addressed through meticulous screening of cases prior to charging which produces only those who are factually guilty.[16] However, these assertions seem to ignore the

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[12] *See* Kenneth Kipnis, *Criminal Justice and the Negotiated Plea, 86 ETHICS 93, 98–99 (1976)* (comparing a prosecutor's plea offer to coercing someone to act at gunpoint*);* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968) (arguing that "the greatest pressures to plead guilty are brought to bear on defendants who may be innocent"); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2494–96 (2004); Dervan and Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem,* 103 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 1 (2012); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 72–73 (1988) (showing how innocent defendants can be encouraged to plead guilty when the plea offer is adjusted to the probability of conviction and expected post-trial sentence); Robert E. Scott & William J. Stuntz, *Plea Bargaining as a Contract*, 101 YALE L. J. 1909, 1935–49 (1992).

[13] *See supra* note 6, note 10 and note 12.

[14] *See* for example Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1165 (2007–2008); Oren Gazal-Ayal & Limor Riza, *Plea Bargaining and Prosecution* 13 EUROPEAN ASS'N OF LAW & ECON., WORKING PAPER No. 013-2009, April 2009; Avishalom Tor et al., *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL LEGAL STUD. 97, 114 (2010); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309 (1983) ("Defendants presumably prefer the lower sentences to the exercise of their trial rights or they would not strike the deals").

[15] John Bowers, *supra* note 14, at 1119 (Where the author argues that the innocence problem springs from misperceptions over: "(1) the characteristics of typical innocent defendants, (2) the types of cases they generally face, and (3) the level of due process they typically desire".)

[16] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 561-64 (4thed, 1992) cited in Jeff Palmer, *Abolishing plea bargaining, an end to the same old song and dance*, 26 AM. J. CRIM. L. 505, 519 (1998). Proponents also argue that the innocence problem would not be an issue where a negotiation meets the following: "(1) the defendant always has the alternative of a jury trial at which both verdict and sentence are determined solely on the merits; (2) the defendant is represented throughout negotiations by competent counsel; (3) both defense and prosecution have equal access to relevant evidence; and (4) both possess sufficient resources to take a case to

very purpose of plea bargaining in providing shortcuts in the legal process and prosecutor's disincentives to carry out rigorous scrutiny - by making convictions easy, plea bargaining reduces prosecutor's incentives to screen out weak cases.[17] Indeed, prosecutors are often suspects of extracting guilty pleas even in very weak cases simply by tailoring their bargaining offers to the chances of the defendant's acquittal.[18] Further, the above claims undermine the role of trials in fact finding; i.e., if pre-charge screening methods were to be relied on, full scale trials would be unnecessary from the outset. The proponents' arguments are also concerned with factual guilt, which is insufficient in itself to condemn a person under the law.

A related objection to the innocence problem runs from another aspects of comparison of the trial and plea bargains. It is contended that the innocence problem is not something unique to plea bargains; innocents face the risk of wrongful convictions in trials alike. Nevertheless, this objection is off the mark both in principle and in practice. While trials are about fact-finding and thus fare very well in terms of getting at the truth, plea bargaining which involves haggling and distortion of facts does not. Certainly, this impinges on outcome accuracy to the detriment of the innocent. What is more, even assuming wrongful conviction is commonplace in trials, the argument does not fare any better than a 'you too' fallacy. This does not justify the problem wherever it takes place.

Undeniably, trials are not immune from wrongful convictions. Indeed, scholarly works on the innocence problem elsewhere identify the following categories of irregularities as factors responsible for wrongful convictions in full scale trials: eyewitness misidentification, false confessions, flawed forensic science, and false informant testimony.[19] While these causes are not inherent to trial and thus can be remedied or at least mitigated using some corrective measures[20], the innocence problem attributed to plea bargaining is inherent and systemic. Unlike in trials, once

trial." *see* Thomas W. Church, *In defense of "Bargain Justice"*, 13(2) LAW & SOCIETY REVIEW, Special Issue on Plea Bargaining , 509-525 (1979).

[17] Oren Gazal-Ayal, *Partial Ban on Plea Bargains,* 27 CARDOZO L. REV. 2295, 2299 (2006).

[18] *See* for example James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1534-35 (1981) (explaining why prosecutors are likely to offer the greatest incentives for those defendants with the greatest chance of acquittal at trial).

[19] *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 5 (2011); Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543–44 (2005); Innocence Project, The Causes of Wrongful Conviction, available at: *http://www.innocenceproject.org/causes-wrongful-conviction* (last visited Jan. 15, 2016).

[20] *Infra* note 50.

pleaded guilty, everyone including the innocent is convicted in plea bargains. As Alschuler succinctly puts[21]:

> A procedure that is designed to determine who is guilty and who is innocent [i.e. trial] seems almost certain to accomplish this task more effectively than a procedure that is deliberately designed to evade the issue [i.e. plea-bargaining]. Even if the function of plea negotiation were merely to vector the risks of litigation, the practice would certainly yield a larger number of wrongful convictions than trial.

One may still doubt whether innocents with a rational mind would ever plead guilty to a crime they have not committed and may simply reject the innocence problem as unrealistic. Nonetheless, there are theoretical as well as empirical evidence to support that innocent defendants are indeed trapped by plea bargaining. Researches indicate that plea bargaining, which operates on manipulation of charge and sentence concessions, is inherently prone to generate the innocence problem.[22] By creating compelling sentencing differentials between trial sentence and plea sentence (often known as trial penalty) in a setting epitomized by power and information asymmetry, and incomparable interests at stake[23] plea bargaining is likely to induce innocents plead guilty simply to avoid more severe punishment at trial.[24] As we shall see below, this is not a mere speculation. The problem prevails regardless of the availability of procedural safeguards such as legal representation.[25] It is also noted that plea bargaining which involves concessions and haggling over facts as opposed to fact-finding, subverts the truth and thus risks innocents pleading guilty.[26] Further, on top of coercive sentencing differentials, such triggering factors as

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[21] *See* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 714 (1981); Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 145 (2011) ("More innocent defendants are convicted by plea bargains than would be by trials alone.")

[22] *Supra* note 6 and note 12; Russell D Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431, 450 (2011).

[23] Apart from power and resources disparity between the two parties to the criminal proceeding, the interests at stake are so lopsided: whereas the defendant is under the threat of losing his freedom or even his life, the prosecution simply risks losing his case.

[24] The higher the sentencing differential the more coercive it becomes for defendants, innocents included. For more on this, *see* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings* 82 TUL. L. REV. 1237 (2008) ("The ubiquity of plea bargaining creates real concern that innocent defendants are occasionally, or perhaps even routinely, pleading guilty to avoid coercive trial sentences."); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, U. ILL. L. REV. 37, 49 (1983) ("The reality of sentencing differentials is generally enough to deprive defendants of any real choice in plea bargaining"); Lucian E. Dervan, *Bargained Justice: Plea–Bargaining's Innocence Problem and the Brady Safety-Valve*, UTAH L. REV. 51, 56 (2012) ("Today, the incentives to bargain are powerful enough to force even an innocent defendant to falsely confess guilt in hopes of leniency and in fear of reprisal.")

[25] Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049, 1065-66 (2013) (noting that heavy trial penalties often pressure defendants into pleading guilty regardless of the presence of a legal counsel).

[26] *See* Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 218 (2011).

innocents' strong risk aversion than the guilty[27], high process costs compared to the costs of a guilty plea,[28] 'cover-up' guilty pleas[29] and government misconduct/forced confessions[30] could aggravate the innocence problem.

More profoundly, empirical and experimental studies confirm that the innocence problem is a real concern for many justice systems. For instance, empirical studies carried out in jurisdictions with more established legal systems such as the USA and England reveal that plea bargaining results in wrongful convictions. In the USA, several empirical studies report that innocents pled guilty to crimes they did not commit.[31] One empirical study provides us with strong evidence that innocents pled guilty simply to escape a potential long sentence or death penalty at trial.[32] By

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[27] Studies show that the innocent is inherently more risk averse than the criminal because the latter willingly assumes risk while breaking the law in the first place. Innocents mistrust the criminal process for charging them for a crime they did not commit. Unlike the guilty nor are they psychologically prepared to face the repercussions of public trials. Prosecutors offer innocents similar concessions as the guilty. But because of difference in evaluating risk, the innocent attaches higher value for it and may choose the lesser evil - plea bargaining. *See* Andrew Hessick and Reshma M. Saujani, *Plea bargaining and convicting the innocent: the role of the Prosecutor, the Defense counsel and the Judge*, 16 BYU. J. PUB. L. 189, 201 (2001-2002); Michael K. Block & Vernon E. Gerrety, *Some Experimental Evidence on Differences between Student and Prisoner Reactions to Monetary Penalties and Risk*, 24 J. LEGAL STUD. 123, 138 (1995) (finding prisoners, i.e. criminals less risk averse than students (innocents)); Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game* 85 CHICAGO-KENT L REV., 77 (2010) ("… our existing legal system places the risk of going to trial so high that innocence and guilt no longer become the real considerations").

[28] This is particularly the case with defendants held in prolonged pretrial detention, misdemeanor defendants, and so on. *See* Malcolm Feeley, *Plea Bargaining and the Structure of the Criminal Courts*, 7(3) JUSTICE SYSTEM JOURNAL 338–354 (1982); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50(3) UNIVERSITY OF CHICAGO LAW REVIEW 931–1050 (1983).

[29] Guilty pleas can be entered simply to cover up loved ones, a gang member or any other suspect in exchange for a consideration. *See* Cyrus Tata and Jay M. Gormley, *Sentencing and plea bargaining: Guilty pleas Versus Trial verdicts*, OXFORD HANDBOOKS ONLINE, Nov 2016 DOI: 10.1093/oxfordhb/9780199935383.013.40, p.5; See also Alemu Meheretu, *supra* note 1, at 178.

[30] John H. Blume and Rebecca K. Helm, *The Un-exonerated: Factually Innocent Defendants Who Plead Guilty*, CORNELL LAW FACULTY WORKING PAPERS, Paper 113. Available at: http://scholarship.law.cornell.edu/clsops_papers/113 at 21 (2014), (Last accessed 16 March 2019).

[31] Daina Borteck, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1442-45 (2004) (describing cases of defendants who pleaded guilty to capital offences they did not commit.); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 74 (2008) (noting that nine of the first two hundred individuals exonerated by the Innocence Project had pleaded guilty); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 778–79 (2007); Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 *AM. CRIM. L. REV.* 1363, 1395 (2000) ("Available data confirms the common sense proposition that not all guilty pleas are accurate, but it is difficult to pinpoint the precise dimensions of the problem"); Albert W. Alschuler, *supra* note 28, at 932-34; George C. Thomas, *Two Windows into Innocence*, 7 OHIO ST. J. CRIM. L. 575, 577–78 (2010).

[32] Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 63 (1987) (reviewing five cases in which innocent defendants pled guilty in order to avoid the risk of a death sentence); For some individual cases, *see https://guiltypleaproblem.org/* (For example John Dixon pled guilty to rape charges for fear that he would receive a harsher sentence if he proceeded to trial but was later exonerated by DNA evidence).

examining guilty plea practices in the US federal courts, another research concludes that more than two-third of plea bargain defendants would have been acquitted at trial.[33] Although this does not necessarily mean that all guilty pleaders were factually innocent, it can indirectly show a sense of the innocence problem. Further, Gross *et al* in their study of exonerations in the USA from 1989-2003, found out that six percent (20 out of 340) of exonerated defendants pled guilty.[34] Recent data from *The Innocence Project* shows that of the total DNA exonerations in the US so far, 41 defendants (out of 364) pled guilty to crimes they did not commit.[35] However, there are strong reasons to support that the magnitude of the problem cannot be captured by such data of exonerations.[36] First, this applies to limited cases where there is available DNA evidence (Murder and Rape), excluding the vast majority of crimes. Second, many defendants would be prevented from challenging their conviction once they pleaded guilty. That is why many scholars regard such wrongful convictions simply as the tip of the iceberg.[37] Many also believe that the 'true extent of plea bargaining's innocence problem is significantly underestimated by these studies'.[38]

Likewise, in the UK the innocence problem of plea bargaining has been acknowledged by several empirical researches.[39] One classical empirical research conducted by John Baldwin and Michael McConville investigated the probabilities of conviction or acquittal had the case gone to trial, and observed that some innocent defendants and many other defendants who would have been acquitted had the case gone to trial were induced to plead guilty.[40] Although it is difficult[41] to

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[33] Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975) (concluding that more than two-thirds of "marginal" plea bargain defendants would be acquitted or dismissed if they were to contest their cases).

[34] Samuel R. Gross et al., *Exonerations in the United States: 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 536 (2005).

[35] Available at: *https://www.innocenceproject.org/dna-exonerations-in-the-united-states/* (last visited on 26/2/2019).

[36] Dervan and Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 1 (2012).(citations omitted)

[37] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 996 (2004); Samuel R. Gross et al., *supra* note 34, at 531; Allison D. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, *in* INTERROGATIONS AND CONFESSIONS: CURRENT RESEARCH, PRACTICE AND POLICY 86, 91 (G.D. Lassiter & C. Meissner eds., 2010).

[38] *See* for example Samuel R. Gross et al *supra* note 34, at 536; Dervan and Edkins, *The Innocent Defendant's Dilemma*, *supra* note 36 at 21.

[39] *See* John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC'Y REV. 287, 296–98 (1978) (discussing the innocence problem of plea bargaining in England); Robertson and Mulcahy, A. (1994) *The Justifications of 'Justice'--Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts*, *34* B. J. CRIM. 411(1994); MCCONVILLE, M. SANDERS, A AND LENG, R., THE CASE FOR THE PROSECUTION (Routledge, 1991); Newman, D., *Still Standing Accused: Addressing the Gap Between Work and Talk in Firms Of Criminal Defence Lawyers,* 19(1) INT. JOURNAL OF THE LEGAL PROF. 3-27 (2012).

[40] John Baldwin & Michael McConville, *supra* note 39, at 296–98.

determine the extent to which innocent defendants are induced to plead guilty, 'the evidence is compelling that innocent persons are frequently placed at risk and that, on occasion, the weaker and less knowledgeable are wrongly persuaded to plead guilty'.[42] The problem was shared by the Royal Commission on Criminal Justice (RCCJ) established in 1993 to address problems of the UK criminal justice system. The Commission acknowledged the risk plea bargaining poses to innocents who plead guilty, yet, unfortunately, concluded that 'benefits to the system of encouraging those who are in fact guilty to plead guilty outweighed this risk'.[43]

Lastly, some researches which investigated wrongful conviction in Australia have identified plea bargaining as one cause for wrongful conviction.[44]

The innocence problem has also been established by several experimental studies.[45] In one experimental study involving 165 university students (composed of both the innocent and the guilty), all of them were accused of cheating on exams and offered a deal of working in the research lab for 20 hours or face a charge of academic dishonesty.[46] The result was that both innocents and guilty subjects accepted the deal: 75% of the guilty and 52% of the innocents.[47] In another experimental study involving 76 college students, about 89.2% of the guilty and 56.4% of the innocent were willing to admit guilt in exchange for a benefit.[48] Although not perfect analogies with plea bargaining, the above experiments provide insights on how innocents can be trapped and admit wrong for the crimes they have not committed. Albeit not conclusive, they also shed some light on the magnitude of the problem. At any rate, the bottom line is, empirical as well as experimental evidence exists to support the claim that the innocence problem is a real predicament for any system

[41] Allison D. Redlich & Asil Ali Ozdogru, *Alford Pleas in the Age of Innocence*, 27 BEHAV. SCI. & L. 467, 468 (2009) ("Determining the prevalence of innocents is methodologically challenging, if not impossible").

[42] John Baldwin & Michael McConville, *supra* note 39, at 298.

[43] RUNCIMAN, W. G., REPORT OF THE ROYAL COMMISSION ON CRIMINAL JUSTICE111 (HMSO, 1993).

[44] *See* for example Leynne Weathered , *Investigating Innocence : The Emerging Role of the Innocence Project in the Correction of Wrongful Conviction in Australia*, 12(1) GRIFFITH LAW REVIEW 64, 74(2003).

[45] In addition to the ones discussed below, *see* Russell Covey, *Mass Exoneration Data and the Causes of Wrongful Convictions* 1 (Georgia State University School of Law 2011), available at *ssrn.com/abstract=1881767. (Last accessed April, 2016)*.

[46] Miko M. Wilford, *Let's Make A Deal: Exploring Plea Acceptance Rates in the Guilty and the Innocent*, (Master's Thesis, Master of Science, Iowa State University, 2012) at 165.

[47] *Ibid.*

[48] Dervan and Edkins, *supra* note 36.

upholding plea bargaining. What remain less certain are the magnitude and the extent of the innocence problem which certainly vary across jurisdictions.[49]

The above experiences revealed that the innocence problem imputable to plea bargaining is a common problem in developed criminal justice systems. Perhaps, the difference among jurisdictions could be one of magnitude. Thus, it is probably true to maintain that in those inquisitorial jurisdictions, which regulate plea bargaining using statutorily fixed discounts, ban charge and fact bargains and apply rigorous judicial scrutiny, among others, the magnitude of the innocence problem is expected generally to be low.

As we shall see below, this Article argues that the problem would be more pronounced in less developed criminal justice systems such as Ethiopia. Acknowledging the real incidence of wrongful conviction in general and in the context of plea bargaining in particular, jurisdictions have responded by taking varied measures ranging from setting up review/innocence commissions and relaxing barriers in asserting new evidence of innocence, among others.[50] In the context of plea bargaining, proposals ranging from strict regulation of plea bargaining to its total abolition have been made.[51]

2. The Innocence Problem in Context

This section puts the innocence problem in perspective having regard to the specific conditions of the Ethiopian criminal justice system that are likely to negatively affect plea bargaining. It is important to note from the outset that since it is impossible to empirically test the innocence problem in Ethiopia in the circumstances where plea bargaining is yet to be formally applied, this exercise is destined to be simply a prospective one.

[49] In those jurisdictions where plea bargaining forms an integral part of the system, opinions on the magnitude of the problem remain divided. Some take the innocence problem as a substantial threat to the integrity and legitimacy of the justice system. Others simply see the innocence problem as a rare occurrence. *See* Dervan and Edkins, *supra* note 36, at 17-18.

[50] *See* Kent Roach, *Comparative Reflections on Miscarriages of Justice in Australia and Canada*, 17 FLINDERS L. J. 381, 381 (2015); Lissa Griffin, *International Perspectives on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission*, 21 WM. & MARY BILL RTS. J. 1153, 1154 (2013).

[51] From advocates of abolition see for example, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984); Among reformists see, Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings* 82 TUL. L. REV. 1237 (2008); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, U. ILL. L. REV., 49 (1983).

1. Huge power asymmetry between adversaries

Though structured mainly along adversarial lines, the criminal justice playing field in Ethiopia is very much asymmetrical. It is generally the case that in criminal proceedings the balance of power skews more in favor of the prosecution. This is more so in the Ethiopian criminal justice process where the power disparity between the adversaries is quite pronounced. While the prosecution enjoys state resources and powers, having none of these, the defence remains very weak. Structural problems such as absence of robust defence investigation, weak organization of defence service as well as vulnerable defendants (poor and illiterate) could exacerbate the disparity. While the current reform significantly expands the power of the prosecutor, notably through plea bargaining to have a quasi-judicial role, it has not given sufficient attention to the defense. The defense remains intolerably weak: the defense service is poorly organized under public defender's office, and is impaired by budget and manpower constraints, poor salary, excessive workload and problems of mistrust.[52] The private wing is not free from defects, either: it is characterized by limited accessibility, problems of quality representation, and other agency costs.[53]

Consequently, most defendants will continue to go unrepresented or likely to receive incompetent representation.[54] This creates an unbridgeable rift of institutional bargaining power between the adversaries. This, coupled with the nature of interests at risk,[55] means fair negotiations and accurate outcome are less attainable; instead, prosecutorial manipulations and wrongful convictions are very likely.

2. Prolonged pre-trial detention and poor conditions of detention centres

Despite some improvements, longer pre-trial detention has remained a problem in Ethiopia.[56] Pre-trial detention covers a wide range of cases: defendants accused of

[52] *See* Alemu Meheretu, *supra* note 2, at 206.

[53] *Ibid.*, at 211.

[54] *See* section 3 below, *Legal Representation*.

[55] While the defendant is under a threat of losing his liberty or life, the prosecutor runs the risk of losing at trial. The two are not comparable by any stretch of imagination.

[56] On several occasions many Human Rights groups and US State Department expressed their concerns on this. Reports by EHRC once documented that the percentage of detainees awaiting trial was "unsatisfactorily high". *See* EHRC (Ethiopian Human Rights Commission), *Report on Visits to 35 Federal and Regional Prisons*, (Addis Ababa, 2008). Another report documents: "Some detainees reported being held for several years without being charged and without trial. Trial delays were most often caused by lengthy legal procedures, the large numbers of detainees, judicial inefficiency, and staffing shortages". *See* Country Report on Human Rights Practice for 2012, United States Department of State available at: http://www.state.gov/j/drl/rls/hrrpt/2012/af/204120.htm, at 4, visited on 14/3/13. On the other hand, another report claims that the majority of criminal cases both at Federal and State level pending for less than 6

serious crimes to which bail is made out rightly inapplicable - which seems on the rise; defendants charged with lesser crimes but bail is denied for conditions are not satisfied - the grounds of which tend to be widely interpreted by the courts; and defendants temporarily detained - where successive and arbitrary remands pending investigation are common. It also applies to bailed defendants who are unable to furnish the required bail as a non-financial bailing system is unknown. From this, one can clearly see that the problem covers a broad category of defendants and suspects. Pre-trial detention puts such defendants in the dark. By hampering their ability to mount a defense, it increases the probability of convictions at trial[57], which in turn may lead them to an uninformed plea bargaining, notably pre-charge bargains. This would be alarming in Ethiopia where the majority of defendants are not represented.

Further, the state of pre-trial detention centers and prisons is reported to remain troubling and at times 'life threatening'.[58] Thus, pleading guilty would be the best way to end or at least to cut short further detentions under such conditions. In the circumstances, it is probable that innocents are induced or even coerced to plead guilty, or at the very least their plea decisions are influenced by the poor decisions in

months. *See* World Bank, *Uses and users of justice in Africa: the case of Ethiopia's Federal courts*. (Washington DC, 2010), Available at: http://documents.worldbank.org/curated/en/2010/07/13145799/uses-users-justice-africa-case-ethiopias-federal-courts (7/10/14); *UNODC Assessment of the Criminal Justice system in Ethiopia: in support of the Government's reform efforts towards an effective and efficient criminal justice system*, 2011.

[57] "Innocent defendants may fail to gather helpful evidence because they don't know that they need it until it is too late. One uncontroversial tenet of litigation is that the passage of time degrades the quality of the evidence. Witnesses forget (or worse, misremember), they disappear or die; physical evidence is lost, becomes contaminated, or is discarded." *See* Andrew D. Leipold, *How the Pre-trial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1139 (2005). Apparently, this limitation seems to hinder the prosecution as well. However, that is not the case at least in theory for the prosecution exclusively uses the preliminary inquiry to record evidence. On their impact on increasing the probability of convictions, *see* HANS ZIESEL, THE LIMITS OF LAW ENFORCEMENT (University Chicago Press, 1982); Stephanos Bibas, *Plea bargaining Outside the Shadow of a Trial*, 117 HARVARD LAW REVIEW, 2463, 2491 (2004).

[58] One report notes:

> Prison and pre-trial detention centre conditions remained harsh and in some cases life threatening …. severe overcrowding was common, especially in sleeping quarters. The government provided approximately eight birr ($0.44) per prisoner per day for food, water, and health care … Medical care was unreliable in federal prisons and almost non-existent in regional prisons. Water shortages caused unhygienic conditions, and most prisons lacked appropriate sanitary facilities. Information released by the Ministry of Health during the year reportedly stated nearly 62 percent of inmates in various jails across the country suffered from mental health problems as a result of solitary confinement, overcrowding, and lack of adequate health care facilities and services.

See for example Country Report on Human Rights Practice, *supra* note 56, at 4. See also Ministry of Justice & Region Justice Bureaus (Justice Sectors) Five Years (2010/11-2014/15) Strategic Plan, July 2010, (indicating such problems as inadequate prison services and overcrowded prisons and absence of national statistics on prisoners). One of the authors of this Article had also the opportunity to visit one penitentiary where he observed that male prison quarters are incredibly overcrowded. (Date of visit: April, 2013).

which they must await trial in a hostile detention center. Indeed, in practice some defendants pled guilty for crimes 'they have not committed' when they believed that the sentence they would ultimately receive at the end of the trial matches/compares with the time they spent at pre-trial detention centers; in which case, they got immediately discharged.[59] Hence, it logically follows that innocent defendants are likely to plead guilty instead of awaiting their day in court at least where the duration of pre-trial detention exceeds or is equivalent with the sentence offered by the prosecutor. In fact, experience elsewhere shows that innocents plead guilty in misdemeanor cases just to avoid costs of the legal process.[60]

3. Weak investigation /fact finding

One of the major problems that plague the Ethiopian criminal justice system is its weak fact-finding capacity.[61] The problem starts from the intake procedure. As it stands now, the intake procedure, in particular that of arrest, can be carried out without adequate checks and restraints put on police arrest power. The problem has to do with both the law and the practice. The existing Criminal Procedure Code provides no clear standard for the police to undertake arrest. It simply authorizes police to effect arrest when the offence justifies arrest or when summons fails. Even worse, though it demands that arrest should in principle be made with court authorization, the exceptions put to this principle are so broad and vague that in effect the exception becomes the rule.[62] Nonetheless, it should be acknowledged that the proposed law tries to narrow such gaps. However, police occupational culture (experience of arbitrary arrest in particular)[63]; courts' alleged reluctance to seriously scrutinize applications for arrest warrant; prosecutors' failure to supervise the police; absence/little pre-trial review of arrest in practice (some courts simply decide over the custody/bail issues leaving the legality of arrest aside)[64] and defendants' inability

[59] Alemu Meheretu *supra* note 2, at 174.

[60] *See* Malcolm Feeley, *Plea Bargaining and the Structure of the Criminal Courts,* 7(3) JUSTICE SYSTEM JOURNAL 338–354 (1982); Albert W. Alschuler, *supra* note 34, at 931–1050.

[61] *See* Alemu Meheretu, *supra* note 2, at 174.

[62] *See* Articles 26, 50 and 51 of the 1961 Criminal Procedure Code of Ethiopia.

[63] Arrest warrants are rarely sought; arbitrary arrests and detentions are reported. See for example Country Report on Human Rights Practice, *supra* note 23 ("although the constitution and law prohibit arbitrary arrest and detention, the government often ignored these provisions in practice. There were multiple reports of arbitrary arrest and detention by police and security forces"). Even worse, there are concerns that political authorities or higher-level officers direct police to undertake investigations, or arrest "suspects" without probable cause. *See* Linn A. Hammergren, *Justice Sector corruption in Ethiopia,* in DIAGNOSING CORRUPTION IN ETHIOPIA: PERCEPTION, REALITIES AND THE WAY FORWARD FOR KEY SECTORS, at 215 (Janelle Plummer ed., 2012).

[64] This could be because of lack of express legal authority. Neither the Constitution nor the existing Criminal Procedure Code explicitly includes pre-trial review of the legality of arrest during the suspects' first

to challenge illegal arrest[65] mean that more innocents could still be arrested, charged and subjected to plea bargaining.

The criminal investigation does not rely very much on scientific or forensic evidence; for example, no DNA evidence is yet made use of that may be helpful to exonerate the innocent and identify the real culprits.[66] Weakness in the investigation of crimes and collection of evidence is documented.[67] This adversely affects the quality and effectiveness of prosecutions. Prosecution of crimes is relatively cheap in Ethiopia.[68] With plea bargaining it becomes even cheaper.[69] This in turn would allow the prosecution of weak cases and channeling of same to plea bargaining deals to the detriment of innocent defendants. Here, one may take the requirement of sufficient evidence as a gate valve to screen out weak cases. Nevertheless, this guarantee remains unreliable as will be shown in the next section.

4. Forced confessions

The capacity of Ethiopian police to effectively prevent, detect and investigate crimes remains substandard. Police often rely on the suspect as a main source of evidence[70] and use improper methods including torture and other forms of cruel and inhuman treatments to extract confessions.[71] In the face of such practices and weak regulation of police misconduct and impunity[72], defendants are likely to be coerced

appearance to court. Both simply require the appearance of the suspect before court within 48 hours; albeit the Constitution recognizes the right to be informed of the reasons for arrest under Art 19 (3), and the Code mandates the court to grant or deny bail (Art 29 and 59).

[65] Most defendants who are less educated or illiterate are not represented and thus unable to exercise their rights. Still it is not uncommon to see defendants who don't know whether it is possible to bring legal action at all against the police, both in their individual capacity and as a representative of the state. Indeed, the prevailing maxim among Ethiopians has been: "It is impossible to sue the king [state] as is to till the sky".

[66] This test would play a key role in prosecuting crimes of murder and rape, common crimes Ethiopia. According to UNODC Homicide statistics 2013 intentional homicide rate per 100, 000 population in Ethiopia was recorded at 25.5 in 2008.

[67] *See* uses and users of Justice in Africa, *supra* note 56.

[68] This could be partly due to absence of strong standard for prosecution, lack of pre-trial reviews and weak defence.

[69] *See* Oren Gazal-Ayal, *supra* note 17, at 2299.

[70] Indeed, using defendants as a source of evidence is typical to inquisitorial systems, which to a limited extent inspired the Ethiopian criminal procedure.

[71] *See* The African Commission on Human & People's Rights, Resolution No. 218, 2012; Country Report on Human Rights Practice, *supra* note 37 (reporting investigators' use of physical abuse to extract confessions); Reports by UN Committee Against Torture (2010) (expressing its deep concerns over "the numerous, ongoing, and consistent allegations" on "the routine use of torture"); Amnesty International Annual Report 2013 available at: http://www.amnesty.org/en/region/ethiopia/report-2013, June 25/14, (reporting that during interrogations detainees are tortured, ill-treated and forced to sign confession documents).

[72] *Ibid* (the above reports).

to enter guilty pleas. Plea bargaining, which encourages the continued use of confessions/guilty pleas, is likely to sustain, if not intensify the practice.

Indeed, pre-charge bargaining, which seems allowable[73] can be effectively used by the prosecution to bargain with uninformed and unrepresented suspects. Informal bargaining over confessions with the police cannot be ruled out, either. Such bargains are unlikely to be fair and thus be able to yield accurate outcomes. Considerations of fairness demand that defendants be provided with adequate opportunities to understand the nature of the charge, evaluate the evidence and consider the available options before making any choice of plea. A legal system, which allows plea bargaining before the criminal investigation is over or for that matter before a criminal charge is instituted denies suspects such opportunities. It also denies them of important safeguards and undermines their bargaining power. This is exactly what the Ethiopian version of plea bargaining does, if adopted in its current shape. In the circumstances, plea bargaining appears to be more coercive especially to the innocent who are generally risk averse.

5. Sentencing structures and severe punishments

The sentencing structure under the Ethiopian Criminal Code involves quite broad ranges that leave considerable discretion with judges. Since this discretion has resulted in broad and arbitrary discrepancies in the sentencing of like cases, a sentencing manual has been issued and made operational. However, the unlimited form of plea bargaining, which in effect transfers sentencing discretion from judges to prosecutor's bargaining concessions, bestows the latter with unfettered discretion to increase the amount of concessions/sentence discount until it entices defendants to plead guilty. This could involve powerful sentencing differentials that place irresistible pressure on defendants, including innocents to plead guilty. The harshness of punishment at trial, which includes death penalty reinforced by coercive plea offers and such tactics as overcharging from the prosecution could risk innocents plead guilty. An aspect of this is empirically established - revealing that guilty plea rates are higher in countries which uphold death penalty than those which do not, and innocents pled guilty to avoid the risk of death penalty.[74] Albeit

[73] The draft Criminal Procedure Code recognizes plea negotiations with both suspects and defendants. See for example Article 189 of the draft Criminal Procedure Code (2017).

[74] *See* Kent S. Scheidegger, *The death penalty and plea bargaining to life sentences*, WORKING PAPER 09-01 available at *http://www.cjlf.org/papers/wpaper*09-01.pdf (August 10, 2010). *See* also Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 63 (1987) (reviewing five cases in which innocent defendants pleaded guilty in order to avoid the risk of a death penalty); Daina Borteck, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to*

death sentences are rarely executed, one may not rule out this possibility in Ethiopia. Some prosecutors may use death sentence as a bargaining chip to break any resistance from the innocent.[75]

The practice of overcharging cannot be ruled out for prosecutors in Ethiopia.[76] Plea bargaining creates a conducive environment for prosecutors to use overcharging and severe punishments attached to a given charge as a leverage to induce guilty pleas from defendants, innocents included. The informal plea bargaining practice provides us a glimpse of such trends. There is evidence that offense levels of the Federal Supreme Court sentencing guideline have been used as inducement arsenal for prosecutors at the investigative stage.[77] In some cases, the re-definition of crimes and punishment in a way that creates overlaps has been used as a bargaining chip for prosecutors.[78] At the investigative stage where defendants are unrepresented and uninformed of the charges, it is less likely that the negotiation produces accurate outcomes.

6. Pre-trial review

In the absence of trial safeguards for testing the reliability of evidence in plea bargains, the role of pre-trial review becomes even more important. Nonetheless, pre-trial review of the decision to plea bargain has not been expressly envisioned under the Policy and the draft Criminal Procedure Code. Indeed, sufficient evidence that justifies conviction is made a requirement for plea bargaining.[79] However, its enforceability remains elusive - its observance by the prosecutor is not subject to *ex ante* judicial review. Nor is the standard used to measure sufficiency of evidence regulated. Thus, plea bargaining decisions may well be based on unreliable and insufficient evidence.[80] Admittedly, albeit not expressly mentioned, *ex post* judicial review of evidence can be inferred from the judicial approval of the plea agreement, which involves ensuring that the plea agreement ticks all the requirements of the law, the requirement of sufficient evidence being one of them. However, there are

Apply to Prisoners Who Pled Guilty, 25 CARDOZO L. REV. 1429, 1442-45 (2004) (describing cases of defendants who pleaded guilty to capital offenses they did not commit.)

[75] This is not to imply that prosecutors will purposefully target the innocent. Some may genuinely believe that only the factually guilty prefers the bargain and the innocent can reject plea offers in favor of trials.

[76] Its probable existence can be inferred from some cases. For example, in *Demissew Zerihun Vs. the Federal public prosecutor*, a case involving acid attack on a woman, the charge was inappropriately bifurcated into bodily injury and attempted homicide which, given the facts of the case, are mutually exclusive.

[77] *See* Alemu Meheretu, *supra* note 2, at 149.

[78] *Ibid.*, at 150.

[79] *See* Section 3 below.

[80] This is very likely to be true of unrepresented defendants as they are too weak to challenge such evidence.

good reasons to doubt its effectiveness in general and in the Ethiopian setting, in particular.[81] This, reinforced by the certainty advantages of conviction plea bargaining offers to prosecutors and other disincentives involved in criminal investigation notably caseloads and resource limitations, mean weak cases are highly likely to find their way through plea bargaining.[82] This has a direct negative bearing on the innocent.

7. Ethics and professionalism

It is generally acknowledged that professionalism and ethics among justice sector actors are at their infancy stage in Ethiopia. Nor are robust ethical rules and standards put in place. Given this and the agency costs involved, it may be difficult to see interests of justice often prevail over personal interests and preferences. Plea bargaining deals that do not serve defendants' and public interest might simply be struck and thus endorsed for reasons extraneous to the requirements of justice such as mere convenience, expediency or other financial motives. Indeed, the desire to handle more cases and enhance performance provides professionals with strong incentives to plea bargain.[83] This is likely to be the case for prosecutors and judges, whose performance is principally measured based on conviction rates and the number of cases disposed of, respectively in a system which values efficiency over fairness.[84] Financial incentives may also play a role here, especially for private attorneys. The remuneration scheme for private attorneys, which is flat fee per case as opposed to an hourly rate, could drive those attorneys whose mind is eagerly fixed on money to heavily rely on plea bargaining and encourage their clients to plead guilty as early as possible so that they can handle more cases and thus make more

[81] *See* below the section on 'Judicial review and approval'.

[82] In contrast, one may argue that ex *ante* judicial intervention would invite judicial bargaining and thus the processing of weak cases. But it must be ensured that the court is not mandated to involve in the plea negotiation but rather only to check whether preconditions for plea bargaining are met, i.e. to license plea bargaining and its decision to do so needs to be reasoned. Again one may wonder whether such reviews could help on the face of the judge's interest to end cases quickly. However, though it cannot be an absolute guarantee (due to the inherent flaws of plea bargaining), *ex ante* review is likely to mitigate the problem by making prosecutors more accountable.

[83] This is likely to be true even with a robust code of conduct put in place. Empirical research shows that formal rules have limited impact on working routines of lawyers but rather organizational and ideological drivers are important in shaping behavior. *See* for example Goriely C. Tata, et *al*, *Does mode of delivery make a difference to criminal case outcome and clients' satisfaction?,* CRIMINAL LAW REVIEW, 120-135 (2004). In Ethiopia, both the ideological and institutional drive tends to incline towards crime control and efficiency.

[84] *See* the discussion on 'Judicial review and approval' below.

fees.[85] Certainly, all these adversely affect innocents and thus contribute to the innocence problem.

8. Vulnerable defendants

Experience in some jurisdictions reveals that in plea bargaining certain defendants are more exposed to wrongful convictions. This concerns young offenders, intoxicated, insane/mentally retarded and low intelligence defendants.[86] With less developed material conditions and scanty legal procedures the vulnerability of this class of defendants exacerbates, which is more probable in Ethiopia. One may not expect voluntary and intelligent guilty pleas from these categories of defendants; instead wrongful convictions are very likely. It is a matter of fact that most defendants in Ethiopia did not receive legal representation or at least not fortunate to get competent and effective legal representation. Thus, legal representation is not reliable to safeguard them (for more, see Section 3 below).

In conclusion, with a less developed legal system and the inherent unreliability of the system of plea bargaining to screen out the innocent and other contributing factors attributed to the Ethiopian justice system, the proposed plea bargaining is hugely amenable to have innocents plead guilty. Those factors that could further undermine the integrity of the process and contribute to the innocence problem include huge power asymmetry between adversaries, prolonged pretrial detention, poor conditions of detention centers, weak investigation/fact finding capacity, and absence of pretrial review.

3. Guarantees against the Innocence Problem

With a view to addressing the dangers of plea bargaining, notably the innocence problem, several substantive and procedural safeguards have been provided for under the ECJ Policy as well as the draft Criminal Procedure Code. These include the requirement of sufficient evidence, the voluntariness requirement, the duty of

[85] This is empirically tested and valid elsewhere even in developed legal systems. *See* for example P. Fenn, N. Rickman and A. Gray, *Standard Fees for Legal Aid: Empirical Analysis of Incentives*, 59 OXFORD ECONOMIC PAPERS 662 (2007); F. H. Stephen, G. Fazio and C. Tata, *Incentives, Criminal Defense Lawyers and Plea Bargaining*, 28 INT. REV. OF L. AND EC. 212 (2008) (suggesting that the behavior of defense lawyers may be influenced by financial incentives); Pamela S. Karlan, *Fee Shifting in Criminal Cases*, 71 CHI.-KENT L. REV. 583, 588 (1995).

[86] Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1064 (2010) (reporting that mentally ill, mentally retarded, and borderline mentally retarded defendants composed 43 percent of DNA exonerees who had falsely confessed; 65 percent of false confessors were mentally disabled, under eighteen at the time of the crime, or both).

disclosure, legal counsel, and judicial approval of the plea agreement. Some of these guarantees are enshrined under the FDRE Constitution. This section reviews the efficacy of these guarantees in the Ethiopian context.

1. The requirement of sufficient evidence

The ECJ Policy and the draft Criminal Procedure Code require the prosecutor to make sure that there is sufficient evidence to warrant the defendant's guilt before plea bargaining.[87] In jurisdictions where the practice is established, this requirement is sometimes called a *partial ban* on plea bargaining.[88] The requirement ordains that plea bargaining can be validly made only after investigation has produced sufficient evidence of guilt. By proscribing the prosecutor from simply resorting to plea bargains before the case is investigated thoroughly, and adequate evidence is amassed, Ethiopian policy makers attempt to raise the fairness of plea bargaining and thus outcome accuracy.

Nonetheless, the requirement of sufficient evidence is open to circumvention. This involves a determination that the prosecutor makes based on untested evidence with little/no pre-trial safeguards to ensure its reliability, i.e. no lawyer present, little prosecutorial supervision, and no defined standard to measure sufficiency and reliability.[89] This requirement is nothing unless safeguards to ensure the reliability of evidence as well as a strong standard to measure the sufficiency of evidence with appropriate review mechanism are put in place. It is also possible for prosecutors to induce guilty pleas using unfounded charges. In trials, they are blamed for instituting charges without sufficient evidence and preparation.[90] This would be more so with plea bargaining, which has little to do with fact finding and circumvents trial guarantees that test evidence sufficiency and reliability. Further,

[87] See The FDRE Criminal Justice Policy, 2011, Section 4.5.4.2, p. 36 and Article 189(4) of the draft Criminal Procedure Code, *supra note* 4.

[88] *See* Oren Gazal-Ayal, *supra* note 17, at 2299.

[89] The standard is yet to be determined by the Attorney General of FDRE. *See* FDRE, The Criminal Justice Policy, 2011, section 3.10 at 13 (which demands that the Prosecutor General issues directives that provide standards on this issue). Yet, such approach has its own limitations: First, given the policy inclination toward efficiency, the office of prosecution is less likely to restrain itself meaningfully using its own guidelines. Second, effective enforcement mechanisms of the rules may presuppose external review. However, weak culture of judicial review means the possibility that the guidelines are challenged before court (judicial review) would be very rare.

[90] This practice is ironically labeled as 'charging to fail'. *See* Uses and Users of Justice in Africa, *supra* note 56 at xxi.

plea bargaining creates a good atmosphere for this to happen as prosecutors have little incentive to weed out weak cases.[91]

Particularly, pre-charge bargaining, which appears permissible under the proposed version of plea bargaining, can be effectively used to evade the requirement of sufficient evidence and negotiate on weak cases.[92] At this stage, the investigation might not be completed nor sufficient evidence might be gathered or at least a charge detailing the crime committed and the evidence forwarded, might not be instituted. Under such circumstances, the requirement for sufficient evidence remains a hollow one. Furthermore, institutional preoccupation on efficiency (much emphasis on conviction rates)[93], the instrumentality of plea bargaining to manage caseload and ensure certainty of convictions, and thus raising conviction rates all provide prosecutors strong incentives to circumvent the requirement of sufficient evidence. From the foregoing, it follows that the requirement of sufficient evidence is likely to remain a mere chimera and, therefore, incapable of properly safeguarding innocents against the wrongful convictions of plea bargaining.

That said, it can be argued that measuring prosecutors' performance using conviction rates may discourage them from pursuing weak cases. In particular, the method of calculating conviction rates at Federal level, which is based on the ratio of convictions over indictments as opposed to final judgments[94], could discourage the pursuing of weak cases. Nonetheless, this may not be always the case in the context of plea bargaining. Given the possibility of skirting the requirement of sufficient evidence, the relative certainty of convictions in plea bargains, vulnerability of defendants and most importantly the possibility of pre-charge bargaining wide open, prosecutors may still work on plea negotiations to raise conviction rates even in weak cases while strong cases go to trial. Further, the way conviction rates are calculated differs from one regional state to another; some of them using the ratio of convictions over judgments.[95] This would rather encourage the processing of weak cases via plea bargaining so that conviction is more or less ensured.

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[91] *See* Oren Gazal-Ayal, *supra* note 17, at 2299. (By diminishing the cost to the prosecutor of bringing weak cases, plea bargaining decreases the incentive to properly screen out weak cases through prosecutorial discretion at the outset).

[92] *See* Alemu Meheretu, *supra* note 3, at 417.

[93] *See* Alemu Meheretu, *supra* note 2.

[94] *See* the Strategic Plan, *supra* note 58.

[95] One government report acknowledging the use of different approaches of computing conviction rates among states, notes the difficulty of making comparisons and drawing appropriate lessons. *See* the Strategic Plan, *supra* note 58.

2. The voluntariness requirement

The *voluntariness requirement* is often used to assess the legality and validity of the plea agreement *ex post* than *ex ante*. Here, it is used as a pre-condition to initiate plea bargaining in that the defendant's willingness to bargain should be secured first. To this end, the defendant is required to express in writing that he/she has waived her/his rights.[96] Apparently, this requirement seems to solicit defendant's informed consent to engage in plea negotiations. However, it has far-reaching implications. By causing the surrender of his/her bargaining arsenal, it has a chilling effect on the defendant's bargaining power. It suffices that the defendant mentions in writing that he/she is willing to bargain, albeit this may not guarantee the genuineness of guilty pleas based on which the plea agreement is struck. This is mainly because the powerful (coercive) sentencing deferential, unparalleled bargaining power of the parties (the interests at stake, uneven resources, information deficit, etc.), overcharging, pre-trial detention[97], all put defendants under irresistible pressure with an effect that will taint the process as well as the outcome, i.e., to yield inaccurate guilty pleas from innocents.

Explicit in this requirement is the problem of post guilty plea negotiations. The draft law provides that plea bargaining shall be conducted where the defendant pleads guilty and accepts responsibility.[98] Unless taken as a poor drafting, this implies that plea negotiations are made after the defendant pleads guilty. Strictly speaking, once the guilty plea is tendered, it is difficult to think of plea bargaining for there is nothing to bargain for. Perhaps, 'negotiation' can still be made about the sentence. Yet, any post guilty plea negotiation is unlikely to be fair as it undermines, if not completely removes the defendant's bargaining power. Once pleaded guilty, the defendant loses his/her bargaining tool and thus may easily submit to the prosecutor's manoeuvres.

3. The duty of disclosure

The huge disparity of power between the parties to the trial is quite pronounced in criminal litigations. Only the state has the powers of search and seizure, the power to arrest, intercept conversations, compel witnesses to testify, etc. The defence, having none of these opportunities, finds itself in a weak and vulnerable position. The notion of disclosure (prosecution disclosure in particular), which is inextricably

[96] *See* Article 189(5), The Draft Criminal Procedure Code (2017).

[97] For details see section 2 above.

[98] Article 186, The Draft Criminal Procedure Code (2017); translation by authors.

linked with the principle of equality of arms, aims to narrow down such a power imbalance.

The FDRE Constitution guarantees the accused to have full access to any evidence presented against him.[99] Although this can be construed as imposing a duty of disclosure on the part of the prosecution, it suffers from several limitations. First, it is limited in scope in that the wording: "evidence presented against him" excludes exculpatory evidence which normally forms part of duty of disclosure. Second, the timing for disclosure seems not regulated. For instance, it is not clear whether the duty applies at the pre-trial stage or is limited to the trial stage. Third, the way the right of disclosure (access to evidence) is framed gives a wrong impression that it is absolute, i.e. no room is left for non-disclosure which is necessary to protect some overriding interests such as national security. Finally, there is no enforcement mechanism should the prosecution fail to disclose relevant evidence. Admittedly, some of the above concerns can be addressed using relevant laws of evidence and procedure.

The ECJ Policy embraces the duty of disclosure in a relatively better fashion and calls for a legal framework imposing the duty on both the prosecution and the defendant. However, it does not require the same degree of disclosure between the prosecution and the defence. The prosecutor has the obligation to disclose any evidence he/she intends to rely upon, directly or indirectly, as well as any exculpatory evidence.[100] However, the defence's duty of disclosure is limited to those evidences and laws he/ she intends to use at trial.[101] By introducing the duty of disclosure in the Ethiopian criminal justice system, the policy aims to elevate the fairness, effectiveness and the expeditiousness of the criminal justice process. Arguably, the duty of disclosure is indispensable in plea bargains than in any other case disposing tools. In particular, the importance of prosecution disclosure cannot be overemphasized in Ethiopia, where the power imbalance remains much more skewed in the prosecution's favour. A complete and early prosecution disclosure of all relevant evidence, both culpable and exculpable, may increase the fairness of negotiations. It may help defendants arrive at an informed decision and put some sort of restraint in the prosecutor's leverage of overcharging, thereby improving the accuracy of the plea.[102] Yet, unlike its earlier version (2013), the latest version of the

[99] *See* Article 20 (4) of the FDRE Constitution.

[100] The FDRE Criminal Justice Policy (2011).

[101] *Ibid.*

[102] *See* for example D. K. Brown, *The Decline of Defense counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIFORNIA LAW REVIEW 1585, 1621 (2005) (suggesting that: "…discovery is a primary

draft Criminal Procedure Code (2017) fails to emulate the policy in this regard. It simply requires the public prosecutor to submit the charge and accompanying evidence to the defendant whenever he decides to plea bargain.[103] Ostensibly, this seems a form of disclosure. However, it is not clear whether the defendant has full access to the content of the evidence or just to the list of evidence as is the case with the existing practice. The omission of the mention of the duty and the language used in the latest draft seem to refer to the latter.[104] Further, unlike what is provided for under the Policy, the scope of disclosure seems to be limited only to incriminating evidence.[105]

Another cause for concern is the fact that the duty of disclosure is not sanctioned, i.e., the effect of prosecution's failure to discharge the duty of disclosure is left unregulated. Given prosecutors' pre-emptive opposition to the duty, problems of ethics among the parties, and the limited access to legal counsel, the possibility of failure to disclose evidence looms large.[106] It is probably true to argue that where evidence which is the subject of disclosure has been suppressed by the prosecution, the defendant's decision (guilty plea) is likely to be based on insufficient information and thus uninformed. This may raise concerns on the accuracy, fairness and reliability of the guilty plea, and hence the innocence problem.

Moreover, it is not clear whether disclosure rights can be waived as part of the plea bargaining deal. In the USA, studies show that the range of rights that are bargained away by plea agreements has expanded to include such important safeguards as the right of disclosure.[107] In Ethiopia, unless expressly proscribed, waivers can be easily obtained. A waiver of disclosure means defendants would lose their bargaining power and would be more exposed to prosecutorial coercions and manipulations. Similarly, by leaving the defence counsel incapable of gauging the strength of the prosecution evidence, waiver is likely to undermine the quality of legal counsel the defendant may receive. All these combined are likely to culminate in an unfair process and inaccurate outcome. In other words, with exculpatory

mechanism to improve the factual record's comprehensiveness and reliability, because it makes fact investigation and pre-trial … scrutiny of evidence easier").

[103] *See* Article 190 (2), The draft Criminal Procedure Code (2017). The article reads: "…. አቃቤ ህግ ድርድር አንዲደረግ መወሰኑን ወይም ለቀረበዉ ጥያቄ ፈቃደኛ መሆኑን በጹሁፍ በመግለጽ የክፈተውን ክስና ማስረጃ ክክስ መግለጫ ጋር ለተከሳሹ መስጠት ይኖርበታል።"

[104] This is just a draft law and thus it is possible the duty can be still fully recognized. The subsequent discussions are based on the content of the Criminal Justice Policy which sufficiently embraces the duty.

[105] Art 190, the draft Criminal Procedure Code (2017).

[106] *See* Alemu Meheretu, *supra* note 2, at 121-22.

[107] *See* for example Daniel P. Blank, *Plea bargain Waivers Reconsidered: A legal pragmatist's Guide to loss, Abandonment and Alienation* 68 FORDHAM L. REV. 2011, 2014 (1999-2000).

evidence undisclosed and with enticing concessions from the prosecution, innocent defendants are likely to plead guilty.

In conclusion, although disclosure may enhance the accuracy of guilty pleas in Ethiopia, it is likely to be hampered by a couple of factors and thus fall short of arresting the innocence problem: First, as shown above it is not fully recognised. Second, the permissibility of pre-charge bargaining (before evidence is collected) means there is nothing to disclose, and thus defendants are likely to bargain in the dark. Third, absence of effective enforcement mechanism, i.e. the fact that the effect of failure to disclose evidence remains unaddressed, casts a serious doubt over the enforceability of the duty. Fourth, such implementation barriers as prosecutors' misperception of the duty (many prosecutors interviewed are opposed to the duty) coupled with problems of ethics among the parties could undermine the duty.[108] Finally, the limited access to legal counsel and the conditions of defendants (poor and uneducated) mean its applicability would be seriously curtailed.

4. Legal representation

The FDRE Constitution guarantees every accused the right to legal counsel of their own choice; and should they be unable to pay for legal services (the means requirement is established) and miscarriage of justice is likely to arise (the legal requirement is satisfied) they are entitled to legal assistance at state expense.[109]

Similarly, the ECJ Policy demands that the accused should be represented in plea bargains. The latest (2017) draft law, removing the qualification made by the earlier draft[110], echoes the policy to proscribe the prosecutor from making any plea negotiation with unrepresented defendants.[111] This is a noticeable development, albeit legal representation is not a panacea for the innocence problem, particularly in the Ethiopian context.

First, there is no guarantee that the right to legal representation cannot be erroneously waived by Ethiopian defendants, nor is there any sanction to that effect, i.e., bargaining with unrepresented defendants. For that matter, most defendants are not in a position to know that plea bargaining is permissible only with a legal counsel present or even their right to legal counsel in general. This means defendants could simply waive their right to legal counsel. Second, the availability and quality

[108] *See* Alemu Meheretu, *supra* note 2, at 182-3.

[109] *See* FDRE Constitution Art 20(5).

[110] The earlier draft allows plea bargaining with unrepresented defendants in less serious crimes.

[111] *See* Article 189, draft Criminal Procedure Code (2017).

of legal representation[112] is so meagre that defendants are less likely to receive competent representation, if not none at all. Third, structural problems would inhibit effective representation in the Ethiopian version of plea bargaining. The defense has either little or no room to effectively participate in the pre-trial process. Interrogations are conducted in the absence of a lawyer, no parallel defense investigation as such exists, and there is limited defense access to resources and unparalleled power between the prosecution and defense. Fourthly, and most importantly, plea bargaining is inherently inimical to competent and effective representation.[113]

Such *structural forces* and *psychological biases* as prosecutors' pressure and incentives, the attorneys' pressures and incentives (both financial and non-financial), defendants' aversion to risk, and information deficit[114] would taint legal representation thus raising real concerns whether competent legal representation can be ensured in plea bargaining. For instance, with financial and non-financial incentives involved, the defence counsel may find it difficult to choose trial against plea bargaining even if his client's interest so suggests.[115] This is especially the case with regard to private attorneys.

At this point, it is worthwhile to discuss the effect of plea agreements struck without a defence attorney present. In jurisdictions such as the USA, incompetent and ineffective counsel could render the guilty plea involuntary, let alone its total absence. In Ethiopia, neither the policy nor the draft Criminal Procedure Code expressly address the fate of plea agreements reached with unrepresented defendants. The presence of competent defence counsel in plea negotiations presumably enables the defendant make relatively informed choice. Where a defendant whose cause calls for legal representation goes unrepresented, miscarriage

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[112] *See* Abebe Asamere, *የጠቡቶቹ ሥነ ምግባር ችግሮችን በተመለከተ ለውይይት የቀረበ ጥናት*, WONBER, (*Alemayehu Haile Memorial Foundation Periodical)* (2011). In practice, it is available to the indigent only in very serious crimes such as capital offences. *See* also the UNODC survey report of 2011, which indicates that Ethiopia had only 4000 lawyers for a population of 81 million. Of course, the number might considerably change now.

[113] *See* for example Jane C. Moriarty and Marisa Main, *Waiving Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38(4) HASTINGS CONSTITUTIONAL LAW QUARTERLY (2011); Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, UTAH L. REV. 1 (2003); Albert Alschuler, *The Defense Attorney's Role in Plea Bargaining*', 84 YALE. L. J. 1179, 1180 (1975) (who argues that [plea bargaining] subjects defense attorney to serious temptation to disregard their clients' interests.).

[114] A. Alschuler, *Personal failure, institutional failure and the Sixth Amendment*, 14 N. Y. U. REV. L. & SOC. CHANGE 149 (1986) (plea negotiation system insulates attorneys from review and often makes it impossible to determine where inadequate representation has occurred.); Stephanos Bibas, *supra* note 113.

[115] *See* Albert Alschuler, *supra* note 113 (who argues that [plea bargaining] subjects defence attorney to serious temptation to disregard their clients' interests.).

of justice is likely to arise. The problem appears to aggravate in the context of plea bargaining – an inherently coercive institution. This, coupled with the conditions of defendants in Ethiopia, makes plea bargaining much less likely to be based on intelligent and voluntary guilty pleas. This, in the final analysis, is sufficient in itself to set aside the plea agreement. In fact, one can arrive at similar conclusion from the language of the proposed law by implication where the court is mandated to reject the plea agreement if it is contrary to the law and morals.[116] Form this one can infer that bargaining with unrepresented defendants, which is contrary to the law, is sufficient to reject the agreement. However, absent clear standard on this, it depends on the court whose decisions might be overshadowed by its own incentives and weak judicial review culture.

5. Judicial review and approval

Even though courts in Ethiopia may not partake in plea negotiations, in theory they still can play a key role in reviewing the process, the plea agreement and authorising its enforcement. Plea agreements are not valid and thus cannot be enforced until approved by the courts.[117] In principle, the veto power courts exercise over the plea agreement maintains their conventional authority of determining guilt or innocence of the accused. Nevertheless, in reality, it all depends on how this translates into action. This works well only if courts go beyond rubberstamping the plea agreement and meticulously review the process as well as the content of the agreement. However, this is less likely to be the case in Ethiopia for a couple of reasons. Put simply, judicial review may not effectively regulate the Ethiopian version of plea bargaining. The weak culture of judicial review[118], institutional drive towards efficiency[119], the tendency towards crime control ideology and lack of political independence[120] make effective reviews of prosecutorial discretion unlikely and the rubberstamping of plea agreements in overburdened courts is hard to resist in the context of scarce resources. The nature of review envisaged by the proposed law

[116] Article 194 and 195 of the Draft Criminal Procedure Code (2017).

[117] *Ibid.*, Article 194(3).

[118] *See* generally, Assefa Fiseha, *Some Reflections on the Role of the Judiciary in Ethiopia*, 3(2) ETHIOPIAN BAR REVIEW, 105, 110-11, (2009).

[119] Judges' caseload, institutional preoccupation with efficiency which is partly expressed in the judges' performance evaluation system in place, which is 60 cases per month in one high court and 44 cases per month in another regional high court, and plea bargaining's instrumentality to manage caseload would provide judges strong incentives to rubberstamp plea agreements. *See* Alemu Meheretu, *supra* note 2, at 197-98.

[120] *See* Linn A. Hammergren, *supra* note 63, at 183 (Noting …"political interference with the independent actions of courts or other sector agencies…" labels it as one form of corruption.); Assefa Fiseha, *Separation of Powers and Its Implication for The Judiciary in Ethiopia*, 5(4) JOURNAL OF EASTERN AFRICAN STUDIES 702-715 (2011); *See* Uses and Users of Justice in Africa, *supra* note *56*, (indicating political and other interference with judicial decisions and operations).

which, among others, recognizes limited appeal[121], the inherent coercions involved in plea bargains which are beyond the reach of judicial scrutiny[122], the weakness of defendants (in particular unrepresented ones) - all converge to make judicial review less reliable in protecting the innocent defendant.

That said in general, courts, when presented with the plea agreement, have three options: to accept it as agreed, to accept it with modifications, or to reject it altogether. Though their power to reject and accept plea agreements cannot be disputed, jurisdictions vary as to the court's power to modify the plea agreement. While jurisdictions like Italy and France seem to adopt the *all-or-nothing approach* – the court must either accept or reject the agreement, USA takes the middle position - courts' decision in this regard depends on the nature of the agreement. Thus, if the agreement falls within what is referred to as 'binding pleas' or 'Type C agreements',[123] courts cannot modify its terms to impose a sentence other than the agreed one without triggering withdrawal of pleas.[124] If they accept the agreement, they are bound by the sentence. The position taken by the above jurisdictions, which trades away the traditional power of courts, seems to be justified by principles of contract law, i.e., the terms of the plea agreement can only be modified by parties to the agreement. It seems also to be vindicated by defendant's reasonable expectations and protection from prejudicial increase of sentences by courts. However, this is moot for it compromises the principles of judicial independence as well as the courts' duty to discover the truth.

Under the Ethiopian variant, although courts are not empowered to modify the terms of the agreement directly, they can do so indirectly. The latest draft mandates courts to endorse, reject or to prompt the parties modify the terms of the agreement

[121] For example, the plea agreement is unreviewable by appeal once accepted by the court; grounds of withdrawal and available remedies are not provided. There could be a need to make appeal where the court errs and accepts the plea agreement.

[122] This has to do with the conditions under which the plea agreement is struck: the large sentence differentials, unequal institutional bargaining power of the parties, respective incomparable stakes involved etc. and courts' limited access to information in the bargaining process as they depend on parties' selective presentation of facts. (All the evidence and information remains at the hands of the parties. The judge is presented with the agreement. Although he may inquire information from the parties, the latter may have little/no incentive to provide him. Nor is the judge allowed to hear victims account. The requirement of sufficient evidence as shown above is not promising either).

[123] This represents agreements where the prosecutor instead of recommending a particular sentence or range, agrees to a specific sentence. *See* Joshua D. Asher, *Unbinding the Bound: Reframing the Availability of Sentence Modifications for Offenders Who Entered into 11(c) (1) (C) Plea Agreements*, 111 (5) COLUMBIA LAW REVIEW 1004, 1023 (2011).

[124] *Ibid.*

and resubmit it for approval, as appropriate.[125] Thus, where courts find the plea agreement contrary to the law or morals, they may reject it or cause its modifications.[126] Yet, what is less certain is the vague phrasing: *contrary to the law or morals*. It is unclear which law is referred to here. Morality is also so impressionistic a concept to serve as a standard to measure the validity of plea agreements (plea bargains) whose underlying moral justification is under severe attack.

For instance, taking criminal law as a standard, it is not clear whether the proportionality of sentence to the criminal act and the degree of guilt, an established rule under criminal law and a test plea bargaining hardly passes, would trigger modification. To argue in the negative contradicts with the conventional role courts retain in determining the appropriate sentence. This cannot be aligned with the independence of the judiciary and the constitutional clause which demands courts to heed to only the law[127] and not to the terms of the parties.

Before concluding this section, two points deserve discussion. The first concerns whether courts need to consider victims' interest before approving the plea agreement. As it stands now, victim's interest is not among the factors to be considered (at least it is not expressly indicated) in approving plea agreements. This represents one area of weakness the Ethiopian variant of plea bargain exhibits and where we missed out the advantages of victim participation[128] where it: serves as a check against prosecutorial excesses and manipulations of plea agreement; provides courts with information relevant to review the plea agreement; spares separate civil proceedings; fosters victim and public satisfaction and thus legitimacy and trust of the system.

The second point relates to the courts' power to oversee the defence attorney. Given the structural problems accompanying legal representation in plea bargaining (which is discussed above) this is all the more important. While claims of ineffective representation/incompetent representation have increasingly been construed expansively elsewhere - thereby enhancing judicial oversight of the role of the

[125] *See* Article 194, The draft Criminal Procedure Code (2017).

[126] *Ibid.*, Article 194(4).

[127] Whether the court is mandated to review the proportionality of sentence with the gravity of the offence or the degree of guilt with the bargained-for-charge is not clear. However, it can be argued from Art 79(3) of the FDRE Constitution that the court is obliged to review the above matters. This Article provides that judges shall exercise their functions in full independence and shall be *directed solely by the law*. From this, it follows that the judge must only heed to the law and not the sentence agreed upon by the parties. Thus, if the sentence proposed by the parties is disproportionate to the degree of guilt the court should reject it or revise it. Nevertheless, the passivity of courts on reviews means this would be a far-fetched venture for them.

[128] For more on this, *see* Alemu Meheretu, *supra* note 2, at 227-28.

defence attorney in plea bargaining,[129] the issue remains inexplicable in Ethiopia. For that matter, ineffective representation has not been recognised as a ground for appeal in full-scale trials.

To recap, one can see that court's decision to accept or reject the plea agreement hinges on its legality and morality. In some jurisdictions as in Germany and Italy, whatever the reasons for accepting or rejecting the agreement may be, it forms part of the judgment, i.e., courts are required to state their reasons explicitly.[130] This requirement is worth having in Ethiopia for, among others, it helps to discourage simple rubberstamping of plea agreements and increases judicial accountability. It also facilitates further reviews by appeal or cassation, as appropriate.

Conclusion

Whilst trials are prone to wrongful convictions that are largely imputable to extrinsic factors, i.e. irregularities in using some sources of evidence, plea bargaining is intrinsically exposed to resulting in wrongful conviction. Rather than risking severe punishment at trial, innocents may take the lower risk – plea bargaining. With compelling concessions/sentencing differentials along with other prosecutorial tactics such as overcharging, strong risk aversion than the guilty, innocents are likely to plead guilty simply because they believe it is 'rational' to do so. Indeed, empirical evidence elsewhere reveals that plea bargaining creates the innocence problem.

Though one cannot support the innocence problem with empirical evidence in Ethiopia at this particular time where plea bargaining is yet to be implemented, it is possible to claim that in the advent of plea bargaining the innocence problem would be a serious challenge to the justice system. Three counts can support this conclusion: First, in more established legal systems such as the USA and UK, the innocence problem represents one of the major inherent flaws of plea bargaining. This has already been empirically established. It would be more so in the Ethiopian criminal justice system, which lacks many of the features of established legal systems. Second, the nature of the model adopted by Ethiopia is prone to induce

[129] This is the case for example, in the USA. Following *Padilla*, the role of the court in plea bargaining has been the subject of discussion. ***See*** Stephanos Bibas, *Regulating the Plea Bargaining Market: from caveat emptor to consumer protection*, 99 CAL. L. REV. 1117 (2011).

[130] Stephen P. Freccero, *An introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 375-76 1993-1994; Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective* 12(1) INTERNATIONAL CRIMINAL JUSTICE REVIEW 22, 48 (2002).

innocents to plead guilty. The unlimited model is characterized by the fact that it applies to any crime, vests with the prosecution broader and unregulated discretion, involves huge sentencing deferential and unregulated concessions, and that it is likely to distort the truth.

These traits of the model alongside scanty procedural safeguards against wrongful convictions mean innocents remain at risk and thus the innocence problem would be cause for real concern. Third, specific contexts and features of the Ethiopian criminal justice system would leave innocents at peril and contribute to yield false guilty pleas. Such features of the system as colossal power asymmetry between the parties, lack of legal representation, prolonged pretrial detentions, poor conditions of detention centers, weak fact-finding capacity, absence of pretrial review of evidence, among others, imply that the Ethiopian version of plea bargaining is highly amenable to have the innocent plead guilty. This, beyond jeopardizing innocents, would put the integrity of the criminal justice process into question and consequently to be met with further loss of public confidence in the system. As Schulhofer observes, justice and punishment are classic public goods and tolerating innocent defendants to plead guilty creates serious negative externalities.[131]

That said, with a view to address the blemishes of plea bargaining, notably the innocence problem, several procedural and substantive guarantees are put in place. These include the requirement of sufficient evidence, mandatory representation of defendants, disclosure rights, and judicial review of plea agreements. Yet, none of these guarantees seem prophylactic enough to ensure the fairness and accuracy of plea bargaining for reasons relating to: the nature of the guarantees which are prone to circumventions; and the Ethiopian context, viz., legal, material and structural problems as well as the nature of plea bargaining which involves powerful sentencing deferential and leaves considerable power asymmetry between adversaries. Put simply, the guarantees are less reliable to protect the innocent from wrongful convictions. To have a clear understanding of the nature and the magnitude of the problem, further research is needed in the future once the inevitable plea bargaining becomes formally operational.

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[131] Schulhofer, *supra* note 6, at 1985.

The Use of 'Special Investigation Techniques and Tools' in the Fight against Serious Crimes: Legal Basis and Human Rights Concerns in Ethiopia

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Abstract

Commission of crime has increasingly become secretive, sophisticated and organized. To meet the growing challenge this poses to law enforcement, modern criminal justice systems embed different 'reactive' and 'proactive' law enforcement methods and strategies in the fight against the most serious crimes. In this regard it can be noted that many countries, including Ethiopia, use various intelligence - and digital - led proactive law enforcement methods. Currently, in Ethiopia law enforcement authorities have begun using certain special investigation techniques and tools to prevent, detect, investigate and prosecute some serious offences. Electronic surveillance and undercover operations are somehow becoming common in the fight against alleged crimes of terrorism, corruption, money laundering, trafficking in human beings, computer crimes, tax evasion, value added tax and customs offences. While useful and sometimes necessary, the employment of such techniques and tools, however, poses serious risks of misuse/abuse threatening the enjoyment of some of the vital human rights and freedoms. This article aims to introduce the notions of 'special investigative techniques' and 'special investigative tools', and outlines the fundamental reasons that justify the use of such techniques and tools in modern criminal justice systems. It also sketches the conditions and limits that are required to employ such techniques and tools. The article examines the legal basis for the use of those techniques and tools in Ethiopia today. In addition, it presents a brief highlight on attendant human rights concerns arising from the use of those techniques and tools. Finally, it draws conclusions, and forwards recommendations.

Key terms: Deceptive investigative techniques, entrapment, Ethiopia, human rights concerns, Special Investigation Techniques

Introduction

Traditionally, methods of crime prevention, detection, investigation and prosecution have been *reactive* in character.[1] Apart from physical surveillance and police

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patrolling in suspected areas, these have been essentially based on crime-victim reporting, witness examination, suspect interrogation and confession, search and seizure of documents, instruments or fruits of crimes and examination of crime scenes. Such, basically *ex-post facto*, investigative techniques might work well in cases of non-complex and unsophisticated crime instances and in cases of single-instance wrongdoings.

The perpetration of some serious crimes such as terrorism, grand corruption, money laundering, trafficking in human beings, drug trafficking and cybercrimes has become too complex, clandestine, inaccessible and impenetrable to "outsiders" and to law enforcement authorities that function in traditional ways.[2] As Joh rightly notes "some crimes involve secretive, complex, and consensual activities."[3] Sophisticated perpetrators and organized underground groups are engaging in the commission of grave offences in secretive or complex ways and they are causing massive scourges and destructions in the communities where the criminal acts are committed.[4] Some criminals are increasingly using advanced technologies and means of communications such as computers and the Internet to commit or to facilitate the commission of traditional and new forms of crimes, such as corporate and cybercrimes, with no or little notice from law enforcement authorities and the

[1] Criminal investigation could be *reactive* or *proactive*. The reactive method is typically applied to crimes that have already taken place while the proactive method mainly relates to targeting of a particular criminal or forestalling a criminal activity that is planned for the future or that is taking place. See ANDREW L-T CHOO, ABUSE OF PROCESS AND JUDICIAL STAYS OF CRIMINAL PROCEEDINGS, 133 (2nd edn, 2008); MARIANNE F.H. HIRSCH BALLIN, ANTICIPATIVE CRIMINAL INVESTIGATION: THEORY AND COUNTERTERRORISM PRACTICE IN THE NETHERLANDS AND THE UNITED STATES 28 (2012); UNITED NATIONS OFFICE ON DRUGS AND CRIME, POLICING: CRIME INVESTIGATION CRIMINAL JUSTICE ASSESSMENT TOOLKIT (2006), available at https://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Crime_Investigation.pdf (accessed on 2 December 2017); M. Maguire and T. John, Covert *and Deceptive Policing in England and Wales: Issues in Regulation and Practice*, *4* EUR. J. CRIME CRIM. L. & CRIM. JUST. 316 (1996); Schotte Astrid, *Proactive Policing in Belgium and The Netherlands* (2009-2010), Unpublished MA Thesis, Ghent University, at 2, available at http://lib.ugent.be/fulltxt/RUG01/001/458/485/RUG01-001458485_2011_0001_AC.pdf (accessed 5 March 2018).

[2] Lisa A. Barbot, *Money Laundering: An International Challenge*, 3 TUL. J. INT'L & COMP. L. 193-201 (1995); Barbara Crutchfield George and Kathleen A. Lacey, *A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives*, 33 CORNELL INT'L L.J. 551 (2000); Benjamin B. Wagner & Leslie Gielow Jacobs, *Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations*, 30 U. PA. J. INT'L L. 215-217 (2008); Elizabeth E. Joh, *Breaking the Law to Enforce it: Undercover Police Participation in Crime*, 62 STAN. L. REV. 162 (2009-2010); United Nations Office on Drugs and Crime, *Toolkit to Combat Trafficking in Persons* 69-71 (2006); United Nations Office on Drugs and Crime, *The use of the Internet for terrorist purposes* 1-12 (2012); Kelly A. Gable, *Cyber-Apocalypse Now: Securing the Internet against Cyber-terrorism and using Universal Jurisdiction as a Deterrent*, 43 VAND. J. TRANSNAT'L L. 59-62 (2010); Nicholas W. Cade, *An Adaptive Approach for an Evolving Crime: The Case for an International Cyber Court and Penal Code*, 37 BROOK. J. INT'L L. 1139-1151 (2011-2012); Laurentiu Giurea, *Special Methods and Techniques for Investigating Drug Trafficking*, 3(2) INT'L J. CRIMINAL INVESTIGATION, 137-146 (2013), available at www.ijci.eu/published/IJCI_64_Giurea.pdf (accessed 6 November 2015).

[3] Joh, *Supra* note 2, at 162.

[4] *Id.*; Bruce G. Ohr, *Effective Methods to Combat Transnational Organized Crime in Criminal Justice Processes*, 58 RESOURCE MATERIAL SERIES 40 (December 2001) available at http://www.unafei.or.jp/english/pdf/PDF_rms/no58/58-05.pdf (last accessed 27 February 2018).

general populace.[5] Using financial institutions such as banks, business entities and websites as tools to facilitate or conceal their criminal acts, some criminals are engaging in laundering "dirty" money and/or financing terrorist activities without being noticed or identified.[6] At times, the traditional reactive methods of crime prevention, detection, investigation and prosecution appear to be outpaced in such changed circumstances.[7]

Hence, it has become necessary to design new techniques of law enforcement, to employ new tools and proactive strategies that involve covert and deceptive activities in order to combat the commission of serious crimes which are committed in consensual or complex, clandestine, sophisticated and/or organized ways.[8] Simon Bronitt and many others have noted the proliferation of the use of special investigative techniques that involve *covert* and *deceptive* actions of law enforcement authorities from time to time.[9] The use of undercover operations, deployment of listening devices, interception of telephone and Internet communications and conducting of other electronic surveillance measures are becoming common in most jurisdictions. Given the sophistication of criminal commission and the serious threats and dangers some criminal doers pose against public interests as well as against the law enforcement authorities, the need to modernize and enhance law enforcement techniques and tools to effectively tackle those secretive, underground,

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[5] *Id*. See also Mark D. Young, *Electronic Surveillance in an Era of Modern Technology and Evolving Threats to National Security*, 22 STAN. L. & POL'Y REV. 11 (2011).

[6] Barbot, *Supra* note 2, at 193.

[7] See the observations of Astrid, *Supra* note 1, at 2; Wagner & Jacobs, *Supra* note 2, at 216-217; Giurea, *Supra* note 2, at 318; Maguire and John, *Supra* note 1, at 318.

[8] Ross notes, "In most democracies, political elites, legal actors, and critics agree that *undercover investigations* are in some sense as necessary evil." See Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 495-496 (2007).

[9] Simon Bronitt, *The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe*, 33 COMM. L. WORLD REV. 35 (2004), wherein Bronitt observes: "The 20th century witnessed significant increases in *covert surveillance* and *proactive investigation*." Ross (*Supra* note 8, at 493) further notes: "In the wake of the September 11 attacks, *undercover policing* has become an increasingly important law enforcement tool in the United States and in Europe." See further Bernard W. Bell, *Secrets and Lies: News Media and Law Enforcement Use of Deception as an Investigative Tool*, 60 U. PITT. L. REV. 746 (1998-1999); Nicholas Wamsley, *Big Brother Gone Awry: Undercover Policing Facing a Legitimacy Crisis*, 52 AM. CRIM. L. REV. 182 (2015) (noting the development of undercover policing in the United States). See also John A.E. Vervaele, *Special Procedural Measures and the Protection of Human Rights General Report*, 5 UTRECHT L. REV. 74-77 & 83 (2009); Wagner & Jacobs, *Supra* note 2, at 196-237; Ch. Joubert, *Undercover Policing - A Comparative Study*, 2 EUR. J. CRIME CRIM. L. & CRIM. JUST. 18-38 (1994). See also Francis C. Sullivan, *Wiretapping and Eavesdropping: A Review of the Current Law*, 18 HASTINGS L.J. 59 ff (1966); Lijana Stariene, *The Limits of the use of undercover agents and the right to a fair trial under Article 6(1) of the European Convention on Human Rights*, 3 (117) JURISPRUDENCE, 263 (2009); Clive Harfield, *The Governance of Covert Investigation*, 34 MELB. U. L. REV. 773 (2010); Quirine Eijkman & Bibi van Ginkel, *Compatible or Incompatible? Intelligence and Human Rights in Terrorist Trials*', 3(4) AMSTERDAM LAW FORUM 3-16 (2011), available at www.clingendael.nl/sites/default/files/20111100_cscp_artikel_ginkel.pdf (accessed 8 November 2015); Giurea, *Supra* note 2, at 137-146; Murdoch Watney, *Understanding Electronic Surveillance as an Investigatory Method in Conducting Criminal Investigations on the Internet*, available at http://www.isrcl.org/Papers/2008/Watney.pdf (accessed 6 November 2015).

organized, dangerous and sophisticated forms of offending is indeed plausible. The use of special investigation techniques and tools is really borne of necessities.[10]

Yet, the use of special investigation techniques and tools poses serious concerns against the protection and enjoyment of human rights and fundamental freedoms and other societal values such as the principles of legality and fairness as well as the rule of law and public confidence in the administration of justice.[11] They are susceptible to misuse or abuse; law enforcement officials and other security agents could endanger the enjoyment and exercise of some basic human rights and freedoms such as the right to liberty and the right to privacy.[12] Thus, it is necessary to strike a proper balance between those competing and/or conflicting interests that may arise while using those special investigation techniques and tools. It is essential to have appropriate normative and institutional regulatory and controlling mechanisms that could address undue interference, abuse or misuse that may result from the arbitrary or zealous, or callous use of special investigation techniques and tools by law enforcement authorities.

This article aims to introduce the notions of 'special investigation techniques' and 'special investigation tools' and to examine the legal basis for their employment in Ethiopia today. Accordingly, the article in Section 2 begins with an exposition of the meanings of these terms and goes on to outline some principal factors that trigger their employment in modern criminal justice systems. It further highlights the conditions of use and the limits that need to be observed. In Section 3, the article examines the legal basis for the use of these techniques and tools in some criminal offences in the current Ethiopian criminal process. In Section 4, it attempts to offer a brief highlight on attendant human rights concerns that need to be addressed in relation to special investigation techniques and special investigation tools. Finally, the article closes with conclusions and some recommendations.

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[10] See Maguire and John, *Supra* note 1, at 320 & 330 (noting the increasing acceptance of covert and deceptive methods of investigation in England and Wales as a 'necessary evil'); Joh, *Supra* note 2, at 180; Stariene, *Supra* note 9, at 263; Ross, *Supra* note 8, at 496, 498-499, 558-574; Wagner & Jacobs, *Supra* note 2, at 217; Thomas B. Kearns, *Technology and the Right to Privacy: The Convergence of Surveillance and Information Privacy Concerns*, 7 WM. & MARY BILL RTS. J. 976 (1999) (noting surveillance as a useful and necessary aspect of criminal investigation in modern times); Simon Bronitt and Declan Roche, *Between Rhetoric and Reality: Socio-legal and Republican Perspectives on Entrapment*, 4 INT'L J. EVIDENCE & PROOF 77 (2000).

[11] Bronitt, *Supra* note 9, at 36; Maguire and John, *Supra* note 1, at 319; Elizabeth N. Jones, *The Good and (Breaking) Bad of Deceptive Police Practices*, 45 NEW MEXICO L. REV. 523-524 & 540 (2015).

[12] *Id.*; Wagner & Jacobs, *Supra* note 2, at 222; Giurea, *Supra* note 2, at 137; Maguire & John, *Supra* note 1, at 319; Ross, *Supra* note 8, at 537-538; Harfield, *Supra* note 9, at 774-776; Mark G. Young, *What Big Eyes and Ears You Have!: A New Regime for Covert Governmental Surveillance*, 70 FORDHAM L. REV. 1023 (2001); Tom Sorell, *Preventive Policing, Surveillance, and European Counter-Terrorism*, 30 CRIM. JUST. ETHICS 2 (2011). There are also other *ethical* and *legitimacy* concerns which such techniques raise (See Joh, *Supra* note 2, at 157; Jones, *Supra* note 11, at 523).

1. The Use of Special Investigation Techniques and Tools in Criminal Process: Definition, Justifications, and Limits

1.1. Definition

Before dealing with the reasons that justify the use of special investigation techniques and tools in modern criminal justice systems, it is appropriate to briefly introduce the notions of 'special investigation techniques' and 'special investigation tools'.

To begin with the idea of 'special investigation techniques', we should note that this expression lacks a widely accepted meaning across the legal circles. So far there is no universally agreed upon legal definition of the term.[13] However, it is clear that the expression fundamentally connotes the use by law enforcement authorities of *secretive* and/or *deceptive* means of law enforcement.[14] These are methods which often involve *undercover* and *covert surveillance* operations and various forms of *anticipative* criminal investigation. Giurea, Joubert, Nilsson, Ballin and many other scholars note the numerous, varied and evolving as well as secretive and deceptive nature of such techniques.[15] Common examples include entrapment, controlled delivery, covert filming, covert listening, covert interception of electronic communications, interception of postal letters, access to computer database, etc. These and other varieties of the special investigative methods are believed to enhance the prevention, detection, investigation and prosecution of serious offences which could not easily be traced and proven through traditional means of law enforcement. Offence-facilitation by undercover police or by another agent, for instance, helps law enforcement authorities to identify, arrest and then to detain actual offenders while

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[13] Toon Moonen, *Special Investigation Techniques, Data Processing and Privacy Protection in the Jurisprudence of the European Court of Human Rights*, 1(9) PACE INT'L L. REV. 100 (2010); Hans G. Nilsson, *Special Investigation Techniques and Developments in Mutual Legal Assistance - The Crossroads between Police Cooperation and Judicial Cooperation*', at 40, available at: www.unafei.or.jp/english/pdf/RS_No65/No65_07VE_Nilsson2.pdf (last accessed 6 November 2015).

[14] See Nilsson, *Supra* note 13, at 40 (noting that special investigative techniques involve the use of *subterfuge* or *deceptive* and *secretive* means of investigation); Maguire and John, s*upra* note 1, at 317-318 (referring to *covert* and *deceptive* techniques as constituting 'proactive policing'); Joh, s*upra* note 2, at 156-167 (describing various surveillance or intelligence operations, preventive operations and facilitative operations as types of *undercover policing* falling within the umbrella of *authorized criminality*); Sorell, s*upra* note 12, at 3 (noting that special investigation techniques are done without the knowledge of the people being investigated, and sometimes involve deception). In Ethiopia, as will be shown hereunder, the various covert and deceptive techniques which law enforcement officers may employ in human trafficking and smuggling of migrants are explicitly referred to as *special investigative techniques* (see Art 18 of Proclamation No.909/2015). The *Criminal Justice Policy of the Federal Democratic Republic of Ethiopia* (Yekatit 25, 2003 E.C. or 4 March 2011) also explicitly employs this similar term (see Section 3.17, at 20-23) and envisages the possible use of such techniques in serious crimes which are committed in complex ways as well as in transnational fashion, when detailed laws guiding and regulating such activities are issued in the future. See also Ballin, s*upra* note 1, at 3-4.

[15] Giurea, s*upra* note 2, at 137; Joubert, s*upra* note 9, at 18-20; Nilsson, s*upra* note 13, at 40-42; Ballin, s*upra* note 1, at 4 (describing the idea of *anticipative criminal investigation* as one which "covers any form of proactive investigation on behalf of the government for the prevention of serious crimes or threats and can typically be characterized by its intelligence-led approach").

purchasing, or importing or supplying illegal drugs to other persons, or while public officials are receiving bribes. The undercover police officers or other agents may pretend to be drug users or illegal gun buyers looking for a willing seller, or they may provide the illegal drugs themselves, the chemicals necessary for drug manufacture, or the "buy" money to the suspects.[16]

While there is no universally accepted single definition, Moonen as well as Giurea attempt to provide an operational definition of the term 'special investigation techniques' by relying on the Council of Europe's Recommendation (2005) 10 on Special Investigative Techniques of 25 April 2005.[17] In that context, the term is defined as referring to "techniques [that are] applied in the context of criminal investigations for the detection and investigation of serious crimes and suspects, designed to collect intelligence so as not to alarm the persons concerned."[18] From this definition, one gathers that the method of detection and investigation adopted in special investigative techniques is essentially a secretive or surreptitious one. Law enforcement officers attempt to gather and collect intelligence as well as judicial evidence about suspects and/or crimes without letting the targeted person know what is underway.

On the other hand, special investigative techniques may involve some form of offence-facilitation in disguised fashion. A suspect or a targeted person is somehow enticed, fooled, invited or put on test to a form of criminal offence by an undercover police officer or another *agent provocateur*.[19] In such method an undercover police officer, or intelligence officer or any other *agent provocateur* engages in some form of deceptive activity and dupes the identified suspect or targeted person to commit a form of crime with a view to apprehending the person while engaging in the criminal act.

Some international, regional and national legal instruments such as Art 20 of the UN Convention on Transnational Organized Crime (2000)[20] and Art 50 of the UN Convention against Corruption (2003)[21] explicitly include special investigation techniques such as electronic or other forms of surveillance, undercover operations,

[16] Joh, s*upra* note 2, at 166.

[17] Recommendation (2005) 10 of the Committee of Ministers, Council of Europe, is available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805da6f6 (accessed 12 December 2017).

[18] Moonen, s*upra* note 13, at 101; Giurea, s*upra* note 2, at 137.

[19] Joh, s*upra* note 2, at 164-166; Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1396-1398 (2004).

[20] Available at: https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf; see also its guideline at https://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf.

[21] Available at: https://www.unodc.org/pdf/.../convention_corruption/.../Convention-e.pdf.

controlled delivery and integrity testing as enhanced methods of law enforcement.[22] Many developed nations are currently using a variety of undercover policing techniques and covert surveillance which include secret 'bugging' or eavesdropping, wire-tapping, pen registers, Global Positioning System (GPS) tracking, interception of emails and other electronic means of communications, covert human and camera surveillance to effectively fight some category of serious crimes.[23] These techniques and tools enable law enforcement authorities to gather information about criminal designs as well as about individuals who are involved in the commission of those crimes. They enable law enforcement authorities to control and foil criminal commission, to arrest ongoing criminal actions, to collect and gather valuable evidence that leads to a successful prosecution of persons involved in the commission of serious crimes. Bell notes: "Undercover techniques provide an efficient and effective means to reveal secrets society needs to know - either to sanction wrongdoers and frustrate their plans, or to warn potential victims."[24] Young also observes: "… information gained from wiretaps, for example, 'can be powerful evidence of guilt' and thus the allure of these technologies for crime-fighting is predictably and justifiably very strong."[25] Sharing the observation of others, the same author writes: "Wiretapping and eavesdropping are among the most effective investigative techniques available to combat crime."[26]

As has been noted, special investigation techniques basically involve secretive and deceptive law enforcement methods.[27] In the case of *secret (clandestine) or covert investigative techniques*, investigating authorities try to "hide what they do from the subject of the technique".[28] Various electronic surveillance activities such as audio

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[22] See STEVEN FOSTER, THE JUDICIARY, CIVIL LIBERTIES AND HUMAN RIGHTS 135-174 (2006); *United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators* (September 2004), at 89-93, available at; https://www.unodc.org/pdf/crime/corruption/Handbook.pdf (accessed on 2 November 2015); UN OFFICE ON DRUGS AND CRIME, CURRENT PRACTICES IN ELECTRONIC SURVEILLANCE IN THE INVESTIGATION OF SERIOUS AND ORGANIZED CRIME 1-2 (2009), available at: https://www.unodc.org/documents/organized-crime/Law-Enforcement/Electronic_surveillance.pdf (accessed on 2 November 2015); Ross, *supra* note 8, at 493; R. Rustige, *First World Conference on New Trends in Criminal Investigation and Evidence: A Report*, 4 EUR. J. CRIME CRIM. L. & CRIM. JUST. 302 (1996).

[23] Joh, *supra* note 2, at 161, 179-180; Bronitt, *supra* note 9, at 35; Moonen, *supra* note 13, at 100; See also Young, *supra* note 12, at 1023-1046; Sorell, *supra* note 12, at 3; Jeremiah Courtney, *Electronic Eavesdropping, Wiretapping and Your Right to Privacy*, 26 FED. COMM. B. J. 1 ff (1973); Maguire and John, *supra* note 1, at 318; Colquitt, *supra* note 19, at 1396-1398.

[24] Bell, *supra* note 9, at 746-747.

[25] Young, *supra* note 12, at 1023 (footnote omitted).

[26] *Id*., at 1025 (footnote omitted).

[27] There is also another form of proactive policing that appears to be evolving, i.e., *disruptive form of policing* (see Maguire and John, *supra* note 1, at 318). As Maguire and John (*Id*.) explain, the aim of such form of policing "is to unsettle the development and functioning of criminal enterprises through a variety of 'spoiling tactics'. These often involve collaboration between the police and other agencies with different powers: for example, local authority housing regulations may be used to evict people suspected of drug dealing. They may also include the spreading of false rumors to sow mistrust between criminals."

[28] Moonen, *supra* note 13, at 100. Nilsson (*supra* note 13, at 40) also notes that such method involves concealment of what is being done and further writes: "The tailing of a person, telephone tapping and filming of persons are

surveillance, or visual surveillance, thermal surveillance, tracking surveillance and data surveillance and other covert operations highly contribute to the success of such techniques. The covert category of electronic surveillance includes wiretapping, eavesdropping and video surveillance operations. While *wiretapping*, which normally involves a physical entry into a telephone or telegraph circuit to intercept a conversation, refers to "the surreptitious overhearing of telephone conversations by mechanical or electronic means," *electronic eavesdropping* pertains to the "the use of electronic 'bugging' devices to enable one to eavesdrop upon a conversation, without tangible penetration either into a wire or into the physical area where a conversation occurs."[29]

Deceptive investigative techniques, on the other hand, refer to the use of "intentional deceptive methods which make the subject of such methods of investigation believe something to be true which in reality is not."[30] These methods usually involve targeting suspects or individuals with potential to engage in some identified crimes. They are operationalized with supplying or spreading of false information or rumors, or involve different spoiling tactics, deceptive or trickery and other entrapment activities.[31] Often these include the deployment of undercover officers, or other hired undercover informants or *agent provocateurs* that engage in controlled delivery, buy-busts or sell-busts, flash roll activities or 'sting' or 'decoy', or infiltration operations.[32] The identity of the law enforcement agent is disguised in order to detect, prevent or secure evidence of criminal activities.

In the case of *controlled delivery* the undercover agent plays a passive role by letting the suspect to advance in his/her criminal activity and try to catch the suspect red-handed.[33] Once law enforcement authorities have obtained information on a specific deal concerning illegal activities, they may decide to see it while being carried out by dealers without intervening. In the meantime, law enforcement agents try to catch those actors and participants red-handed.[34] Joubert further says that "the passive

by nature secret. The aim of the secrecy is not to alter the behavior of the presumed offender but to deprive him of his information."

[29] Sullivan, s*upra* note 9, at 59; Courtney, s*upra* note 23, at 2.

[30] Moonen, s*upra* note 13, 100. Nilsson, s*upra* note 13, at 40, writes: "The use of subterfuge involves a certain degree of deception: there is a procedure which seems to lead an individual to perform certain acts or reveal certain information by generating a divergence between what is supposed to be the case and what is expressed in a conventional manner or otherwise. Infiltration and pseudo-purchases are examples."

[31] Joubert, s*upra* note 9, at 19-20; Maguire & John, s*upra* note 1, at 318; Colquitt, s*upra* note 19, at 1396 -1398.

[32] *Id*.; Colquitt, s*upra* note 19, at 1396-1398; Wamsley, s*upra* note 9, at 182. See also Bronitt, s*upra* note 9, at 38. Joh identifies three different types of undercover investigations, viz., *surveillance* (intelligence operations), *preventive* operations and *facilitative* operations (Joh, s*upra* note 2, at 163-165). Wamsley expounds that the word 'undercover' implies engaging in a secret (covert) and deceptive operation (Wamsley, s*upra* note 9, at 182).

[33] Joubert, s*upra* note 9, at 19.

[34] Maguire & John, s*upra* note 1, at 318.

character of the observation operation may change into a more active operation as law enforcement officials themselves take part in the deal as undercover agents." [35]

In some other methods undercover agents play active roles; they pose in any number of guises to lure people into breaking the law. For example, in the case of *buy-busts* an undercover agent engages in buying some prohibited items such as drugs from a target person; in the case of *sell-busts* an undercover agent sells prohibited items such as stolen things to buyers with a view to identifying the people who are involved in such criminal activities.[36]

In the case of *decoy* or *entrapment*, undercover agents entice, but without forcing, target persons to commit some criminal acts.[37] Bronitt and Roche note that deception lies at the core of entrapment.[38] While there is no consensus on the exact meaning and scope of entrapment,[39] the term has been defined as signifying "the use of deception to produce the performance of a criminal act under circumstances in which it can be observed by law enforcement officials", or as "the use of deceptive techniques to test whether a person is willing to commit an offence."[40]

Another form of deception technique involves *integrity testing*. Such methods test whether public officials and servants resist offers of bribes and refrain from soliciting them.[41]

The term 'special investigative tools', on the other hand signifies those various *devices* and *software programs* that enable law enforcement authorities to use and implement special investigation techniques. Apart from specific enabling legislation and guidelines, these devices could include a variety of modern technological and communicative devices and software programs that help to intercept correspondences, to undertake electronic surveillance activities with a view to access data, trace location, detect, recognize, perceive or identify target persons and things

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[35] *Id.* Joubert (*supra* note 9, at 19) further writes, "In that case one speaks of flash roll, sting operation or infiltration." As the same author notes, the "difference between the three [*flash roll*, *sting operation* and *infiltration*] is not as clear cut as one may want to believe. Flash roll and sting operations may be limited to short periods of time but it is obvious that they involve infiltration as well. Infiltrators may not only be undercover police officials but may be also hired informers. In that case, the use of listening devices may be an important issue."

[36] Colquitt, *supra* note 19, at 1398.

[37] *Id.*

[38] Bronitt and Roche, *supra* note 10, at 77.

[39] *Id.*; Bronitt, *supra* note 9, at 38.

[40] Bronitt, *supra* note 9, at 38. Bronitt and Roche, *supra* note 10, at 77 note: "The term encompasses a wide range of proactive investigative techniques ranging from 'manna from heaven' operations where unguarded valuables are placed in public view in order to tempt passers-by to complex undercover 'stings' involving collaboration between international law enforcement agencies for months or even years." See further Choo, *supra* note 1, at 134 (footnote 8) noting that it may be used in a broader sense to refer 'to activities taking place before or during the commission of an offence which may aid its commission or even influence the precise way in which it is carried out.

[41] See UNITED NATIONS HANDBOOK, *supra* note 22, at 90.

such as explosives, drugs, concealed items, etc.[42] These days there are a wide array of highly sophisticated surveillance technologies and software programs in the developed world that help law enforcement authorities to intercept communications or that which help to have enhanced perception and detection.[43] Writing in the context of the US, Gatewood states that the most notable advances in surveillance technology are "the computer, the Internet, cell phones, wireless devices, and Global Positioning System technology".[44]

Using such sophisticated technologies and software programs, law enforcement authorities can identify specific phone numbers that have been used to make dials (outgoing calls) including the duration and time of call,[45] or phone numbers that have been used to receive incoming calls.[46] Using variety of devices and software programs law enforcement authorities may "bug" phone lines, record wired or wireless or oral conversations, or may trace and locate someone's positions.[47] Some of the devices and software programs may enable such authorities to scan and identify the contents of things and human bodies, or to sense heat,[48] or to detect or see guns, other explosives or other substances, to identify voice, to access computer data or data in other storage devices, or to monitor Internet traffic.[49] Still others could help them to record keystrokes made on computers,[50] to monitor or sniff e-mails,[51] or to capture communication information directly from a network.[52]

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[42] See Young, s*upra* note 12, at 1023-1046. Young (at 1024 *ff.*) classifies the array of surveillance technologies into three categories. These are: 1) *technologies for intercepting communications*, such as wiretaps; 2) *technologies for enhancing perception*, such as night-vision devices and thermal imagers; and 3) *technologies for identifying and tracking*, which includes location-tracking devices, biometric devices, and computer systems and databases.

[43] *Id.*

[44] Jace C. Gatewood, *Warrantless GPS Surveillance: Search and Seizure-Using the Right to Exclude to Address the Constitutionality of GPS Tracking Systems Under the Fourth Amendment*, 42 U. MEM. L. REV. 307 (2011).

[45] Young, s*upra* note 9, at 1031 ("Pen register"). "A *pen register* is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line [the telephone number dialed by the target phone]. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. It does not involve any monitoring of telephone conversations."

[46] *Id.*, ("trap-and-trace device"). A "trap and trace" records incoming connection information (the telephone number(s) of the device(s) calling the target phone).

[47] *Id.*, at 1031 (Global Positioning System-GPS). Gatewood states: "GPS can be installed virtually anywhere: in cell phones, in laptops, in children's clothing, and even under the skin of pets. The uses of GPS technology and its capabilities appear to be limitless." (Gatewood, s*upra* note 44, at 308).

[48] Young, s*upra* note 12, at 1033 ("thermal imagers"). Thermal imagers, also known as forward-looking infra-red, are devices that "detect unusual patterns of heat emanating from objects such as a house"; they "detect the differences in the heat emitted by objects relative to other objects and convert these results into visual displays"; they are "commonly used by law enforcement for detecting abnormal emissions of heat from houses that is often a tell-tale sign of the cultivation of marijuana" (*Id.*, at 1020, 1033 & 1034).

[49] *Id.*, at 1030 ("Echelon"). This is a spying apparatus capable of monitoring and capturing Internet traffic around the world (*Id.*).

[50] *Id.* ("Key logger"). This is a soft-ware system that records all keystrokes made on a target computer (*Id*).

[51] *Id.*, at 1029 ("Carnivore"). This is a computer program that enables law enforcement authorities to select and record a defined subset of the traffic on the network to which it is attached (*Id.*).

Further still, there are others that could help to pick up and analyze the air surrounding a person for traces of narcotics,[53] or to eavesdrop on a specific person who is talking on cellular telephones,[54] and so forth. Often special investigation techniques are made possible, facilitated or enhanced by the use of such an advanced technological and communication devices and software programs.

1.2. Justifications

Unlike many traditional crimes, such as bodily injury, homicide, theft or robbery, the commission of some crimes takes place in clandestine, organized and sophisticated manner. This is particularly true in grand corruption, money laundering, tax fraud or evasion, contraband, trafficking in human beings, terrorism, cybercrimes and the like. As many writers have noted, the proliferation of advanced technologies and means of communications has contributed for a stealthy commission of traditional and new forms of crimes.[55] In such criminal commissions, there may not be overt occurrences likely to be noticed by law enforcement authorities or to be reported by witnesses. Perpetrators may not leave traces; there may not be private victims to complain, etc. Perpetrators may not be found in the physical (geographic) territory of the state where the crime is committed. In such

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[52] PETER D. KEISLER, CYBELE K. DALEY & DAVID W. HAGY, INVESTIGATIVE USES OF TECHNOLOGY: DEVICES, TOOLS, AND TECHNIQUES (U.S Department of Justice Office of Justice Programs, 2007), at 84 ("sniffer"), available at www.ojp.usdoj.gov (accessed on 4 November, 2015).

[53] Young, s*upra* note 12, at 1067 ("Sentor").

[54] *Id*., at 1028 ("Triggerfish"). As stated by Young (s*upra* note 12, at 1028, footnote 39) "Triggerfish" is the product name of a technology that will "pluck cell calls out of the air." It allows a law-enforcement agent to eavesdrop on a specific person who is talking on cellular telephones in the vicinity of the agent."

[55] See Orin S. Kerr, *Internet Surveillance Law after the USA Patriot Act: The Big Brother That Isn't*, 97 NW. U. L. REV. 610 (2002-2003); Young, s*upra* note 12, at 1025 (footnote 24) (quotes another source and writes: "Organized criminals make extensive use of wire and oral communications in their criminal activities..."; Harvey Rishikof, *Combating Terrorism in the Digital Age: A Clash of Doctrines: The Frontier of Sovereignty-National Security and Citizenship-The Fourth Amendment-Technology and Shifting Legal Borders*, 78 MISS. L.J. 385-390 (2008-2009); Kelly A. Gable, *Cyber-Apocalypse Now: Securing the Internet Against Cyber-terrorism and Using Universal Jurisdiction as a Deterrent*, 43 VAND. J. TRANSNAT'L L. 60-62, 73-87 (2010); Cade, s*upra* note 2, at 1139-1147 (2011-2012). Gable (at 60) writes:

> The Internet has revolutionized and exponentially increased the threat that terrorism poses to national and international security. The Internet not only makes it easier for terrorists to communicate, organize terrorist cells, share information, plan attacks, and recruit others, but also is increasingly being used to commit cyber-terrorist acts.

Cade (at 1144), in the context of the US, also writes:

> As more personal information is conveyed over the Internet and stored in the cloud, everything from information on bank accounts to federal infrastructure, from personal email to private photos, is increasingly vulnerable to cyber-attack. As a result, nearly every person could be victim to a cyber-attack, whether they are individual Internet surfers, non-computer-using customers of Internet-using companies, or even citizens of cloud-embracing national governments.

changed circumstances, the normal traditional investigative techniques and tools may not be effective means to enforce applicable laws.[56]

In some cases, such as cases involving grand corruption, investigators and other law enforcement authorities may stand helpless as there may not be crime scenes to study, or victims to interview, or fingerprints or any other trace evidence to examine.[57] Even, in cases where there are witnesses or victim individuals, some witnesses may likely be participants; or, some witnesses may be concerned about retaliation if they report to law enforcement authorities.[58] Even mere identification of the individuals who engaged in the alleged criminal conduct – identifying the individual who has been engaged in criminal commission - may not be sufficient to protect the public interest. In those heinous crimes such as terrorism, money laundering and trafficking in human beings it is necessary to foil criminal preparations and planning by embracing comprehensive prevention strategies. Law enforcement agents need to identify individuals who might be willing to aid acts such as terrorism, even if they are not currently involved in such activities.

Furthermore, in cases where there are organized network of criminals, or in cases where higher government officials are involved, the attempt to conduct criminal investigation and to collect evidence may be a risky and dangerous venture for investigators and other law enforcement authorities.[59] In other cases, organized criminal doers and corrupt public officials may succeed to "buy" the will of law enforcement authorities and the media in their favor, or they may successfully bury or destroy items of evidence making dedicated investigators unable to find out cogent evidence. Still in other cases, investigation by law enforcement authorities may be too costly and it may require huge resource allocation and funding. For better insights, it is worth quoting at length what Wagner and Jacobs write in the context of public corruption:[60]

> Public corruption crimes pose unique evidence-gathering challenges to law enforcement everywhere. Unlike many other crimes, crimes of corruption are

[56] Maguire & John, s*upra* note 1, at 318; International Council on Human Rights Policy (2010), *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*, at 67, available at www.ichratorg/files/reports/58/131b_report.pdf (accessed on 4 November, 2015).

[57] Wagner and Jacobs, s*upra* note 2, at 215. In presenting some of the arguments that are forwarded in favor of employing undercover policing, Wamsley (s*upra* note 9, at 183) writes:

> Undercover techniques serve a critical function in the criminal justice system. Often, underground criminal activity can only be discovered through undercover investigation; this is especially true when law enforcement officers need to locate the bigger fish, such as the leaders in complex criminal organizations. Additionally, crimes involving narcotics - the most common target of undercover operations - finances, wildlife, or property often have no victims or witnesses who can reveal the crime to the police. Another critical use of undercover operations is preventing crimes before they occur, such as through infiltrating terrorist organizations.

[58] *Id*., at 216.

[59] *Id*.

[60] *Id*., at 215-216 (Footnotes omitted).

> carried out in secret. The essence of the crime is a covert deal struck by two satisfied parties who have no incentive to report it, with no independent witnesses. Its means are outwardly unremarkable - typical dealings between businesses or members of the public with individuals in their official capacities, which become suspicious only when viewed with a sophisticated eye as part of a scheme of corrupt activity. The results - official influence or benefits indirectly delivered – are not readily apparent. There is no crime scene to study, no victim to interview, no fingerprints or trace evidence to examine. Financial documents, which form a primary source of evidence, are often protected by law or difficult to obtain, and require resources and expertise to decipher. Witnesses are likely complicit or concerned about retaliation from superiors if they file a report. Perpetrators, especially of high-level corruption, are often savvy politicians, business people and financiers who understand how to bury the evidence of their misdeeds, and have the connections and means to call on other professionals - lawyers, accountants, computer experts - to help execute the deed and launder the proceeds. These criminals, with their hired help, can take advantage of jurisdictional boundaries and identify loopholes that hide their activities.

The same writers further note:

> They [Corrupt public officials] may be in a position to influence public opinion, to threaten the careers of investigators and prosecutors, or to interfere with the investigation. They may also prolong the proceedings through various tactics and tarnish the efficiency and quality of the overall administration of justice. All of these factors may drain the will of dedicated investigators and prosecutors, and the public support on which they depend.[61]

Hence, there is the need to use "insiders", infiltrating or undercover agents, electronic or other forms of covert surveillance or other proactive means of law enforcement to closely know and apprehend the individuals involved in the commission of such clandestine, complex, organized and/or sophisticated forms of criminal commissions. The rationale behind using special investigatory techniques and tools such as covert surveillance and undercover agents is thus one of real necessity.[62] In respect of electronic surveillance, it has been observed: "The value of employing electronic surveillance in the investigation of some forms of serious crime, in particular organized crime, is unquestionable. It allows the gathering of information unattainable through other means."[63]

The use of the undercover agents, deceptive tactics, wire-tapping, eavesdropping, interception of e-mails and other forms of correspondence, or other proactive

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[61] *Id*., at 216.

[62] Kearns, s*upra* note 10, at 976; see also International Council on Human Rights Policy, s*upra* note 56, at 67; Ross, s*upra* note 8, at 493-499.

[63] The United Nations Office on Drugs and Crime, *Current practices in electronic surveillance in the investigation of serious and organized crime* (2009), at 1, available at https://www.unodc.org/documents/organized-crime/Law-Enforcement/Electronic_surveillance.pdf (accessed on 14 December 2017).

techniques and tools[64] help detecting and identifying criminal commission and criminal doers. Such techniques and tools further facilitate the collection and analysis of valuable evidence and contribute to apprehending true suspects timely; they lead towards investigative successes and eventually to effective and efficient law enforcement outcomes.[65]

1.3. Conditions of use and limits

While the importance and contributions of special investigation techniques and tools towards fighting serious crimes is obvious, on the other hand, there are attendant concerns that need to be considered seriously. The public interest in the prevention, detection, investigation and prosecution of serious crimes which justifies the use of special investigation techniques and tools needs to be balanced with other competing rights and interests of individuals and the general public.

As the use of special investigation techniques and tools are intrusive and invasive in nature and susceptible to misuse or abuse, it is necessary to ensure that they are used only in cases of serious crimes in circumstances that justify such use and as a measure of last resort.[66] With regard to electronic surveillance, it has been noted:

> The use by law enforcement of electronic surveillance should not be an investigative tool of first resort, instead its use should be considered when other less intrusive means have proven ineffective or when there is no reasonable alternative to obtain crucial information or evidence. Even when electronic surveillance is appropriate, it will generally need to be used in conjunction with other investigation methods in order to be most effective.[67]

Given their immense adverse effects on fundamental rights and liberties, the use of special investigative techniques and tools should not be granted liberally. Besides threatening the right to liberty, right to privacy, freedom of speech and expression, covert investigations may "pose significant threats to the principles of legality and

[64] Such as whistleblower protection, access to financial records, granting of immunity or sentence reduction mechanisms to those criminal participants who willingly expose and provide valuable evidence of criminal commission (divide and rule tactics).

[65] See, for instance, Joubert, *supra* note 9, at 19; Maguire and John, *supra* note 1, at 318; Moonen, *supra* note 13, at 100; Wagner and Jacobs, *supra* note 2, at 218-234; Harfield, *supra* note 9, at 782; Wamsley, *supra* note 9, at 183.

[66] Harfield (*supra* note 9, at 778) thus opines: "The arena of covert investigation is potentially *more vulnerable*, since such investigation, by definition, cannot be challenged by the subject of the investigation in ways that overt investigation powers can be." See also Choo, *supra* note 1, at 133; Joh, *supra* note 2, at 157; Courtney, *supra* note 23, at 4; Vervaele, *supra* note 9, at 75; Moonen, *supra* note 13, at 98-102; Young, *supra* note 12, at 1039; Sorell, *supra* note 12, at 5-6; Ross, *supra* note 8, at 494 & 572. Young (at 1039) notes the risks of *misuse* inherent in the various applications of surveillance technologies by law enforcement authorities.

[67] *Current practices in electronic surveillance*, *supra* note 32, at 1.

fairness, as well as the public interest in upholding public confidence in the administration of justice."[68] Hence, it has been noted:

> States must ensure that sanctioned investigative techniques do not encroach upon human rights. Special investigative techniques must not break the law and, in particular, must respect the right to a fair trial and the right to property. Electronic surveillance (such as wiretapping, interception of telecommunications and access to computer systems) must normally be approved by a court. [….].[69]

It has further been opined:

> When conducting undercover operations, law enforcement officials must be careful not to open themselves to charges of incitement (entrapment); that is, they must avoid influencing a person to commit an offence that he or she would not otherwise have committed.[70]

It is crucially important to ensure that the use of such techniques and tools are only allowed in serious criminal cases, and even in those serious criminal cases, only when the normal or regular or conventional investigation methods are found insufficient to effectively fight those criminal commissions.[71] It is also necessary to ascertain that the use of any specific kind of special investigation technique and tool is compatible with internationally recognized human rights standards and other shared societal values in specific contexts. In addition, it is imperative to ensure that any of such techniques and tools is not creating opportunities or loopholes for overzealous and unscrupulous law enforcement authorities and undercover agents to misuse or abuse the processes at work.[72] There should be a system of legal constraints and adequate safeguards against misuse wherein surveillance (and other special investigative mechanisms) may only be used when all other tools have either been exhausted or

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[68] Bronitt, s*upra* note 9, at 36. Furthermore, those who participate in special investigative techniques may go beyond what is authorized and may act contrary to law; they may engage in corruption scandals (See Joubert, s*upra* note 9, at 18).

[69] International Council on Human Rights Policy, s*upra* note 56, at 67.

[70] *Id.*

[71] Moonen, s*upra* note 13, at 102; Harfield (s*upra* note 9, at 774) opines: "Just because some method can be used does not mean it should be used."

[72] Moonen, s*upra* note 13, at 102 (noting that the Committee of Ministers of the Council of Europe maintained in 2005 that "special investigation techniques should only be used where there is sufficient reason to believe that a serious crime has been committed or prepared, or is being prepared, by one or more particular persons or an unidentified individual or group of individuals. Proportionality between the effects of the use of special investigation techniques and the objective that has been identified should be ensured." In this respect, when deciding on their use, an evaluation in the light of the seriousness of the offence and taking account of the intrusive nature of the specific special investigation technique used should be made. There need to be sufficient reasons to believe that the individual is involved in the commission or likely commission of specified serious offences (*Id.*). Courtney (s*upra* note 23, at 5-6) also observes: "Electronic surveillance has an almost unlimited potential for abuse when it strays from the criminal to the political arena. […] It can be used to discredit a political opponent or to destroy dissent. When surveillance tools in the hands of the government are used to stifle political opposition, democracy itself suffocates."

proven inefficient.[73] Sorell writes: "Special investigation measures should be used only when the prevention or prosecution of serious crime requires it, and not in a way that conflicts with the right of anyone arrested to a fair trial. Where there is a choice of measures, the less intrusive should be preferred."[74] Emphasizing their impact on right of privacy, Courtney also writes:

> Lurking beneath the legal aspects of privacy is the very real fear that if the technology of 'Big Brother' is allowed to interfere with our lives with impunity, human interrelationships as we know them today would be impossible. The control of private information is highly important because through the exchange of such information, relationships such as friendships, trust and love are born. If private information, once communicated, is open to unrestrained scrutiny, one would be deterred from sharing such information. Few people could fall in love if they suspected that conversations in their apartments were monitored by the police, in the park by their business competitor, and in that dimly lit romantic restaurant by the Internal Revenue Service. Viewed in this light, invasions of privacy amount to dehumanizing conduct in a very real and personal way.[75]

In respect of undercover agents, it has been further noted: "It is unfair under the right to a fair trial to prosecute an individual for a criminal offence incited by undercover agents, which, but for the incitement, would probably not have been committed."[76]

In many jurisdictions covert surveillance and undercover operations are thus considered as subsidiary means or as mechanisms of 'last resort'.[77] And, such techniques are said to be acceptable only if adequate and sufficient safeguards against abuse are put in place. As noted by many writers including Nilsson, Moonen, Stariene, Young as well as Friedland,[78] it is essential to have a clear and foreseeable procedure for authorizing, implementing and supervising the specific measures that are intended to be used. It is also necessary to adopt sufficient legislation in order to provide police officers and other law enforcement authorities engaging in such activities with guidelines that will help them stay within the scope of what is generally acceptable in a democratic society abiding by the principles of the rule of law and respect for human rights.

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[73] Young, *supra* note 12, at 1044 (noting that there is risk that these technologies will be used improperly or illegally, whether for gathering evidence or intelligence).

[74] Sorell, *supra* note 12, at 5-6.

[75] Courtney, *supra* note 23, at 4.

[76] THE OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (ODIHR), COUNTERING TERRORISM, PROTECTING HUMAN RIGHTS: A MANUAL 187 (2007).

[77] Moonen, *supra* note 13, at 135; Ross, *supra* note 8, at 494.

[78] See Nillson, *supra* note 13, at 45; Moonen, *supra* note 13, at 101-102; Stariene, *supra* note 9, at 264; Young, *supra* note 25, at 1092-1098 and M.L. Friedland, *Controlling Entrapment,* 32 U. TORONTO L.J. 29-30 (1982). See also International Council on Human Rights Policy, *supra* note 56, at 67-68.

2. Legal Basis for the Use of Special Investigation Techniques and Tools in Ethiopia

Ethiopia, like any other country, should stay abreast of global trends in all essential spheres of activities including in the fight against serious crimes - whether these crimes are of local, regional/continental, transnational or international nature. It is actually one of the responsibilities of the Ethiopian government to protect public interests and to ensure the safety and security of individuals and groups within its territory.

Also, as explicitly recognized in the preambles of the Anti-Terrorism Proclamation,[79] the Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation,[80] the Corruption Crimes Proclamation[81] as well as the recent Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Proclamation,[82] Ethiopia is duty bound to play its own part in the fight against those global, regional/continental and transnational serious crimes posing danger to peace, security, development and financial systems. Improving and enhancing methods of law enforcement is one such element to carry out the responsibility of the government and to protect public interest. This may involve or include the use of special investigation techniques and tools for the prevention, detection, investigation and prosecution of those crimes identified to be serious enough to warrant the use of such techniques and tools. This point appears to be well-noted in the Criminal Justice Policy of Ethiopia.[83]

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[79] The Anti-Terrorism Proclamation No. 652/2009, *Federal Negarit Gazeta, 15th Year, No. 57*.

[80] The Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation No. 780/2013, *Federal Negarit Gazeta, 19th Year, No. 25*.

[81] The Corruption Crimes Proclamation No. 881/2015, *Federal Negarit Gazeta, 21st Year, No. 36*.

[82] The Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Proclamation No. 909/2015, *Federal Negarit Gazeta, 21st Year, No. 67*.

[83] See Section 3.17 (at 20) of the Criminal Justice Policy of the Federal Democratic Republic of Ethiopia (Yekatit 25, 2003 E.C). It has been stipulated as follows:

> ከጊዜ ወደ ጊዜ ከባድ፣ ውስብስብ እና ዓለም አቀፋዊ ባሕርይ ያላቸውን የወንጀል ድርጊቶች ለመከላከል እና አፈፃፀማቸውን በበቂ ማስረጃ አስደግፎ ለማውጣት አንዲቻል ዘመናዊ የሆኑ የምርመራ ቴክኒኮችን በወንጀል ፍትሕ ሥርዓቱ ውስጥ ማስተዋወቅና አሠራሩንም አግባብ ባላቸው ሕጎች የተደገፈ ማድረግ አስፈሊጊ ነው። በወንጀል ምርመራ ሂደት በሕግ ዕውቅና ከሚሰጣቸው ልዩ የምርመራ ቴክኒኮች እና ዘዴዎች መካከል በተለያዩ የኤሌክትሮኒክስ መሣሪያዎች እና ሌሎች መንገዶች ማስረጃዎችን መሰብሰብና በስውር ክትትል ማድረግ፣ ማንነትን ደብቆ ወይም በሌላ ሽፋን የተደራጁ የወንጀል ቡድኖች ውስጥ ሠርጎ መግባት፣ የተለያዩ የይምሰል ሕጋዊ ግንኙነቶችን ከተጠርጣሪው ጋር በመፍጠር ወይም በማከናወን ማስረጃ ማሰባሰብ እና የመሳሰሉት ሊጠቀሱ ይችላሉ።
>
> In order to be able to prevent the commission of certain sophisticated, complex and trans-boundary crimes and with a view to prosecute such crimes, in *post facto* circumstances, with sufficient evidence, it is necessary to embed modern special criminal investigation techniques within the criminal justice system of the country with an appropriate legal framework thereto. In this regard there are currently some newly evolving techniques and methods that attained legal recognition. With the appropriate legal framework, law enforcement authorities may venture to gather and collect evidence using special criminal investigative techniques and methods such as electronic surveillance, covert surveillance, infiltration and the like. (Translation by the author).

Thus, this Section will briefly present the legal basis for the use of special investigation techniques and tools in Ethiopia in order to effectively fight those crimes identified to be very serious and dangerous, i.e., terrorism, corruption, money laundering and financing of terrorism, trafficking in human beings, and computer crimes.

2.1. Some practices involving the use of special investigation techniques and tools

As is the case in other jurisdictions, we are currently witnessing an expanding use of special investigation techniques and tools by the different law enforcement authorities in Ethiopia in their fight against some serious crimes. Specialized bodies such as the Federal Ethics and Anti-Corruption Commission, the National Intelligence and Security Service, the Ethiopian Revenue and Customs Authority and the regular police have been engaging in conducting covert surveillance and undercover operations until very recently. There were some cases that reached to courts of law which could prove this fact. For instance, in *Federal Ethics and Anti-Corruption Commission vs- T. case*,[84] the accused, a First Instance Court Judge at the time, was put under arrest on 24 Tahisas 1998 E.C. (and later on convicted) as per the covert surveillance by undercover police officers while the accused was allegedly receiving bribe. Similarly, in *Federal Ethics and Anti-Corruption Commission vs- Sh. Case*,[85] undercover police officers of the Federal Ethics and Anti-Corruption Commission were reported to have put the accused (a High Court judge at the time) under arrest on 18 Tir 1998 E. C. while the latter was receiving bribe. As can be read from the court case, undercover police officers were conducting surveillance against the accused after a complaint was made to the Federal Ethics and Anti-Corruption Commission. The undercover police officers put the accused under arrest after his long conversation was eavesdropped (with the alleged victim) via a recording electronic device and as soon as he received birr 7,000 as bribe. The court case further illustrates that the prior repeated phone calls between the accused and the private complainant (pen register and trap and trace) were obtained from the Ethiopian Telecommunication Corporation and submitted as evidence against the accused. As a result, the accused was convicted for committing corruption offence.

One may also refer to *Tarekegn G/Giorgis et al vs- Ethiopian Revenue and custom Authority* case[86] as well as the *Girma Tiku vs- Federal Ethics and Anti-Corruption Commission* case[87] where covert surveillance and undercover operations were to some

[84] See File No. 44152 of the Federal High Court at Addis Ababa.

[85] See File No. 44612 of the Federal High Court at Addis Ababa.

[86] Cassation Criminal File No. 48850, 10 FEDERAL SUPREME COURT OF ETHIOPIA, CASSATION DECISIONS 189-191 (2003 E.C.).

[87] Cassation Criminal File No. 51706, 10 FEDERAL SUPREME COURT OF ETHIOPIA, CASSATION DECISIONS 211-218 (2003 E.C.).

extent used to detect, investigate, prosecute and/or prove/disprove corruption and value added tax related criminal commissions.

Now the crucial issue that needs to be addressed is the legal basis for the use of such secretive and deceptive investigation methods in Ethiopia. Do we have laws empowering law enforcement authorities to employ such special investigation techniques and tools? If yes, do these laws sufficiently provide the conditions or circumstances for the use of these techniques and tools? Do they also provide for limits on their use? These and related issues will be addressed below.

2.2. The legal framework for the use of special investigation techniques and tools

I shall begin with *corruption offences*.[88] In this regard we have the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005.[89] Art 46 of this Proclamation explicitly grants the power to intercept correspondences and letters for the investigation of corruption offence. Sub (1) of this article stipulates:

> Where it is necessary for the investigation of corruption offence, head of the appropriate organ [Federal or Regional State Organ which is empowered to investigate and/or prosecute corruption offences] may order the interception of correspondence by telephone, telecommunications and electronic devices as well as by postal letters.

As per this provision it was possible for the Federal and Regional Ethics and Anti-corruption commissions, and it is possible today for the Federal Attorney General[90], to use special investigative techniques and tools with a view to detect, investigate and prosecute corruption offences.[91] These techniques can involve various forms of

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[88] For the details of what constitutes or establishes corruption offences in Ethiopia refer to Part Two (Arts 9-32) of the Corruption Crimes Proclamation No. 881/2015, *Federal Negarit Gazeta, 21st Year, No.36*.

[89] *Federal Negarit Gazeta, 11th Year, No.19*. Although this proclamation is recently amended by the Revised Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No.882/2015, there is nothing new or altered issue in respect of the part that deals with special investigation techniques and tools. Nevertheless, criminal investigation and prosecution powers and duties given to the Commissioner of the Federal Ethics and Anti-corruption Commission under its establishment Proclamation No 433/2005 (as amended by Proclamation No. 883/2015) and the Revised Anti-corruption Special Procedure and Evidence Proclamation No. 434/2005 (as amended by Proclamation No. 882/2015) are given to the head of the Federal Attorney General. See Art 8 (2) (b) of the Federal Attorney General Establishment Proclamation No. 943/2016, *Federal Negarit Gazeta, 22nd Year, No.62 (May, 2016)*.

[90] As per Art 7 (1) (b) and Art 22 (2)-(5) of the Federal Attorney General Establishment Proclamation No. 943/2016, the Federal Attorney General is granted with the power to exercise those criminal investigation and prosecution powers and duties that were given to the Commissioner of the Federal Ethics and Anti-Corruption Commission as well as that of the Director General of the Ethiopian Revenues and Customs Authority.

[91] This proclamation does not say anything if these bodies could also use such techniques and tools for preventive purposes. As the law stands now, it grants such power "for *investigation* of corruption offence" and for prosecution (as implied by the admissibility of the evidence gathered through such techniques and tools) of the same. Yet, there is no plausible reason to confine the use of these techniques and tools only to *post facto*

undercover and surveillance operations. These may include interception of wire communications (wire-tapping), oral communications, wireless communications, electronic communications (eavesdropping), and/or communications made through postal letters. As sub (2) of Art 46 makes it clear, evidence obtained and gathered through "video camera, sound recorder, and similar electronic devices" can serve to establish criminal commission by accused persons. As can be inferred from the reading of Art 45, it is also possible to access computer or computer database. As the use of such methods and tools helps intensifying the fight against corruption and enhancing the efficiency of the criminal process in the country, having such legislative basis is timely and appropriate. This law could have further explicitly included methods such as undercover operations, controlled delivery, integrity testing/entrapment and establishment of simulated relationships as it did for the interception of correspondence and postal letters and accessing of computers and computer data.

But, under what circumstances could Federal and Regional ethics and anti-corruption commissions have used, and now the Federal Attorney General as per Arts 7 (1) (b) and 22 (2)-(5) of Proclamation No. 943/2016 and possibly (as per the recent ongoing efforts to re-organize public prosecution institutions in regional states paralleling the changes at the Federal level) the respective Attorney General of Regional States can use such techniques and tools? And, what limits are put in their use? For example, are there any legislative restrictions or constraints that relate to the use of surveillance devices? Given the invasive and pervasive nature of such techniques and tools as well as the possibility to misuse/abuse such processes, it is vital to seriously consider these questions.

In this regard, Art 46 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation provides that such special investigation techniques and tools may be used "where it is necessary for the investigation of corruption offence". The expression "where it is necessary" leaves wide room for the head of the appropriate organ to determine *when* and *what technique* and *what tool* to use. There are no indicative factors or objective tests for the determination of the use of such techniques and tools as "necessary" by the head of appropriate organs. Also, this provision does not explicitly state as to whose correspondence and letters may be targets or objects of such interception. Although it is obvious that a suspect's correspondence with other persons is likely to be the main target, there is no clear limitation put against resorting to other persons. This may invite a trial-and-error approach to be adopted. Whether such a measure against other persons is "necessary for the investigation" is simply to be determined by the heads of the appropriate organs on a case-by-case approach. There are no guidelines or directives which help such heads to arrive at a reasonable administrative decision in this regard. There is no means or parameter to know if such heads are abusing their discretionary power.

circumstances. The fight against this public cancer rather would be more intensified and fruitful if such methods are used in the preventive and control activities.

Also, courts are not empowered to supervise and check the reasonableness and proportionality of such orders. Even the head of the appropriate organ is not required to first check if the conventional methods of investigation may be sufficient to attain the desired outcome before resorting to those special investigative techniques and tools. The only limit provided under sub (3) of Art 46 is on the duration of the interception which may not normally exceed four months. From the foregoing, it is possible to gather that the Federal and Regional States' Ethics and Anti-Corruption Commissions, the Federal Attorney General and perhaps the Attorneys General of the respective regional states, are/is granted with sweeping powers to investigate crimes involving corruption offences using special investigation techniques and tools without any supervision and check from judicial bodies.

On the other hand, we do not find any express authorization granted by the legislature for relevant law enforcement authorities to use special investigation techniques and tools in tax related offences which includes tax evasion, in VAT offences, as well as in customs offences.[92] So, one may question the legality of resorting to such undercover and covert surveillance operations in VAT and customs offences. Perhaps, one may argue on the basis of the gravity and impacts of such crimes against public interest to justify the use of such techniques and tools. Yet such an appraisal and attendant determination falls within the province of the law-making organs. The decision to authorize the use of special investigation techniques and tools should come following such determination by the appropriate legislative organ(s). It is to be recalled that the impacts or threats of the use of such techniques and tools on the enjoyment of human rights and fundamental freedoms and other societal values are huge. There are also risks of abuse or misuse. Using such techniques and tools without any legislative guidance may put many constitutional values and fundamental interests in jeopardy.[93] Such an approach may even stand in clear contradiction to some explicitly stipulated constitutional provisions. In respect

[92] For example, there are no such enabling provisions in the Value Added Tax Proclamation No. 285/2002, *Federal Negarit Gazeta, 8th Year No. 33* as well as in the Value Added Tax (Amendment) Proclamation No. 609/2009, *Federal Negarit Gazeta, 15th Year No. 6*, in the Customs Proclamation No. 859/2014, *Federal Negarit Gazeta, 20th Year No. 82*, and in the Federal Tax Administration Proclamation No. 983/2016, *Federal Negarit Gazeta, 22nd Year, No. 103*. See the respective proclamations for the details of what constitutes or establishes VAT offences, customs offences and tax offences. For *VAT offences* refer to Section 12 (Arts 48-58) of Proclamation No. 285/2002 and Art 2 (18) of Proclamation No. 609/2008; for *customs offences* refer to Part Seven, Chapters One and Two (Arts 156-173) of Proclamation No. 859/2014; and, for *tax offences* including *tax evasion* refer to Part Fifteen, Chapter Three (Arts 116-132) of Proclamation No. 983/2016. Furthermore, note that the power given to the Director General of the Ethiopian Revenues and Customs Authority under its establishment Proclamation No. 587/2008 and Customs Proclamation No. 859/2014 to conduct criminal investigation and prosecution is transferred to the Federal Attorney General (Art 8 (2) (b) of the Federal Attorney General Establishment Proclamation No. 943/2016).

[93] Quoting other authors, Colquitt (*supra* note 19, at 1397 (footnote 50)), for instance, writes "undercover proactive police operations 'using a variety of unorthodox tactics gives officers an enormous amount of discretion... [and without supervision an] opportunity to harass, entrap, and otherwise violate a citizen's rights'."

of right of privacy, for example, Art 26(3) of the Constitution of Federal Democratic Republic of Ethiopia provides:

> No restrictions may be placed on the enjoyment of such rights [right of privacy] except in compelling circumstances and *in accordance with specific laws* whose purposes shall be the safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others [emphasis added].

Following an appraisal of the gravity and impacts of such crimes, it is necessary to promulgate appropriate specific laws directed to addressing identified problems.

Even when there are specific laws authorizing the use of special investigation techniques and tools in such cases, it is necessary that the legislative body has provided at least some minimum legal restrictions. Among other things, restrictions on conditions of use, when and how long to use, the requirement of prior authorization from courts or other independent bodies, preference to use the less intrusive techniques and tools, proportionality requirement, etc., need to be considered and stipulated ahead of the real practice.[94] Writing in the context of Member States of the European Union, Nilsson notes:

> The use of a special investigation method in proactive criminal investigations is […] sensitive from the point of view of protecting individual liberties but it appears that in many Member States of the European Union this is a possibility under certain conditions, such as that there should be a legal framework for the method and that there is adequate control, in particular judicial control. In addition, there must be a reasonable suspicion that an offence will be committed and that the investigation method is used exceptionally. In particular the safeguarding of public order needs to be taken into account. There is ample case law from the European Court of Human Rights in relation to when a reasonable suspicion arises. There must be an existence of facts or information which will satisfy an objective observer that the person concerned may have committed the offence.[95]

What has been observed in the context of the members of the European Union applies equally, if not more, to Ethiopia - a country having governmental institutions and officers less accustomed to many democratic values including the rule of law and accountability. It will not be amiss to recall what Courtney has noted in respect of the potential and loophole which electronic surveillance creates for

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[94] For the practice and jurisprudence of other jurisdictions employing special investigative techniques and tools for specifically identified offences see, for instance, Bronitt, s*upra* note 9, at 35 ff; Giurea, s*upra* note 2, at 137-138; Nilsson, s*upra* note 13, at 42. It has also been noted (see International Council on Human Rights Policy, s*upra* note 56, at 67): "Electronic surveillance (such as wire-tapping, interception of telecommunications and access to computer systems) must normally be approved by a court. Under no circumstance can electronic surveillance be ordered solely on the authority of the police, the prosecution service or an anti-corruption law organization."

[95] Nilsson, s*upra* note 13, at 42.

governmental authorities to abuse or misuse the process to discredit political opponents or to destroy dissent and in effect to suffocate democracy itself.[96]

When we consider crimes of terrorism, money laundering and financing of terrorism as well as trafficking in human beings and smuggling of migrants, we have relevant specific laws in Ethiopia that authorize the use of special investigation techniques and tools in each of the cases.

In respect of *crimes of terrorism*[97] Arts 14, 17 and 18 of the Anti-Terrorism Proclamation expressly stipulate about the use of such techniques and tools. Sub (1) of Art 14 in particular proclaims that in order to prevent and control a terrorist act the National Intelligence and Security Service may, upon getting court warrant:

> (a) intercept or conduct surveillance on the telephone, fax, radio, internet, electronic, postal and similar communications of a person suspected of terrorism;
> (b) enter into any premise in secret to enforce the interception; or
> (c) install or remove instruments enabling the interception.

To use special investigation techniques and tools in cases of crimes of terrorism, unlike in cases of corruption offences, it is necessary first to obtain an authorization or permission from a court of law. Legally speaking, authorities of the National Intelligence and Security Service cannot *intercept* or *conduct surveillance* on the "telephone, fax, radio, internet, electronic, postal and similar communications" of any person who is not suspected of engaging in some terrorist activity.[98] Such

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[96] See what has been quoted at footnote 69 above (Courtney, s*upra* note 23, at 5-6).

[97] For the details of what constitutes or establishes crimes of terrorism and related crimes in Ethiopia refer to Part Two (Arts 3-12) of Proclamation No. 652/2009.

[98] Incidentally, it is imperative to note, by way of a passing remark, that the Anti-Terrorism Proclamation of Ethiopia lists out in very broad and vague terms the activities that constitute crimes of terrorism and those other related crimes under Part Two, from Art 3 through Art 12. This Part is vehemently criticized from many corners for employing *very broad* and *ambiguous terms* which expose individuals and groups for a lot of uncertainties and for executive political manipulations and oppressive measures. Unlike the experience of some source countries such as Canada's Anti-Terrorism Act of 2001, UK's Terrorism Act of 2000 (which later on was amended by the Anti-terrorism, Crime and Security Act 2001, and subsequently by Terrorism Act of 2006), the Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 and the Criminal Code Amendment (Terrorism) Act 2003 and the Criminal Code (Terrorist Organizations) Act 2004 of Australia, the Ethiopian Anti-Terrorism Proclamation regrettably fails to include an *exception clause* that explicitly mentions acts such as advocacy activities, strikes and lockouts, demonstrations and protests, etc., that would fall outside of the purview of proscribed activities. Even it is very doubtful if law enforcement authorities and court judges in practice are paying good attention to the specific *actus reus* and *mens rea* elements and the *specific circumstances* thereof which Art 3 or any other provision of the Ethiopian Anti-Terrorism Proclamation entrench in order to establish a crime of terrorism proper or a related offence. For instance, in order for an activity to fall within the definition of terrorism under Art 3, there should be an act of *coercion of the government*, or *intimidation of the public/section of the public*, or there should be an act *of destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country* or there should be such *threats*. That is not sufficient. In addition, it must be shown that such acts are designed "to coerce the government" or "to intimidate the public or a section of the public" for the purpose of advancing a "political, religious, or ideological cause." As discussions are underway currently between the ruling party, the Ethiopian Peoples' Revolutionary Democratic Front on the one hand, and some opposition political parties, on the other, with a view to amend this Proclamation, there is some

measures are to be effected only against "a person suspected of terrorism" and surveillance may be carried out only if a court of law grants permission to the National Intelligence and Security Service.[99] This provision, of course, fails to provide some grounds or clues that enable courts of law to decide upon whether or not to grant warrant of surveillance to the applicant body. It is not clear whether 'mere suspicion' that a person is engaged in some terrorist act or that a 'probable cause' exists showing the involvement of such a person has to be established by the applicant in order for the court to issue the warrant. Also, assessing if the conventional methods of investigation may be sufficient to obtain the desired outcome is not stipulated as a precondition to issue a warrant. Further still, the court is not instructed to check on whether less forms of intrusive techniques and tools can work out in each case before issuing a warrant upon request.

Unlike those cases of interception of correspondences stipulated under Art 14, Arts 17 and 18 of the Anti-Terrorism Proclamation put stricter *preconditions* and *limitations* for the issuance of court warrant to execute physical covert search. Art 17 requires that, unless in urgent cases, the police need to submit to a court of law a written application demanding for a permission to conduct covert search. The police are required to show "reasonable grounds".[100] Art 18 then sets out those points that should be taken into consideration by the court either to grant or not to grant the covert search warrant: namely, "the nature or gravity of the terrorist act or the suspected terrorist act", and "the extent to which the measures to be taken in accordance with the warrant would assist to prevent the act of terrorism or arrest the suspect". Sub (2) of this provision provides the things that should be included in the warrant including the premise to be searched, the names of occupiers, the maximum duration the warrant remains valid and the description of the evidence to be seized. These requirements and limitations help minimizing, if not eliminating, likely overzealous or unscrupulous motions of police officers.

In the opinion of this author, Art 14 should have been drafted in the manner that Arts 17 and 18 are drafted as interception of correspondences under Art 14 ["telephone, fax, radio, internet, electronic, postal and similar communications"] bear no less, if not more, impacts on the enjoyment of human rights and fundamental freedoms such as right of privacy. The "reasonable grounds"

hope that such and related problems inhering in the proclamation will be addressed. As things stand now, there is an apparent need for enhancing judicial capability, judicial activism and the operationalization of the principle of separations of powers and its counterpart checks and balances to properly comprehend or understand the nature and scope of acts of terrorism and to correctly apply the Anti-Terrorism Proclamation. Despite the regrettably explicit exclusionary omission, no one should confuse those advocacy activities, strikes and lockouts, demonstrations and protests, etc., with those activities that properly fall within the purview of the legislatively proscribed acts of terrorism or related acts constituting punishable crimes.

[99] Art 14 (4) provides that "the National Intelligence and Security Services or the police may gather information by surveillance in order to prevent and control acts of terrorism."

[100] Reasonable grounds to believe that "a terrorist act has been or is likely to be committed", or "a resident or possessor of a house to be searched has made preparations or plans to commit a terrorist act" and that "covert search is essential to prevent or to take action against a terrorist act or suspected terrorist activity."

requirement, the points or factors that need to be considered and assessed by the court either to grant or not grant the requested warrant, and the things that should be included in the warrant and the maximum period for which such warrant remains valid should have been included under Art 14.

Arts 25 and 26 of the Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation also expressly provide for the use of special investigative techniques and tools in *crimes of money laundering and financing of terrorism*.[101] Art 26 deals with undercover operations and controlled delivery. To carry out undercover operations or a controlled delivery sub (2) of Art 26 requires prior authorization by a court of law. Sub (3) further prohibits the inducing of a target person to commit money laundering or financing of terrorism crimes.

Art 25(1) of this Proclamation, on the other hand, provides that courts of law may authorize crime investigation authorities, for a specific period, to:

(a) monitor bank accounts and other similar accounts;
(b) access computer systems, networks and servers;
(c) place under surveillance or to intercept communication;
(d) take audio or video recording or photographs of acts, behaviors and conversations; and,
(e) intercept and seize correspondence.

Yet, such techniques and tools are not as such easily available methods for investigating authorities to resort to at their will. The authorization or permission of courts cannot easily be obtained without first satisfying judges about the existence of some reasonable grounds. Sub (2) of Art 25 expressly stipulates that such techniques and tools "shall only be used when there are serious indications that such accounts, computer systems, networks and servers, telephone lines or documents are or may be used by persons suspected of participating in money laundering or financing of terrorism." Before granting permission for investigative authorities to execute any of the activities indicated above, judges are required to check the existence of 'serious indications'. If they are satisfied about the existence of 'serious indications', they authorize investigators to execute the identified measures and the purpose must be in order to authorize investigators to gather evidence or to trace proceeds of crimes.

Similarly, Art 18 of the Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Proclamation allows the use of special investigative techniques and tools in the *crimes of human trafficking and smuggling of migrants*.[102] The Police are allowed to infiltrate suspected criminals, criminal groups or

[101] For the details of what constitutes or establishes crimes of money laundering and financing of terrorism in Ethiopia refer to Part Five (Arts 29-33) of Proclamation No. 780/2013.

[102] For the details of what constitutes or establishes crimes of human trafficking and smuggling of migrants in Ethiopia refer to Part Two (Arts 3-13) of Proclamation No. 909/2015.

organization, to conduct surveillance against suspects, to intercept private communications of suspects, to create simulated legal relationship, or to use any other appropriate special investigative techniques. In the case of interception of private communications, police officers are required to get an authorization from a court of law, save in compelling circumstances.[103]

Further still, the House of Peoples' Representatives has issued a specific and new Computer Crime Proclamation in 2016[104] that endorsed the use of special investigative techniques and tools. As stated in the Preamble of this proclamation, it has become "necessary to incorporate new legal mechanisms and procedures in order to prevent, control, investigate and prosecute computer crimes" and to "facilitate the collection of electronic evidence" for the successful fight against computer crimes.[105] Accordingly, Part Three of the Proclamation deals with 'Preventive and Investigative Measures'. It begins, under Art 21, by providing for the principle as follows:

> The prevention, investigation and evidence procedures provided in this Part and Part Four of this Proclamation shall be implemented and applied in a manner that ensure protection for human and democratic rights guaranteed under the Constitution of the Federal Democratic Republic of Ethiopia and all international agreements ratified by the country.

This is a commendable approach which puts, in explicit terms, human and democratic rights as the anchor points on which the overall implementation and application of this law is founded. Law enforcement authorities and judicial bodies should recognize and respect this clear and legitimate guidance that goes in line with the Bill of Rights entrenched in the Constitution.

After providing for the above general principle, the law grants investigatory organs - the public prosecutor and the police – the power "to intercept in real-time or conduct surveillance, on computer data, data processing service, or internet and other related communications of suspects", and to "search or access physically or virtually any computer system, network or computer data" in cases where it is found necessary to

[103] In compelling circumstances and in cases where there is no other means to obtain required evidence, the police may obtain permission from the Minister of Ministry of Justice [currently the Head of the Federal Attorney General] to intercept private communication (and this needs to be submitted within 72 hours to the President of the Federal High Court for approval). Whether this submission to the President of the Federal High Court will really provide a meaningful scrutiny and review mechanism is yet to be seen in practice.

[104] The Computer Crime Proclamation No. 958/2016, *Federal Negarit Gazeta, 22nd Year, No. 83*. For the details of what constitutes or establishes computer crime in Ethiopia as per this proclamation refer to Part Two (Arts 3-19).

[105] Art 2 (1) of this Proclamation provides definition for 'computer crimes'. As can be observed, this encompasses a crime committed against a computer, computer system, computer data or computer network; conventional crime committed by means of a computer, computer system, computer data or computer network; Illegal computer content data disseminated through a computer, computer system, or computer network.

prevent computer crimes and for computer crime investigation to collect evidence.[106] Pursuant to Art 25(1), to prevent computer crimes and collect evidence related information, the investigating organ may request court warrant to intercept[107] in real-time or conduct surveillance, on computer data, data processing service, or internet and other related communications of suspects. In such cases, the court shall decide on the application as well as determine the relevant organ that could execute interception or surveillance as necessary. Sub (2) of the same article underscores that such an application and determination "shall only be applicable when there is no other means readily available for collecting such data and this is approved and decided by the Attorney General." Nevertheless, the Attorney General may give permission to the investigating organ to conduct interception or surveillance without court warrant *where there are reasonable grounds and urgent cases to believe* that a computer crime that can damage critical infrastructure is or to be committed.[108] In such circumstances, the Attorney General is duty bound to present the reasons for interception or surveillance without court warrant to the President of the Federal High Court within 48 hours.

On the other hand, Art 31(1) of this Proclamation authorizes the investigating organ to apply to the court to obtain or gain access to that computer data where a computer data under any person's possession or control is reasonably required for purposes of a computer crime investigation. And, the court may, without requiring the appearance of the person concerned, order the person who is in possession or control of the specified computer data, to produce it to the investigatory organ or give access to same if it is satisfied with the application of the investigating organ.

3. Human Rights Concerns Arising from the Use of Special Investigation Techniques and Tools in Ethiopia Today

As can be learnt from the experience of other countries and as highlighted above, the use of special investigation techniques and tools is susceptible to abuses and misuses especially from governmental authorities. It gives opportunities for "spying" on the activities and conversations of individuals. Using the pretext of criminal prevention or criminal investigation there is the possibility for law enforcement authorities and

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[106] See Arts 25, 31 and 32 of the Computer Crime Proclamation. Art 2 provides definitions for computer data, computer or computer system, data processing service as well as network. *Computer data* refers to "any content data, traffic data, computer program, or any other subscriber information in a form suitable for processing by means of a computer system"; *computer or computer system* refers to "any software and the microchips technology based data processing, storage, analysis, dissemination and communication device or any device that is capable of performing logical, arithmetic or routing function and includes accessories of that device"; *data processing service* means "the service of reception, storage, processing, emission, routing or transmission of data by means of computer system and includes networking services", and *network* signifies "the interconnection of two or more computer systems by which data processing service can be provided or received".

[107] As defined under Art 2 (12), interception refers to "real-time surveillance, recording, listening, acquisition, viewing, controlling or any other similar act of data processing service or computer data."

[108] See Art 25(3).

other undercover agents/informants to strain individual and social life by interfering into the realm of private life and other lawful activities. For different reasons such as for political interests, personal feuds or animosity some may use the law for wrongful and illegitimate ends. Covert interceptions of the conversations and activities of citizens, tailing, tracking and monitoring of the activities, movements and relationships of individuals, accessing of computers and databases or other storage devices, bank accounts, luring of individuals and groups to engage into a criminal activity or playing "dirty games", deceiving others with the ulterior motive of trapping them, etc., are by themselves the most invasive and intrusive measures. These are big concerns for any country such as Ethiopia that resort to the use of some special investigation techniques and tools. Yet, as noted above, the use of such techniques and tools has become "a necessary evil" due to actual and perceived threats that countries are facing from time to time ranging from national security dangers like terrorism or political and religious extremism to organized crime, drug trafficking, corruption, trafficking in human beings and cyber-crimes.

As noted above, Ethiopia has introduced these new techniques and tools to intensify the fight against some serious crimes such as corruption, terrorism, money laundering and financing of terrorism, trafficking in human beings and smuggling of migrants and computer crimes.[109] The statutory entrenchment of some special techniques and tools appears appropriate to enhance the fight against the perpetration of those crimes and to effectively and efficiently prevent, detect, investigate and prosecute individuals and groups engaging in the commission of any of these crimes.

However, there are serious concerns that such techniques and tools pose threat to fundamental rights and freedoms. As can be gathered from the foregoing brief analysis, there are no statutory and institutional frameworks which authorize and regulate the use of any special investigation techniques and tools in the crime of tax evasion, VAT offences as well as customs offences. But there are instances where undercover operations and covert surveillance have been deployed in such cases.[110] Running undercover operations and conducting covert surveillance without any legal basis and guiding statutory norms is very dangerous. The lack of independent scrutiny and review mechanisms could exacerbate the problem. Innocent individuals and business entities working lawfully may be exposed to ill-motivated ends. In

[109] The Criminal Justice Policy of the Federal Democratic Republic of Ethiopia envisages the possible use of such techniques in serious crimes which could be committed in complex ways as well as in transnational fashion. As the Policy document explicitly enunciates, the deployment of any special investigation techniques and tools is contingent upon the *prior issuance of detailed laws* that guide and regulate such activities or operations (see Section 3.17, at 20-23).

[110] The cases of *Tarekegn G/Giorgis et al vs- Ethiopian Revenue and custom Authority*, Cassation Criminal Case File No. 48850, 10 FEDERAL SUPREME COURT OF ETHIOPIA, CASSATION DECISIONS 189-191 (2003 E.C.); and *Ethiopian Revenue and custom Authority vs- Geda Focha et al*, Cassation Criminal Case File No. 60345, 13 FEDERAL SUPREME COURT OF ETHIOPIA, CASSATION DECISIONS 247-255 (2005 E.C.), are just two examples of reported and unreported practices.

circumstances wherein legal and institutional vacuums reign, the right to privacy, the right to liberty, the right to freedom of expression, the right to fair trial and the right to property of individuals and groups could be jeopardized.[111]

While the legislative body has expressly introduced the use of special investigative techniques and tools in crimes of corruption, the provisions regulating such operations are a bit patchy and suffer from lack of appropriate institutional scrutiny and review mechanisms. The law in force now does not sufficiently provide the necessary conditions and limits that should be observed in using such techniques and tools. It does not empower the judiciary to issue warrants and to review likely abuses or misuses. As noted, the right to privacy, the right to freedom of expression, the right to liberty, the right to fair trial, the right to property, etc., of individuals and groups may be put at risk by ill-motivated, or overzealous, or unscrupulous law enforcement authorities and undercover informants, as well as by the increasing use of advanced technological tools in the criminal investigation process.[112]

Compared to corruption offences, the legislature in Ethiopia has enacted detailed norms regulating the use of special investigation techniques and tools in respect of crimes of terrorism. Yet the Proclamation can further be improved to avoid or minimize the aura of a government of "Big Brother"[113] and to safeguard the enjoyment of human rights and fundamental freedoms such as freedom of speech and expression, freedom of association, right to liberty and freedom of movement.

As highlighted above, the Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation is by far a well-crafted law as regards the use of special investigation techniques and tools. It has encompassed every detail regarding the use of different special investigation techniques and tools, the conditions and limits of such use and oversight mechanisms. The Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Proclamation also contains some provisions that could help reduce ill-motivated, overzealous or unscrupulous steps or measures. Yet the determination of "reasonable suspicion to

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[111] These are some of the vital human rights and fundamental freedoms that the Constitution of the Federal Democratic Republic Ethiopia (1995) explicitly avows to protect and safeguard under Arts 26, 17, 29, 20, and 40, respectively. International and regional human rights instruments such as the Universal Declaration of Human rights of 1948, the International Covenant on Civil and Political Rights of 1966 and the African Charter on Human and Peoples' Rights of 1981 more or less, and with some variations on the right to privacy and the right to property, recognize these vital human rights (the ICCPR does not explicitly recognize the right to property; the African Charter does not explicitly protect the right to privacy). By virtue of Art 9 (4) of the FDRE Constitution, ratified human rights instruments are considered as part and parcel of the law of the land. Ethiopia ratified the ICCPR on 11 June 1993 and the African Charter on 15 June 1998 without any reservations.

[112] Courtney, s*upra* note 23, at 4; Kearns, s*upra* note 10, at 976; International Council on Human Rights Policy, s*upra* note 56, at 67.

[113] Taken from GEORGE ORWELL, NINETEEN- EIGHTY FOUR (1949); see also Wamsley, s*upra* note 9, at 177; Kerr, s*upra* note 55, at 607; Courtney, s*upra* note 23, at 4; April A. Otterberg, *GPS Tracking Technology: The Case for Revisiting Knotts and Shifting the Supreme Court's theory of the Public Space under the Fourth Amendment*, 46 B.C. L. REV. 661-662 (2004-2005).

believe that a crime of human trafficking [or] smuggling of migrants" is left for the police. The authorization of the court is required only in the case of interception of private communication. Hence, the potential for misuse or abuse or arbitrary actions is already apparent.

Also, the Computer Crimes Proclamation grants investigatory organs the power to use some special investigative techniques with a view to preventing, detecting, investigating and prosecuting computer crimes. This Proclamation starts with a clear statement of the principle that guides the implementation and application of the special investigative techniques. It further provides that such a technique will only be resorted to when there is no other means readily available for collecting information or judicial evidence. Furthermore, this proclamation in principle requires possession of court warrant or authorization to conduct surveillance, to intercept and to effect search and seizure. As noted above, this is subjected to exception only in urgent and exceptional circumstances. Whether law enforcement officials would subject themselves to the rule of law and abide by the constitutional and statutory norms protecting the right to privacy, the right to freedom of expression, the right to liberty, the right to fair trial, the right to property and the like needs to be seen in practice. Whether individuals that may be subjected to the use of special investigation techniques and tools would come to know their rights, be courageous, committed and capable to assert their internationally, constitutionally and statutorily recognized rights is another factor in order to resist or remedy any possible illegal intrusions. The functioning of courts in an impartial, neutral and independent manner is also another decisive element to avert or mitigate human rights violations that may arise in practice.

Conclusion

The clandestine nature of some criminal activities, the rise of complex and organized criminal networks and the proliferation of powerful and sophisticated perpetrators intent on silencing potential witnesses have triggered the use of special investigation techniques and tools as "necessary evils". Many countries currently use special investigative techniques and tools that involve secretive, deceptive and integrity testing methods of law enforcement in the fight against some specified serious offences. Yet, these techniques and tools are considered as useful and necessary only in so far as they are implemented in cases where other regular methods of prevention, detection, investigation and prosecution of serious crimes are found insufficient or inadequate and as far as they are used with all the necessary caution and safeguards. Such proactive law enforcement methods need to be used by putting in place some strict guidelines and by establishing oversight mechanisms. The propriety of a government's undercover agents engaging in any kind of secretive or deceptive activity as well as the interception of correspondences must be anchored in the principle of the rule of law. Such activities and measures should also be subjected to judicial or other form of independent review mechanisms.

As has been discussed in the article, there is a legal basis for the use of some special investigation techniques and tools in the Ethiopian criminal process in respect of crimes of corruption, terrorism, money laundering and financing of terrorism, trafficking in human beings and smuggling of migrants as well as in computer crimes. However, those provisions relating to crimes of corruption and terrorism in particular remain porous and susceptible to abuse or misuse. This author is of the opinion that these laws can further be improved by drawing lessons from what has been provided in some greater details in the Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation and to some extent in the Computer Crimes Proclamation. Explicitly incorporating undercover operations and infiltration methods, as well as controlled delivery and integrity testing could be more helpful to intensify the fight against those crimes. On the other hand, it is of paramount importance to include provisions that could help control likely abuses or misuses by law enforcement authorities. The public interest in fighting these crimes can be served without greatly jeopardizing the enjoyment of human rights and fundamental freedoms. Thus, apart from the judicial authorization requirement or establishment of any other independent internal or external oversight mechanism of the investigative authorities, it is necessary to indicate under what circumstances and against whom such special investigation techniques and tools could be applied. It is also necessary to clearly state the *conditions and limits of such use*. It is also essential to design relevant legislative policy and guidelines for appropriate utilization and lawful implementation of special investigation techniques and tools in the fight against some crimes that the legislature deems are serious enough to attract such proactive policing. Doing so helps addressing potential human rights violations which may arise from the use of special investigation techniques and tools in the criminal justice process of the country.

* * *

ክስ መስማት በኢትዮጵያ የፌዴራል ፍርድ ቤቶች፡- ሕጉና አተገባበሩ

ቴዎድሮስ ምህረት*

አህፅሮተ-ፅሁፍ

የፍትሐ ብሔር ክስ ከሚያልፋባቸው ሂደቶች አንዱ ክስ መስማት ሲሆን ይህም በጽሑፍ የቀረበውን ክርክር ቅርጽ ለማስያዝ እና ቀጣዩን አቅጣጫ ለመወሰን የሚረዳ ወሳኝ ምዕራፍ ነው። በዚህ ደረጃ የሚከናወነው ተግባር በፍርድ ቤቱ ሙሉ ቁጥጥር ሥር መሆን ያለበት ሲሆን ክርክሩን ፊር ለማስያዝ ወሳኙ ሥራ የሚከናወንበት ሂደት ነው። ይህ ጽሑፍ ሕጉ ይህንን የፍትሐ ብሔር ክስ ሂደት ምዕራፍ በአግባቡ አልሰየመውም፣ በተግባርም በፍርድ ቤቶች የሚታየው የተዘበራረቀ አተገባበር በዚህ ደረጃ ሕጉ ሊያሳካ ያሰበውን ግብ እውን ማድረግ አላስቻለም በሚል ይከራከራል። ከዚህ በተጨማሪም አተገባበሩ መዘበራረቁ በፍርድ ቤቱና በባለጉዳዮች የጊዜና የሀብት ብክነትን እያስከተለ ከመሆኑም በላይ በውሳኔዎች ጥራት ላይ ጉዳት እያደረሰ ይገኛል። ከዚህም በላይ በሕጉ የተመለከተውና በተግባር በሚታየው አሠራር መካከል ያለው ክፍተት ሂደቱ ተገማች እንዳይሆን አድርጎታል። ከዚህ አንጻር ይህ ጽሑፍ ሕጉንና አተገባበሩን በመፈተሽ የመፍትሔ ሐሳብ ለማቅረብ ያለመ ነው።

ቁልፍ ቃላት፡- **የመስማት መብት፣ ክስ መስማት፣ ክርክር መስማት**

መግቢያ

በኢትዮጵያ የፌደራል ፍርድ ቤቶች የፍትሐ ብሔር ክርክሮች የሚመሩት በ1958 በወጣው የፍትሐ ብሔር ሥነ-ሥርዓት ሕግ መሰረት ነው። የፍትሐ ብሔር ሥነ-ሥርዓት ህጉ በዚህ ዘመን ለሚጠበቀው የፍትሐ ብሔር ፍትህ አስተዳደር ብቁ ስለመሆኑ ጥያቄ ሊነሳ መቻሉ እንደተጠበቀ ሆኖ በይዘቱ ሕጉ በአመዛኙ ግልጽ ነው። ነገር ግን በአተገባበር ሂደት መዛነፎች ሲያጋጥሙ ይስተዋላል። መዛነፉ በአንድ ዳኛ የተፈጸመ ወይም በአንዳንድ አጋጣሚ የሚፈጠር ሲሆን ጉዳቱ የጎላ ላይሆን ይችላል። ነገር ግን ይህ ችግር በመደበኛነት የሚከሰት ከሆነ ወይም ሕጉ በዘፈቀደ የሚተገበር ከሆነ የሂደቱን ፍትሐዊነት እንዲሁም የውጤቱን ተአማኒነት ጥያቄ ውስጥ ያስገባዋል። ከዚህም በላይ የዚህ ችግር መኖር የፍትሐ ብሔር ሥነ-ሥርዓት ሕጉ ያነገበውን ፍትህን ወጪ ቆጣቢ በሆነና በአጭር ጊዜ የማስተዳደርን ዓላማ ይስታል። ከዚህ አንጻር ፍርድ ቤቶች በሥራ ላይ ያለውን ሕግ ለመተግበር መትጋት እንዲሁም አላሰራ የሚሉ ሕጎች ወይም ድንጋጌዎች ደግሞ እንዲሻሻሉ የሕግ ማሻሻያ ሐሳብ ማቅረብ ይጠበቅባቸዋል።[1]

የፍትሐ ብሔር ሥነ-ሥርዓት ሕጉ ከወጣበት ከ1958 ጀምሮ ከፍርድ ቤት ሥልጣን ጋር በተያዘ ካልሆነ በስተቀር የተደረገ ማሻሻያ እምብዛም ሲሆን የፍትሐ ብሔር ጉዳይ ክርክር አመራርን በተመለከተ የተደረገ ለውጥ የለም። የጉዳዮች ብዛትና ውስብስብነት

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* ጠበቃና የሕግ አማካሪ።

[1] *የፌዴራል ፍርድ ቤቶች አዋጅ* ቁጥር 25/1988፣ ፌዴራል ነጋሪት ጋዜጣ፣ 2ኛ ዓመት ቁጥር 13፣ የካቲት 7 ቀን 1988 አንቀጽ 33/2። በተለይ አንቀጽ 38 *ሥነ-ሥርዓትን የሚመለከቱ መመሪያዎችን እንዲያወጣ ሥልጣን እንደሰጠው* ማየት ይቻላል። *የፌዴራል ፍርድ ቤቶች አዋጅን እንደገና ለማሻሻል የወጣ አዋጅ* ቁጥር 454/1997፣ ፌዴራል ነጋሪት ጋዜጣ፣ 11ኛ ዓመት ቁጥር 42፣ ሰኔ 7፣ 1997።

ቢጨምርም፤ በልምድም ሆነ በሕግ አስተምህሮት የተደረሰባቸው አዳዲስ አስተሳሰቦች እና ምክረ-ሐሳቦች ቢኖሩም እስከ አሁን እያገለገለ ያለው በ1958 የወጣው የፍትሐ ብሔር ሥነ-ሥርዓት ሕግ ነው። ስለዚህ አሁን ያለው ሕግ ታሳቢ ያደረጋቸው ሁኔታዎች በተለወጡበት ሁኔታ እስከአሁን በሥራ ላይ ይገኛል። ከዚህ ጋር በተያያዘ የሚነሱ ጥያቄዎች በአጠቃላይ የፍትሐ ብሔር ክርክር ተጀምሮ እስከሚጠናቀቅ ያለውን ሂደት የሚመለከቱ ቢሆንም በዚህ ጽሑፍ ለማየት የሚሞከረው የመሰማት መብት መገለጫ የሆነውን የክስ መስማት ሂደትን ነው። የጽሑፉ ትኩረትም አሁን ያለው ሕግ በዚህ የክስ ሂደት ደረጃ ላይ ያለው አቋም፣ ለማሳካት ያሰበውን ግብ እና በፍርድ ቤቶች ያለውን ተፈጻሚነት ለመዳሰስ ነው።

ይህ ጽሑፍ በዋናነት የአንድ ባለሙያ የዓመታት አስተውሎትን (observational study) መሠረት አድርጎ ሕጉና አተገባበሩ ላይ ፍተሻ የሚያደርግ ነው። በተጨማሪም በተቻለ መጠን በፍርድ ቤቶች ያለውን አተረጓጎምና ተዛማጅ የሆኑ አገሮች ተሞክሮ ለማየት ጥረት ተደርጓል። ጽሑፉ በዋናነት በፍርድ ቤቶች የሚታየው የተዘበራረቀ አሰራር መልክ መያዝ ስላለበት ወደ መፍትሄው የሚያደርሰንን ውይይት ማስጀመር እንደ ግብ ይወሰዳል። ለበርካታ ዓመታት ያገለገሉ ባለሙያዎች ያጠራቀሙትን ትዝብት እና ያስተዋሉትን ተሞክሮ ለማጋራት ይነሳሳሉ ብሎ ጸሐፊው ያምናል። መሬት ላይ ያለው እውነትና የሕጉ አተገባበር በየዕለቱ በሰዎች ኑሮ ላይ ያለውን ውጤት እንዲሁም በፍትህ ሥርዓቱ ላይ የሚያሳድረውን ተጽዕኖ መመርመርና የመፍትሔ አቅጣጫዎችን የመጠቆም ኃላፊነት በሁሉም ባለሙያ ላይ የተጣለ ስለሆነ ችግሮችን ለመፍታት መንገዱን በማሳየት ሁሉም ያቅሙን ሊያዋጣ ይገባል። ይህ ጽሑፍም በዚህ እሳቤ የተደረገ መከራ ነው። ጽሑፉ የመሰማት መብትን ከመመርመር ጀምሮ የክስ መስማትን ምንነትና ዓላማ እንዲሁም ሂደቱንና በዚህ ረገድ በፍርድ ቤቶች የሚስተዋሉ የክስ አሰማም ዘይቤዎችን በመዳሰስ ወደ ማጠቃለያው ይሄዳል።

1. የመሰማት መብት

መንግሥት ካለበት ኃላፊነት በዋናነት በህብረተሰብ ውስጥ ሥርዓት ማስከበር አንዱ ሲሆን ለዚህ ተግባር ከሚያስፈልጉት ተቋማት አንዱ አለመግባባትን የሚፈቱ አካላት ይገኙበታል። እነዚህ ተቋማት ውሳኔ ለመስጠት መሠረት ከሚያደርጓቸው መሠረታዊ ሕጎች በተጨማሪ ሥራቸውን በአግባቡ ለመወጣት የሚመሩበት የሥነ-ሥርዓት ሕግ የግድ ያስፈልጋቸዋል። የሥነ-ሥርዓት ህግ ከጉዳዩ መጀመር እስከ መጠናቀቅ ያሉ ሂደቶችን በሙሉ የሚገዛ ነው። አገሮች የዚህን ሕግ ይዘት የመወሰን ስልጣን ያላቸው ቢሆንም የተወሰኑ ሊጣሱ የማይችሉ የተፈጥሮ ሕግ ተደርገው የሚወሰዱ መርሆዎች እንዳሉ ምሁራን ይስማማሉ።[2] በዚህ ደረጃ ከሚመደቡት መብቶች ውስጥ አንዱ ተከራካሪ ወገን መሰማት አለበት (*audi alteram partem* □□□□□□□ □□□□ "let the other side be heard as well") የሚለው መርህ ነው። ይህ የዓለማዊ እውቀት ብቻ

[2] ለምሳሌ Ajay R. Singh, *Legal Maxim: Audi Alteram Partem & Nemo Judex in Re Sua: Doctrine of Natural Justice*, available at: <https://ctconline.org/documents/legal> (Last accessed December 2018) ማየት ይቻላል። በዚህ ጽሑፍ የተፈጥሮ ፍትህ ሁለት ሐሳቦችን እንደያዘ ተገልጧል። ይኸውም ከመሰማት መብት በተጨማሪ አንድ ተከራካሪ ወገን በራሱ ጉዳይ ዳኛ መሆን የለበትም የሚለውን ያካትታል።

ሳይሆን መንፈሳዊ መሠረትም እዳለው ይታመናል፡፡ ለዚህም በመጽሐፍ ቅዱስ[3] አዳምና ሄዋን ከገነት ከመባረራቸው በፊት አዳም አታድርግ የተባለውን ማድረጉ ታውቆ ለምን እንዳደረጉ እንዲያስረዱ እድል የተሰጣቸው መሆኑ ይጠቀሳል፡፡ ይህ መርሕ በሕግ አስተምህሮት ካለው ቦታ በተጨማሪም በአለም አቀፍ ስምምነቶችም እውቅና ተሰጥቶታል፡፡ ለአብነት ለመጥቀስም ዓለም ዓቀፍ የሰብአዊ መብቶች ድንጋጌ (Universal Declaration of Human Rights) አንቀጽ 10 በሰዎች መብት እና ግዴታ ላይ ውሳኔ ለመስጠት በግልጽ ችሎት የመሰማት መብት መከበርን እንደ ቅድመ ሁኔታ ያስቀምጣል፡፡[4] የአፍሪካ የሰዎች እና ሕዝቦች መብቶች ቻርተርም (African Charter on Human and Peoples' Reights) እንዲሁ ማንኛውም ሰው ጉዳዩ ሊሰማለት እንደሚገባ ይደነግጋል፡፡[5]

ስለዚህ የአንድን ሰው መብት የሚነካ እርምጃ ከመወሰዱ በፊት ይህ ሰው የመሰማት እድል ሊሰጠው ይገባል፡፡ የዚህ ጽሑፍ ትኩረት ይህ በማንኛውም ሕግ ሊጣስ አይገባም ተብሎ በሕግ አስተምህሮት እውቅና የተሰጠው መርህ በሥራ ላይ ባሉ ሕጎች፣ ዓለም አቀፍ ስምምነቶችም ሆነ በታሪካዊ የሕግ ሰነዶች ከፍተኛ ቦታ የተቸረው የመሰማት መብት አተገባበርን ማየት ነው፡፡ ይህ መብት በፍርድ ቤትም ሆነ በሌሎች በሰዎች መብት ላይ ውሳኔ በሚሰጡ አካላት (quasai-Judicial and administrative organs) መከበር እንዳለበት ግንዛቤ ያለ ቢሆንም የዚህ ጽሑፍ ትኩረት ግን መርሁ በፍርድ ቤቶች በተለይ በፍትሐ ብሔር ጉዳዮች የመዳኘት ሂደት ያለው አተገባበር ነው፡፡ የመሰማት መብት በዋናነት በክስ መስማት ሂደት የሚተገበር ሲሆን የዚህ ጽሑፍ ትኩረትም በዚሁ የፍርድ ሂደት ደረጃ ላይ ይሆናል፡፡ አንድ ሰው በክስ ሂደት የመሰማት መብቱ ተጠብቋል ሊባል የሚችለው ምን ሂደት ሲሟላ ነው የሚለው ጥያቄ በውጤቱ ላይ ቀጥተኛ ተጽዕኖ የሚኖረው ቢሆንም ለማየት የምንሞክረው ግን የሂደቱን የተወሰነ ክፍል ነው፡፡ ይህን የክርክር ሂደት ደረጃ ክስ መስማት ብለን ብንጠራውም አንድ ዓይነት ስያሜም ሆነ አረዳድ የለም፡፡ ይህም በዋናነት በሕጎችም ሆነ በዕለት ተዕለት ሙያዊ ኑሯችን ለስያሜው አንድ ዓይነት አጠቃቀም ስለሌለንና ተመሳሳይ ትርጉም ስለማንሰጠው ነው፡፡ በተለይ አብዛኛውን ጊዜ በወንጀል የተከሰሱ ሰዎች ጋር አያይዞ የመጠቀም፣ ከአስተዳደራዊ ውሳኔዎች ጋር የማጣመር እንዲሁም በፍትሐ ብሔር ጉዳዮችም መሰማት በሁሉም የፍትሐ ብሄር ጉዳይ ሂደቶች ጋር ተያይዞ የሚነሳ መሆኑ በጽንሰ ሐሳቡ ላይ እንዲሁም በቃላት አጠቃቀም ረገድ ወጥነት እንደሌለ ማሳያ ስለሆነ ትንሽ ጠለቅ ብሎ ማየትን

[3] በመጽሐፍ ቅዱስ ኦሪት ዘፍጥረት ምዕራፍ 3 ቁጥር 13 ላይ ‹‹እግዚአብሔር አምላክም ሴቲቱን ይህን ያደረግሽው ለምንድነው? አላት›› ተብሎ ተጽፎዋል፡፡

[4] Article 10 of the Universal Declaration of Human Rights reads: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

[5] Article 7 (1) of the African Charter on Human and Peoples' Rights reads:

> Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)

ይጋብዛል፡፡ ነገር ግን ከጽሑፉ ወሰን አንጻር በፍትሐ ብሔር ጉዳይ በፍርድ ቤቶች በሚደረገው ክስ መስማት ላይ በማተኮር የቃሉ አጠቃቀምና የመብቱ አተገባበር በዝርዝር ይታያል፡፡

2. ክስ መስማት ምንድነው?

ክስ መስማት የፍትሐ ብሔር ክስ ሲከፈት የሚከናወን የመጀመሪያው ተግባር ነው፡፡ ከዚህ ጋር ተያይዞ ክስ መክፈት ተብሎ የሚታወቀው የፍርድ ሂደት የትኛው ነው የሚለውን ማየት ይገባል፡፡ ይህን ለመረዳት በሚደረግ ጥረት ተግዳሮቱ የሚጀምረው ከቃላት አጠቃቀም ወጥነት አለመኖር ነው፡፡ ክስ መክፍት፣ የመጀመሪያ ቀጠሮ፣ የቃል ክርክር እንዲሁም ክስ መስማት እና የመጀመሪያ ክስ መስማት የሚሉት ሐረጎች ተመሳሳይ ነገር ለመግለጽ የሚውሉ ቢሆንም በሕጉ ያላቸው አገባብ ወይም በባለሙያዎች ዘንድ ያለው ግንዛቤ ወጥ ካልሆነ በሕግ አተገባበር ላይ ችግር ማስከተሉ አይቀርም፡፡ ለምሳሌ በችሎት ተደጋጋሚ ሙግት ምንጭ ሲሆን የሚስተዋለው የፍ/ሥ/ሥ/ሕ/ቁ 137 የሚናገረው የመጀመሪያ ቀነ ቀጠሮ (at the first hearing of the suit) የሚለውን አገላለጽ ነው፡፡ ስለዚህ ይህን አንቀጽ መሠረት አድርጎ ሰነድ ይዞ የሚቀርብ ተከራካሪ ወገን በትክክለኛው በዚህ ድንጋጌ መጠቀም የሚችለው በየትኛው ቀጠሮ ሲቀርብ መሆኑን አስመልክቶ ጥያቄ ሊነሳ ይችላል፡፡ ይህም የመጀመሪያውን ቀነ ቀጠሮ መለየትንና ከሌሎች ስያሜዎች ጋር ያለውን አንድነት መመርመርን አስፈላጊ ያደርገዋል፡፡ በአጠቃላይ ለቀረበው ክስ መልስ ከተሰጠ በኋላ ባለው የክርክር ሂደት ደረጃ ስያሜ ላይ ግልጽነት የለም፡፡

በተለምዶ የቃል ክርክር ተብሎ የሚታወቀውና በሕጉ ክስ መክፈት፣ ክስ መስማት፣ የመጀመሪያ ቀጠሮ እና ተከራካሪዎችን መመርመር በሚል የተጠቀሱት አገላለጾች አንድነትና ልዩነታቸውን ማየት ያስፈልጋል፡፡ የፍትሐ ብሄር ሥነ-ሥርዓት ሕጉ በውስጡ ላለው ለአራተኛው መጽሐፍ፣ ምዕራፍ ሁለት የሰጠው ስያሜ ክስ መስማት (Trial of Suits) የሚል ነው፡፡ የዚህ ምዕራፍ ክፍል አንድ ክስ ሲከፈት ስለሚፈጸም ሥነ-ሥርዓት (Procedure at First Hearing) የሚናገሩ ድንጋጌዎችን የያዘ ሲሆን ክፍል ሁለት ደግሞ ክርክሩን መስማትንና ምስክሮችን መመርመርን (Hearing of Suits and Examination of Witnesses) የሚገዙ ድንጋጌዎችን ያካተተ ነው፡፡ ክስ መስማት የሚለው አጠቃላይ ርዕስ የመጀመሪያውን ክስ መስማትም ሆነ ክርክሩን መስማት የሚያጠቃልል ቃል ሆኖ እናገኘዋለን፡፡ ይህ በእንግሊዝኛው ከተሰጠው ስያሜ አንጻር የመስማት ሂደቱ በተለያዩ ቀጠሮዎች ለተለያየ ዓላማ የሚካሄድ ሲሆን የሚጀመረውም በክስ መስማት ነው፡፡ በፍትሐ ብሔር ሕጉ ክስ እና ክርክር መስማት ተብለው የሚታወቁት መልስ መቅረብን ተከትሎ በተከታታይ የሚካሄዱ የፍትሐ ብሔር ጉዳይ ሂደት ደረጃዎች ቢሆኑም በሕጉ ክስ መስማት በሚል ተጠቃለዋል፡፡

በዕለት ተዕለት አጠቃቀም የቃል ክርክር የሚለውን አገላለጽ በሕጉ ክስ መክፈት፣ ክስ መስማት እና ተከራካሪዎችን መመርመር ከሚሉት ስያሜዎች ጋር ያለውን ዝምድና መመርመር ተገቢ ነው፡፡ በነዚህ ስያሜዎች ልዩነትና አንድነት ላይ ምልከታ ሲደረግ ክስ መስማት በአንድ ቀጠሮ ሊያልቅ የማይችል ሰፊ ሂደት ሲሆን ተከራካሪዎችን መመርመር ግን በመጀመሪያው ቀጠሮ የሚከናወን የክስ መስማት አካል ነው፡፡ የመጀመሪያ ቀጠሮ የሚለው አገላለጽም ክስ ለመስማት የተያዘውን ቀጠሮ ለመግለጽ

የሚያገለግል ሲሆን ይህም ተከራካሪ ወገኖችን መመርመርንና ክሱን ለመስማት የተያዘውን የመጀመሪያ ቀጠሮ የሚመለከት ነው። ሕጉ ክስ መክፈት በሚል የሚገልጸው ክስ መስማትን እንደሆነ ከሕጉ ይዘት ለመረዳት አያዳግትም። እነዚህ ሐረጎች አንድ ዓይነት ነገር ለመግለጽ ያገለገሉ ከሆነ ወጥ የትርጉም አጠቃቀም እንዲኖርና ወጥ አረዳድ እንዲሰፍን ማድረግ የሚጠበቅበት ሕግ ለምን የዚህ ዓይነት ግርታን በሚፈጥር መልክ መቅረብ እንዳስፈለገ ግልጽ አይደለም።

በአጠቃላይ ይህን ሂደት በገቢር መለየት የማያዳግት ቢሆንም ለይቶ ለመጥራ የሚያስችል ወጥ የሙያ /የቴክኒክ/ ቃል ወይም ሐረግ ሕጉ አለመጠቀሙ እና አሻሚ የቃላት አጠቃቀም የሕጉ መገለጫ መሆኑን መረዳት ይቻላል። ነገር ግን እንዲህ ያለውን የግንዛቤ ችግር ከቋንቋ የእድገት ደረጃ ወይም ከቃላት ትርጉም ውስንነት ጋር ብቻ ማያያዝ ተገቢ አይሆንም። የሕጉ ምንጭ ተድርጎ በሚወሰደው የሕንድ የፍትሐ ብሄር ሥነ-ሥርዓት ሕግም ተመሳሳይ ችግር እንዳለ ከሚከተለው ገለጻ መረዳት ይቻላል።

> *In fact, there are several judicial pronouncements to the effect that the "first hearing" of a suit would be the point where preliminary examination of a party takes place and when issues are settled/framed. However, there is an inherent contradiction in that position, in as much as, both are distinct events, and cannot possibly take place at the same point, i.e., the "first* hearing".[6] *(በሕርግጥ የመጀመሪያው ክስ መስማት ተከራካሪ ወገኖች የሚመረመሩበት እንዲሁም ጭብጥ የሚለይበት ደረጃ መሆኑን የሚያሳዩ በርካታ ፍርዶች አሉ። ነገር ግን እነዚህ ሁለት ኩነቶች በአንድ ጊዜ ሊከሰቱ የማይችሉ ስለሆኑ ይህ አቋም በውስጡ ተቃርኖ የያዘ ነው)*

በፍትሐ ብሔር ሥነ-ሥርዓት ሕጉ የመጀመሪያው ክስ መስማት ተብሎ የሚታወቀው ተከራካሪ ወገኖች የሚመረመሩበት፣ ክስና መልስ የሚነበብበትን እንዲሁም የእምነት/ክህደት ቃል የሚጠየቅበት መሆኑ በሕጉ ቁጥር 241(1) ተመልክቷል። እነዚህ ክንውኖች የክስ መስማት አካል መሆናቸው ግለጽ ቢሆንም ጥያቄው እነዚህ ሁሉ በአንድ ቀጠሮ (በክስ መክፈት ወቅት ወይም በመጀመሪያው ቀጠሮ) የሚከናወኑ መሆን አለመሆናቸው ነው። ከፍትሐ ብሄር ሥነ-ሥርዓት ሕጉ (Civil Procedure Code) አወቃቀር ለመረዳት እንደሚቻለው ክስ መስማት በቀረቡ መቃወሚያዎች ላይ ውሳኔ መስጠትንና ጭብጥ መለየትንም ጭምር የሚያጠቃልል ነው። ከዚህ ተከትሎ የሚመጣው ክርክሩን መስማት ነው። ስለዚህ ክስ መስማት በአንድ ቀጠሮ የሚገደብ ሳይሆን በርካታ ቀጠሮዎችን የሚያካትት የሚያከራክር ነጥብ ካለ ደግሞ ጉዳዩን ለክርክር መስማት የማዘጋጀት ዓላማ ያለው ነው። በአንድ ጸሐፊ በአጭሩ እንደተገለጸው የመጀመሪያው ክስ መስማት ፍርድ ቤቱ ግራ ቀኙ የሚከራከሩበትን ነጥብ ለመረዳት ወደ ማመልከቻዎች ይዘት (ክስና መልስ) የሚገባበት ነው።[7] ነገር ግን አከራካሪ ነጥብ በሌለበት ሁኔታ የመጀመሪያው ቀጠሮ የትኛው እንደሆነ መለየት

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[6] Avin Chhangani, *OPINION: First hearing of a suit – Need to amend the Code of Civil Procedure*, available at: <https://theindianjurist.com/2018/04/24/opinion-first-hearing-suit-need-amend-code-civil-procedure/>, last accessed: December 2018.

[7] C.K. TAKWANI, CIVIL PROCEDURE 182 (Eastern Book Company, 4th ed., 1997).

ይጠይቃል፡፡ ጭብጥ መያዝ በማያስፈልጋቸው ጉዳዩች[8] የመጀመሪያ ክስ መስማት ተብሎ የሚወሰደው ክርክሩን ለመስማት የሚሰጠው ቀጠሮ ተደርጎ ይወሰዳል፡፡[9]

3. የክስ መስማት ዓላማ

ከላይ እንደተገለፀው የክስ መስማት ዋና ዓላማ ተሟጋቾቹን የሚያለያያቸውን ወይም የሚያከራክራቸውን ነጥብ መለየት ነው፡፡ ይህም የተከራካሪዎችን የእምነት/ክህደት ቃል በመቀበል እና ተከራካሪዎቹን በመጠየቅ የሚያከራክራቸውን ጉዳይ አንጥሮ በማውጣት የሚከናወን ነው፡፡ አንድ ጸሐፊ እንዳስቀመጠው

> *The rule confers on the court a power to examine parties with a view to ascertaining the real points in controversy between them and to get admissions from them, so as to eliminate irrelevant issues and evidence and thereby shorten the trial.*[10] *(ይህ ድንጋጌ ተከራካሪዎችን በመመርመር እና የእምነት ቃል በመቀበል ትክክለኛ የክርክር ነጥቦችን በመለየት አላስፈላጊ ጭብጦችን እና ማስረጃዎችን በማስወገድ ክርክሩን የማሳጠር ስልጣን ለፍርድ ቤት ይሰጣል፡፡)*

ሌላ ተንታኝ ደግሞ ግቡ የተከራካሪ ወገኖች ቅድመ-ምርመራ መሆኑንና የቃል ክርክር የሚያገለግለው ክስና መልሱን ለማሟላት መሆኑ ላይ ትኩረት ያደርጋል፡፡[11]

ክስ መስማት ግብ አድርጎ የሚነሳው ተከራካሪ ወገኖች የሚሟገቱበትን ጉዳይ መለየት ነው፡፡ ይህንን ተከራካሪዎቹ ካቀረቡት የጽሑፍ ማመልከቻ (በዋናነት ክስና መልስ) እንዲሁም በክስ መስማት ወቅት ከሚሰጡት ምላሽ ነው፡፡ የሂደቱ ውጤትም ጭብጦቹን መለየት ነው፡፡ ስለዚህ ክስ መስማት አከራካሪውን ነጥብ እና ጭብጡን ለመለየት የሚከናወን ተግባር ነው፡፡ በአጭሩ ክስ መስማት ዋናውን ጉዳይ በመለየት በዝርዝር ከቀረበው ጉዳይ አከራካሪውን ነጥብ በመለየት በቀጣይም ውሳኔ የሚሹ ጭብጦችን እና መሰማት ያለባቸውን ማስረጃዎች ለመለየት የሚያስችል ነው፡፡ ይህም ሁኔታ ፍርድ ቤት በአንድ ጉዳይ ላይ የሚያውለውን ሀብት እና ጊዜ ለመቀነስ እንዲሁም ውሳኔ በፍጥነት ለመወሰን የሚያስችል ሁኔታን ይፈጥራል፡፡

በክሱና በመልሱ ሰፊ ዝርዝር ቢቀርብም የፍርድ ቤቱም ሆነ የተከራካሪዎች ትኩረት መሆን ያለበት በልዩነት ነጥብ ላይ ነው፡፡ ይህም የፍርድ ቤቱን ሥራ ለመቀነስ (ለምሳሌ በክርክር መስማት ጊዜ የሚጠሩትን ምስክሮች ለመወሰን) ይረዳል፡፡ በእርግጥ ክስ ወይም መልስ ሲቀርብ በሚያያዘው የማስረጃ ዝርዝር የሚጠቀሱት ምስክሮች ምን እንደሚያስረዱ በማይገለጽበት እና ቢገለጽም በአብዛኛው ‹‹እንደ ክሱ ያስረዳሉ›› እየተባለ መጥቀስ በተለመደበት ሁኔታ ጭብጡ ቢለይም የትኛው ምስክር በምን ላይ እንደሚያስረዳ ስለማይመለከት ሁሉም ምስክሮች መጠራታቸውን፤ ምናልባትም መሰማታቸውን ማስቀረት አይቻልም፡፡ ስለሆነም የሀብትም ሆነ የጊዜ ቁጠባን ማድረግ አይቻልም፡፡ ሆኖም ግን ክስ ሲቀርብ ምስክር መዘርዘር ብቻ ሳይሆን የሚመሰክሩበትን

[8] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 246/2 በምሳሌነት ሊጠቀስ ይችላል፡፡

[9] Mayank Shekhar, *Civil Procedure: First Hearing*, LEGAL BITES: LEGAL AND BEYOND, available at <https://www.legalbites.in/first-hearing/> Last accessed on 22/08/2018.

[10] P. M. BAKSHI, MULLA CODE OF CIVIL PROCEDURE, 811 (Butterworths, Abridged 13th ed., 2000).

[11] Takwani, *supra* note 7, at 182.

ነጥብም ለይቶ የማመልከት ግዴታ[12] ተፈጻሚ ማድረግ ነው፡፡ እንዲህ ከተደረገ ጭብጡ ከተለየ በኋላ ጭብጡን በሚመለከት ነገር ላይ የሚያስረዱትን ምስክሮች ብቻ በመለየት መስማት ይቻላል፡፡ ይህም አለአግባብ የሚጠሩ ምስክሮችን እንግልት፣ የጊዜ ብክነትን እና ወጪን ይቀንሳል፡፡ ከዚህ በተጨማሪም በአላስፈላጊ ክርክር ዋናው ፍሬ ነገር ሊደበቅ የመቻሉንና ውሳኔውን የተሳሳተ የማድረጉን አጋጣሚ ይቀንሳል፡፡

ጉዳዩን ወዲያውኑ ለመወሰን የሚያስችል የተከሳሽ ወገን እምነት ከሌለ ክስ መስማት ጭብጥ ለመለየት ይረዳል፡፡ ጭብጥ ደግሞ የክርክሩ ወይም የጉዳዩ የጀርባ አጥንት ሲሆን ለክርክርሩም ሆነ ለውሳኔው መሠረት ነው፡፡[13] ስለዚህ ክስ የመስማቱ ሂደትና ውጤቱ (የሚመሠረተው ጭብጥ) የቀጣዩን ሂደት አቅጣጫ እና የውሳኔውን ውጤት የሚወስን የክርክር ሂደት ደረጃ በመሆኑ ከፍተኛ ትኩረት የሚሻና ጥንቃቄ የሚጠይቅ ነው፡፡ በዚህ ደረጃ የሚሰራው ስህተት ቀጣይ ሂደቶችንም ሆነ ፍርዱን የማዛባት ውጤት ይኖረዋል፡፡ ነገር ግን በፍርድ ቤት ከሚሰጡት ውሳኔዎች መረዳት የሚቻለው ጭብጥ መለየት ከባድ ሥራ እንደሆነ ነው፡፡ ይህም በውሳኔዎች ላይ ጭብጥ ተብለው የሚለዩትን በመመርመር የሚደረስበት ድምዳሜ ነው፡፡ ለምሳሌ አንድ ከሥራ አለአግባብ ተሰናበትኩ ያለ ከሳሽ ያቀረበውን ክስ ተከሳሽ ቢክደው የሚያዘው ጭብጥ በአብዛኛው ‘ከሥራ መሰናበቱ ሕጋዊ ነው አይደለም?’ የሚል ነው፡፡ ነገር ግን ጭብጥ መሆን ያለበት ለምሳሌ የሥራ ስንብቱ መነሻ ‹‹ከስራ ቀርቷል›› የሚል ቢሆን እንደሚነሳው ፍሬ ነገር የተጠቀሰው ምክንያት ከሥራ ለማሰናበት የሚያበቃ መሆኑ ወይም የሚያከራክራቸው ከሥራ መቅረት አለመቅረት ወይም የቀረበትን ምክንያት ከሆነ ይህ ነጥብ ተለይቶ በጭብጥነት መያዝ አለበት፡፡ የውል አለመፈጸም በተመለከተ ደግሞ ውሉ በአግባቡ ተፈጽሟል ወይስ አልተፈጸመም የሚለው ሰፊ ጥያቄ ሳይሆን ከሚሰጠው መልስ አንጻር ከውል መኖር አለመኖር ጀምሮ መፈጸም ወይም ላለመፈጸም የቀረበው መከላከያ ተደርጎ ጭብጡ መያዝ አለበት፡፡ በዚህ መሠረት ጭብጥ መሆን ያለበት በደፈናው በውሉ መሠረት ‹‹ፈጽሟል/አልፈጸመም›› በማለት ሳይሆን ከአፈጻጸሙ ጋር ተያይዞ የሚያከራክረው ዋናው ነጥብ ተለይቶ ነው፡፡ ስለዚህ ጭብጥ መያዝ ማለት ሁለቱን ተከራካሪ ወገኖች ያለያየ አንድ ጥያቄ ነጥሎ ማውጣት ተደርጎ መታየት የለበትም፡፡

በእርግጥ በሕጉ ጭብጥ የሚባለው አንደኛው ተከራካሪ ወገን ያመነው ሌላኛው ወገን የካደው የሕግ ወይም የፍሬ ነገር አግባብ ነጥብ እንደሆነ ይገልጻል፡፡[14] ጭብጥ ለጉዳዩ ውሳኔ ለመስጠት የሚያስችል መሆን አለበት፡፡[15] እንዲሁም የሚያዘው ጭብጥ ለጉዳዩ አግባብነት ያለው መሆን ያለበት ሲሆን ይህም የሚወሰነው ለከሳሹ መብት ለመመስረት የሚያስችልና ለተከሳሹ መከላከያ መሆን የሚችል ማናቸውም በሕግ ወይም በማስረጃ የተደገፈ ፍሬ ነገር መሆኑን በማረጋገጥ ነው፡፡[16] ጭብጥ የሚነሳው ተከራካሪ ወገኖች ካቀረቡት ክስና መልስ እንዲሁም ፍርድ ቤቱ ተከራካሪ ወገኖችን ሲመረምር ከሚያገኘው መልስ ወይም ደግሞ ተከራካሪ ወገኖች ካቀረቧቸው

[12] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 223(1(ሀ) ምስክሮች የሚጠሩበት ዓላማ መገለጽ እንዳለበት ይደነግጋል፡፡

[13] Takwani, *supra* note 7, at 182.

[14] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 247/1፡፡

[15] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 246/1፡፡

[16] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 247/2፡፡

ማስረጃዎች ነው፡፡ የዚህ ጽሑፍ ትኩረት በሆነው ክስ መስማት ላይ ተወስነን በዚህ ደረጃ የምርመራ ውጤቶቹን ስንመለከት ሶስት መሆናቸውን እንረዳለን፡፡ እነሱም፡- በአንዱ ወገን የተጠየቀው በሌላኛው ከተካደ ጭብጥ ይመሰረታል፣ ወይም በከፊል ከታመነ ከፊል ፍርድ ይሰጣል[17] ወይም የሚለያቸው ነገር ከሌለ በመጀመሪያው ቀን ቀጠሮ ፍርድ ሊሰጥ ይችላል፡፡[18]

የዚህ ፅሁፍ አዘጋጅ ከዚህ ርዕሰ-ጉዳይ ጋር በተያያዘ በአንድ ጉዳይ ያጋጠመውን ማንሳት እነዚህን ውጤቶች ለማየት ይረዳል፡፡ በአንድ የሥራ ክርክር ጉዳይ ተከሳሽ በሰጠው መልስ ሠራተኛውን በሰራው ጥፋት ከማገድ ውጭ አለማሰናበቱን ገልጾ ሠራተኛው ተመልሶ ስራውን ቢቀጥል ፈቃደኛ መሆኑን በመልሱም በቃል ክርክርም ወቅት አረጋገጠ፡፡ ሠራተኛው ደግሞ ተሰናብቻለሁ ሲል ተከራከረ፡፡ የተጠየቀው ዳኝነት ግን ወደ ሥራ መመለስ ነው፡፡ ስለዚህ በዚህ ጉዳይ ሠራተኛው ወደ ሥራ መመለሱ ላይ ክርክር ስለሌለ ፍርድ ቤቱ ወዲያውኑ ውሳኔ መስጠት ይችል ነበር፡፡ ቢያንስ ተፈፅሟል የተባለውን የሥራ ስንብት ወይም ከስራ የመታገድ ውጤት መመርመር ካለበት ሠራተኛው ሥራውን እየሰራ ውሳኔ ሊሰጥበት ይችል ነበር፡፡ ነገር ግን ፍርድ ቤቱ ስንብቱ ሕጋዊ ነው ወይስ አይደለም የሚል ጭብጥ ይዞ በጉዳዩ ላይ ክርክሩን ከሰማ በኋላ ስንብቱ ሕጋዊ ነው የሚል ውሳኔ ከወራት በኋላ ሰጠ፡፡ አስፈላጊ ከነበረ ይህን ያህል ጊዜ ሳይወስድ እና ሠራተኛው ከሥራው ሳይፈናቀል ወይም ሳይስተጓጎል ክርክሩን ማካሄድ ይቻል ነበር፡፡ ከዚህ ጉዳይ መረዳት የሚቻለው የክስ መስማት ሂደቱ ሕጉ ባሰበው መንገድ ጥቅም ላይ ስላልዋለ እና ፍርድ ቤቱ በአግባቡ ጭብጥ ስላልያዘ ጊዜ ከመባከኑ በተጨማሪ አግባብ ያልሆነ ማጠቃለያ ላይ ተደርሷል፡፡

የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የክርክሩ አመራር ሥርዓትና አግባብ ተከትሎ ካልተካሄደ ፍትሐዊ ውሳኔ ላይ መድረስ እንደማይቻል በተለይም አግባብነት ያለው ጭብጥ ሳይመሰረት የሚሰጠው ውሳኔ አግባብ ነው ሊባል የማይችል መሆኑን አስገዳጅ ውሳኔ ሰጥቶበታል፡፡[19] ከጭብጥ መያዝ በፊት ያለው ሂደት የክርክሩን ይዘት እና ለጭብጥ አያያዝ የሚረዱ ግብዓቶች የሚሰበሰቡበት ሲሆን በቀጣይ ያለው ሂደት ደግሞ ደጋፊ ማስረጃ በመቀበል በጭብጥነት ለተያዙት ጥያቄዎች መልስ ወይም ብያኔ የሚሰጥበት ነው፡፡ ስለዚህ ጭብጡን ለመመስረት ተገቢው ግብዓት እንዲኖር እንዲሁም ተገቢውን ውሳኔ ለመስጠት ትክክለኛውን ጭብጥ መያዝ ያስፈልጋል፡፡ የተሳሳተ ጭብጥ መያዝ የተሳሳተ ውሳኔ ላይ ያደርሳል፡፡

ከዚህ ጋር በተያያዘ ክስ መስማት ሳያስፈልግ ውሳኔ ሊሰጥ መቻሉ አለመቻሉ ሊታሰብበት የሚገባ ነው፡፡ የክስ መስማት አስፈላጊነት የልዩነት ነጥብን አንጥሮ ማውጣት ነው ካልን ይህ ደግሞ በአንድ ጉዳይ ወይም ነጥብ ላይ የተለያየ አቋም የያዙ ተከራካሪዎችን ታሳቢ ያደርጋል፡፡ ሁሉም የፍትሐ ብሔር ጉዳዮች የግድ በግራቀኝ የሚቆሙ ተከራካሪ ወገኖች (opponents) ስለማይኖራቸውና በዚህ ሁኔታ የልዩነት ነጥብ ስለማይኖር ከዓላማው አንጻር ክስ መስማት የማያስፈልገው ለፍርድ ቤት የሚቀርብ ጉዳይ አለ ወይ የሚል ጥያቄ ያስነሳል፡፡ ፍርድ ክርክርን ታሳቢ የሚያደርግ

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[17] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 242፡፡

[18] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 254/1፡፡

[19] *የኢትዮጵያ አየር መንገድ እና እነ ሰዩም ሞላ*፣ <u>የፌዴራል ጠቅላይ ፍርድ ቤት የሰበር ሰሚ ችሎት ውሳኔዎች</u>፣ ቅጽ 8፣ መዝገብ ቁጥር 37391 (2001)፡፡

ቢሆንም ተከራካሪ ወገን ሳይኖር ውሳኔ ሊሰጥ ይችላል፡፡ በዚህ ውስጥ የሚታዩት ስምምነት ማጽደቅ (consent judgment)፣ አንደኛው ወገን በሌለበት ውሳኔ ሲሰጥ (ex-party/dafault judgment) እና በአጭር ሁኔታ ታይቶ የሚወሰን (summary judgment) ይገኙበታል፡፡ በእነዚህ ሁኔታዎች ክስ መስማት አስፈላጊ አይሆንም፡፡ ከፍ/ሥ/ሥ/ሕ/ቁ. 72 መንፈስ መረዳት የሚቻለው ሌላኛው ተከራካሪ ወገን ባይኖርም የክስ መስማት ሂደቱ የሚቀጥል መሆኑን ሲሆን በዋናነት ፍርድ ቤቱ የቀረበውን ጥያቄ ትክክለኛነት የሚያጣራ ስለሚሆንና ይህም የክስ መስማት ዓላማን የሚያሳካ በመሆኑ የሚያስከትለው ጉድለት የለም፡፡

4. ክስ መስማትን የሚያሳልጡ መርሆዎች

የመሰማት መብት ከአንድ ሀገር የሕግ አውጭ አካል ፍላጎትም በላይ የተፈጥሮ ፍትህ መርህ ተደርጎ የሚወሰድ መሆኑ በዚህ ፅሁፍ ክፍል 1 ላይ ተመልክቷል፡፡ ይህ መርህ በራሱ ምሉዕ ቢሆንም አተገባበሩን የሚያግዙ ተዛማጅ የሆኑ ሌሎች መርሆዎች አሉ፡፡ ተከራካሪ ወገኖችን ከመጥራት ጀምሮ በሂደቱ እንዲኖራቸው የሚደረገው ተሳትፎ እና በአጠቃላይ ሂደቱ በተገቢው ሁኔታ መከናወኑ ለመብቱ መከበር እጅግ አስፈላጊ ናቸው፡፡ ከዚህ አንጻር የመጥሪያ አደራረስ፣ በግልጽ ችሎት ማስቻል፣ ገለልተኝነት እና እኩልነት የመሳሰሉ መርሆዎች መከበር የመሰማት መብትን ውጤታማ ያደርጋሉ፡፡ ይህንን ለማሳየት ከዚህ በታች ስለነዚሁ ጉዳዮች መጠነኛ ዳሰሳ ይደረጋል፡፡

4.1. መጥሪያ

አንድ ሰው ክስ እንደቀረበበት ተረድቶ ክርክሩን ለማቅረብ የሚችለው በመጀመሪያ ክስ እንደቀረበበት እና የቀረበበትን ክስ ዝርዝር እንዲሁም መልስ ለመስጠት ወይም ክሱን ለመስማት የተያዘውን ቀጠሮ ሲያውቅ ነው፡፡ ይህ ሁኔታ ጉዳዩ ሲጀመር ብቻ ሳይሆን አንድ ጉዳይ ተቋርጦ ቆይቶ በአንደኛው ተከራካሪ ወገን አመልካችነት ሲንቀሳቀስ ከሌላኛው ተከራካሪ ወገን መጠራትም ጋር ተያይዞ ይነሳል፡፡[20] ከመጥሪያ አሰጣጥ ጋር ተያይዞ የሚነሱ በርካታ ጉዳዮች ቢኖሩም ለዚህ ጽሑፍ ዓላማ በአግባቡ ጥሪ ያልደረሰው ተከራካሪ ወገን የሚደርስበት ጉዳት የመሰማት መብት መገፈፍ መሆኑን ማስመር ነው፡፡ ይህ ደግሞ ያለበቂ ጥረት ሊታለፍ የማይችል መሠረታዊ መብት ስለሆነ መጥሪያ በአግባቡ ባልደረሰበት ሁኔታ በፍርድ ቤቱ የሚሰጠውን ውሳኔ ጥያቄ ላይ የሚጥል ነው፡፡ ስለዚህ የመጠራት ዓላማ የመሰማት ዕድልን ለመስጠት በመሆኑ ከዚህ ጋር ተያይዞ የሚሰጥ ትዕዛዝ ይህን መሠረታዊ መብት እንዳይገፍ ወይም እንዳያሳጣ ከፍተኛ ጥንቃቄ ማድረግ ይጠይቃል፡፡

ሕጉ መጥሪያ መድረስን ተከትሎ የአለመቅረብን ውጤት ሲያስቀምጥ ትኩረት የሰጠው ለክስ መስማት ነው፡፡ ስለዚህ ሕጉ ክሱን የመሰረዝ ውጤት ወይም በሌለበት እንዲታይ አቋም ለመያዝ መሠረት የሚያደርገው በመልስ መስጠት ሳይሆን በክስ መስማት ቀጠሮ አለመገኘትን ነው፡፡ መጥሪያ በዋናነት በክስ መስማት መገኘትን ታሳቢ ያደረገ መሆኑን ሕጉ በዚህ ረገድ የሰጠውን ውጤት በመመልከት መረዳት ይቻላል፡፡ ከሳሹ

[20] እነ አቶ ታከለ ሉርዓያ እና አቶ ደጀን ገብረእግዚአብሔር፣ <u>የፌዴራል ጠቅላይ ፍርድ ቤት ለበር ሰሚ ችሎት ውሳኔዎች</u>፣ቅጽ 19 መ/ቁ. 107838፣ በ19/4/2008 የተወሰነ፡፡ መዝገብ ሲንቀሳቀስ ለተከሳሽ በተገቢው መንገድ መጥሪያ ሳይደርስ ውሳኔ መስጠት ሥነ-ሥርዓታዊ አይደለም የሚል አስገዳጅ ውሳኔ ተሰጥቷል፡፡

ወይም ተከሳሹ በክስ መስማት ወቅት ባይቀርብ በቅደም ተከተል ክሱ እንዲሰረዝ ወይም በአግባቡ መጥሪያ መድረሱ ሲረጋገጥ ተከሳሹ በሌለበት እንዲታይ ሊታዘዝ ይችላል።[21]

መጥሪያ መድረሱ አንድ ነገር ሆኖ የመሰማት መብት መተግበርን ለማረጋገጥ መጥሪያ ከቀጠሮው ቀን በፊት ምን ያህል ቀድሞ መሰጠቱና መጥሪያ ለሚደርሰው ተከሳሽ ወይም ባለጉዳይ ለመዘጋጀት የተሰጠው ጊዜ ከግምት መግባት አለበት። ይህ በዋናነት መልስ ከመስጠት ጋር የተያያዘ ቢሆንም ሕጉ አለመቅረብን ውጤት የሚሰጠው ከክስ መስማት ጋር በተያያዘ ስለሆነ ከዚህ አንጻርም ሊታይ ይገባል። በተለይ መጥሪያ መልስ ለመስጠትና ክስ ለመስማት የሚሰጠው ጊዜ የተቀራረበ ሲሆን (ለምሳሌ ሁለት ቀናት) በዚህ ጽሑፍ ከተነሳው ጉዳይ ጋር ቀጥታ ግንኙነት ይኖረዋል። በአጠቃላይ ለመሰማት የቀጠሮውን መኖር ማወቅ አስፈላጊ ሲሆን ይህም በቂ ጊዜ በመስጠት የመብት አጠቃቀሙን ትርጉም ያለው ማድረግን ይጠይቃል። በተለምዶ መጥሪያ ከአስር ቀን በፊት መድረስ አለበት[22] የሚል ግንዛቤ ያለ ቢሆንም ይህ ግንዛቤ የሕግ መሠረት የሌለው ከመሆኑም በላይ ለሁሉም ጉዳይ ተመሳሳይ ዝግጅት ከአለመጠየቁ ጋር ተዳምሮ ሲታይ ፍርድ ቤቶች የመጥሪውን ጊዜ እንደ ነገሩ ሁኔታ የሚወስኑት መሆን አለበት።[23] ዞሮ ዞሮ ግን የመሰማት መብት ተከበረ ሊባል የሚችለው አንድ ተከራካሪው ወገን ለዝግጅት የሚያስፈልገው በቂ ጊዜ ሲሰጠው ስለሆነ መጥሪያ የሚደርስበት ጊዜ ወይም በፍርድ ቤት የሚፈቀደው ጊዜ ይህንን ግምት ውስጥ ማስገባት አለበት።

4.2. በጠበቃ የመወከል መብት

ክስ መስማት የሚካሄደው ተከራካሪ ወገኖች በሕግ ወይም በፍሬ ነገር ረገድ ያላቸውን ክርክር ለመስማትና ጭብጡን ለመለየት ነው። በዚህ ረገድ ሕጉንና አግባብ ያለውን ፍሬ ነገር ከሕግ አኳያ የሚኖረውን ውጤት ተረድቶ ክርክርን ለማቅረብ ሙያዊ እገዛ አስፈላጊ ነው። ለዚህም ነው ያለጠበቃ እገዛ ይህ መብት ውጤታማ አይሆንም የሚል ክርክር የሚቀርበው። በአንድ ሕግ ውስጥ የሚገኙ ክስ መስማትን የሚመለከቱ ድንጋጌዎች በሁሉም ረገድ ጥሩ ቢሆኑም በተለይም የተከራከሪ ወገኖችን እኩልነት (substantive and procedural equality) የሚያረጋጡ ቢሆንም ተከራከሪ ወገኖች እኩል ሆነዋል (principle of equality of arms) ማለት አይደለም። በፍርድ ቤት ከሚያገለግሉ የቴክኒክ ቃላት ጀምሮ ሕጉንም አውቆና ፍሬ ነገሮች ከሕግ አንጻር የሚኖራቸውን ውጤት ተረድቶ ክርክርን ማካሄድ መስኩ የሚጠይቀውን ተገቢ እውቀትና ክህሎት መኖርን ይጠይቃል። ምንም እንኳ ሕጉ በጠበቃ መወከልን የሚፈቅድ ቢሆንም የተከራካሪ ወገኑ አቅም ካልፈቀደ መብቱ መከበሩ በራሱ የሚፈይደው ነገር የለም። በክስ መስማት ወቅትም በጠበቃ ያልተወከሉ ተከራካሪዎች

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[21] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 70(ሀ) እና 73።

[22] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 240(2) ማስረጃ እንዲቀርብ ሲታዘዝ ትእዛዙ ለመስማት ከተያዘው ጊዜ ከአስር ቀን በፊት መድረስ እንዳለበት ተገልጧል።

[23] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 70/ሐ/ መሠረት ተከሳሹ መጥሪያ የደረሰው መሆኑ ቢረጋገጥም ለተከሳሹ የተሰጠው ቀን ለክሱ መልስ ለማዘጋጀት በቂ ሆኖ በማይገመት አጭር ጊዜ መሆኑን ፍርድ ቤቱ የተረዳው ሲሆን የክርክሩን መስማት ለሌላ ጊዜ እንደሚያስተላልፍ ተደንግጓል። ስለዚህ የተሰጠው ጊዜ በቂ ነው አይደለም የሚለው እንደነገሩ ሁኔታ በፍርድ ቤቱ የሚወሰን መሆኑን ከዚህ ድንጋጌ መገንዘብ ይቻላል። በተጨማሪም የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 192(1) እና 197(10) ይመለከቷል።

በድንገት ለሚነሱ ጥያቄዎች ፍሬ ነገሩን፣ ሕጉንና ሁለቱ የሚኖራቸው መስተጋብርና ውጤት ተረድተው ተገቢውን ክርክር ለማድረግ መቻላቸው አጠራጣሪ ነው።

ከዚህም በላይ ሕጉ የጠበቃን አስፈላጊነት የሚገባውን ቦታ ሰጥቷል ለማለት አይቻልም። ለምሳሌ በፍትሐ ብሄር ሥነ-ሥርዓት ሕጉ አንቀጽ 197(3) የተከራካሪ ወገኖች ጠበቃ ወይም ነገረ ፈጅ ባለመቅረቡ ወይም መቅረብ ባለመቻሉ ምክንያት ቀጠሮ እንደማይቀየር ይደነግጋል። ይህም በፍርድ ቤቶች የጠበቆች መገኘት አለመቻል ሲገለጽ በዳኞች ተደጋግሞ የሚጠቀስ ድንጋጌ ነው። ሕጉ ጠበቃው የቀረበት ምክንያት ምንም ቢሆን የጠበቃ ወይም ነገረ ፈጅ አለመቅረብ ተቀባይነት እንደሌለው አድርጎ የወሰደ ይመስላል። ነገር ግን በዚህ ረገድ የሚኖር ክልከላ ወይም ፈቃድ በዋናነት ታሳቢ ማድረግ ያለበት የተከራካሪውን ወገን የመሰማት መብት ነው። በሌላ በኩል አንድ ጠበቃ ብቻውን እንዲሰራ በሚጠበቅበት ሥርዓት ውስጥ በግል ከሚደርስ እክል በተጨማሪ በድንገት ከፍርድ ቤቶች የሚላኩ መጥሪያዎች የጠበቃውን የጊዜ ሰሌዳ (አጀንዳ) ስለሚያዛቡ እና የሚተካው ባለሙያም ማግኘት ካልተቻለ የጠበቃውም ችግር ከግምት መግባት አለበት። ከዚህ ሁሉ በላይ ግን የተከራካሪ ወገኖችን የመሰማት መብት እና ለዚህ መብት ተግባራዊነት በጠበቃ የመወከል መብታቸው በተገቢው ሁኔታ ቦታ ካልተሰጠው የመሰማት መብት ተረጋግጧል ሊባል አይችልም።

4.3. ግልጽ ችሎት

በዝግ የሚካሄድ የክርክር ሥርዓት ሁል ጊዜ አጠራጣሪ ነው።[24] ሚዛንና ሰይፍ የተሰጠው ተሿሚ ዳኛ ሚዛኑንም ሆነ ሰይፉን በአግባቡ እንደሚጠቀምበት የሚረጋገጠው በአደባባይ በግልጽ ሥራ ላይ ሲያውለው ነው። አንድ አንድ ጊዜ እንደሚስተዋልው ዳኞች በጽህፈት ቤት የሚያሳዩትን ያልተገባ ባህሪ ተመልካች ባለበት ግልጽ ችሎት አይደግሙትም። ስለዚህ ከዚህ የበለጠ ግምት የሚሰጠው የተለየ መብት ከሌለ በስተቀር የመሰማት መብትም ተጠበቀ የምንለው ክርክሩ በግልጽ ችሎት ሲደረግ ነው። ይህ መብት በወንጀል አድራጊነት ከተከሰሱ ሰዎች አንጻር በኢፌዴሪ ሕገ-መንግሥት አንቀጽ 20(1) ተደንግጎ እናገኘዋለን። ይህንኑ በአንድ ሰው መብት ወይም ግዴታ ላይ በፍትሐ ብሔር ችሎት ውሳኔ ሲሰጥ መጠበቅ አለበት በሚል ማስፋት ይቻላል። ይህ እንደተጠበቀ ሆኖ በአዋጅ ቁ. 25/1988 አንቀጽ 26 ለህዝብና መንግሥት ሰላምና ጸጥታ ወይም ለሕዝብ መልካም ጸባይ ወይም ግብረገብነት ሲባል ካልሆነ በስተቀር ፍርድ ቤቶች ለሕዝብ ግልጽ በሆነ ሁኔታ እንደሚያስችሉ በግልጽ ደንግጓል። አገራቱ ከፈረመቻቸው አለም አቀፍ ስምምነቶች አንጻር ስናየው የዜጎችን በግልጽ ችሎት የመሰማት መብት የማረጋገጥ የመንግስት ግዴታ አድርጎ መውሰድ ይቻላል። በተለይ በአለም አቀፍ የሰብአዊ መብቶች ድንጋጌ መሰማት በግልጽ ችሎት ከመሆኑ ጋር ተያይዞ መጠቀሱን ስናይ ለመሰማት መብት ውጤታማነት በግልጽ ችሎት የማስቻልን አስፈላጊነት መረዳት አያዳግትም።[25] ሌሎች አለም አቀፍ ስምምነቶችም ተመሳሳይ ይዘት እንዳላቸው ስናይ ይህ መብት የተሰጠውን ከፍተኛ ቦታ መረዳት ይቻላል። ስለዚህ የመሰማት ዕድል መሰጠቱ ብቻ ሳይሆን በግልጽ ችሎት መከናወኑ አጅግ አስፈላጊ ነው።

[24] That is why it is said that justice behind closed doors will soon reek to high heaven.

[25] Universal Declaration of Human Rights, 1948, Art 10.

4.4. የተከራካሪ ወገኖች እኩልነትና የዳኞች ገለልተኝነት

ፍርድ ቤቶች ገለልተኛ እንዲሆኑ ያለባቸው ግዴታ ተቀጽላ ሆኖ ክስ ሲሰማ ዳኞች የተጣለባቸው የገለልተኝነት ግዴታ እንደተጠበቀ መሆን አለበት፡፡ ፍርድ ቤቶች ከውሳኔ ሊደርሱ የሚገባው የተከራካሪ ወገኖችን የመስማት፣ የመከላከል ብሎም በእኩልነት መርህ የመዳኘት መብት በጠበቀ መልኩ መሆን ያለበት ሲሆን ‹‹አግባብነት ባለው መንገድ ሳያጣሩ/ሳያነጥሩ/ መወሰን ደግሞ ዋነኛው መሠረታዊ የሕግ ስህተት መፈጸም›› መሆኑ አስገዳጅ ትርጉም የተሰጠበት ነው፡፡[26] በሕግ እና በሥነ-ሥርዓት ረገድ በተከራካሪ ወገኖች መካከል እኩልነት (substantive and procedural equality) መኖር ሲሆን የተከራካሪዎች እኩልነት በክስ መስማት ወቅትም መጠበቅ እንዳለበት ግልጽ ነው፡፡

እኩልነት ተረጋገጠ የሚባለው ዳኞች ለተከራካሪ ወገኖች እኩል ዕድል ሲሰጡ ነው፡፡ እዚህ ላይ መነሳት ያለበት የዳኛ ገለልተኛ መሆን ማሳያው ምን መሆን አለበት የሚለው ነው፡፡ ከላይ እንደተገለፀው ክክስ መስማት ዓላማ አንጻር በዚህ ሂደት የሚጠበቀው የሚያለያይ ነገር መኖሩን ማረጋገጥና አከራካሪ ነጥብ ካለ ይህንኑ መለየት ነው፡፡ ከዚህ አኳያ የእኩልነት መብት ተጠበቀ የሚባለው ምን ሲሟላ ነው የሚለው ጥያቄ ቀላል መልስ አይገኝለትም፡፡ በተለይ በዚህ ደረጃ ጉዳዩን የማጣራት ሥራ የሚሰራበት ሂደት በመሆኑ በዋናነት ጥያቄውን የሚያቀርበው ፍርድ ቤቱ በመሆኑና ፍርድ ቤቱ መጠየቅ ያለበት ማብራሪያ በሚያስፈልጋቸው ጉዳዩች ላይ ብቻ በመሆኑ ለሁለቱም ወገን እኩል እድል መስጠት አይጠበቅበትም፡፡ ስለዚህ በዋናነት የዳኞች ሥራ የሚሆነው ተገቢው ጥያቄ ለተከራካሪ ወገኖች በማቅረብ የልዩነት ነጥቡን ማጥራት ነው፡፡ ከዚህ አንጻር ዳኞች አስፈላጊውን እና ተገቢውን ጥያቄ ለሚመለከተው ተከራካሪ ወገን በማቅረብ ጉዳዩን ግልጽ ለማድረግ ከመጣር ውጭ ለሁለቱም ወገን እኩል የመናገር እድል መስጠት አይጠበቅባቸውም፡፡ ይህን በማድረጋቸውም እኩል የመስተናገድ ጥያቄ ሊነሳም ሆነ በተነሳው ነጥብ ላይ ሁሉ የመናገር ዕድል ሌላኛው ወገን የሚጠይቅበት ሁኔታ ሊኖር አይችልም፡፡

በእርግጥ በዳኞች በኩል ይህን መርህ ለማስጠበቅ የሚደረገው ጥረት በእነርሱ በጎ ፈቃድ ላይ ብቻ የተመሠረተ አይደለም፡፡ በችሎቶች በተደጋጋሚ እንደሚስተዋለው ሁለቱም ወገኖች በጠበቃ ባልተወከሉበት ሁኔታ ዳኞች ፈተና ሲገጥማቸው ይታያል፡፡ በዚህ ሁኔታ በጠበቃ ያልተወከለው ተከራካሪ የሕግ ቃላትን ትርጉም አለመረዳት፣ በፍርድ ቤት የሚሰጠው ቃል የሚኖረውን ውጤት ያለመገንዘብ ችግር እንዲሁም ተገቢውን ባለማድረግ የመብት መጣበብ የሚከሰትበት አጋጣሚ አለ፡፡ እኩል አቅም ሳይኖር እኩል እድል ቢሰጥ የእኩልነት መብት ተግባራዊ ሊሆን አይችልም፡፡ በዚህ ሁኔታ አንዳንድ ጊዜ ዳኞች የሚከተለውን ኢፍትሐዊ ውጤት በመገመት በባለሙያ ያልተወከለውን ወገን ለመርዳት የሚገደዱበት ሁኔታ ይፈጠራል፡፡ ይህም ገለልተኝነታቸው ላይ ወይም ስለ እኩልነት መብት ጥያቄ ያስነሳል፡፡

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[26] እነ አቶ በቀለ አማረ /ሁለት ሰዎች/ እና ወ/ሮ ብዙነሽ ግርማ፣ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች፣ ቅጽ 12 መ/ቁ. 52546 በ3/4/2003 የተወሰነ፡፡

5. ክስ የመስማት ሂደት

አንድ ጉዳይ የሚጀመረው በከሳሽ በሚቀርበው ክስ ሲሆን ይህን ተከትሎ በተከሳሽ መልስ ይሰጣል። እነዚህን ሁለት የክርክር ደረጃዎች ተከትሎ የሚመጣው ሶስተኛው ደረጃ ክስ መስማት ተብሎ የሚታወቀው ነው። የመጀመሪያዎቹ ሁለት የክርክር ሂደቶች በጽሑፍ የሚከናወኑ ሲሆን ሶስተኛው ግን ፍርድ ቤቱ አከራካሪውን ነጥብ ለመለየት የሚጠቀምበት በቃል የሚደረግ ጥያቄ እና መልስ ነው። በዚህ ዕሁፍ ቀደም ሲል እንደተገለፀው ይኸን ሂደት በተመለከተ የስያሜ መምታታት ስላለ ለማየት የሚሞከረው ክስ መስማትን (hearing) እንጂ ክርክር መስማትን (trial) ባለመሆኑ በዚህ ንዑስ-ርዕስ የሚደረገው ገለፃ በዚሁ የተወሰነ ይሆናል።

በዕለት ተዕለት የባለሙያዎች የቃላት አጠቃቀም መገንዘብ የሚቻለው ክስ መስማት ከመልስ መቅረብ በኋላ ባለ ቀጠሮ የሚከናወን ሥራ ተደርጎ እንደሚወሰድ ነው። ነገር ግን ከላይ እንደቀረበው ክስ መስማት የአንድ ቀን ክንውን ሳይሆን መጀመሪያውና መጨረሻው በተለያዩ ቀናት ሊሆን የሚችል ተከታታይነት ያለው ሂደት ሊሆን እንደሚችል ከሕጉ ድንጋጌዎች መረዳት ይቻላል። የሆነ ሆኖ ክስ መስማት የሚጀመረው ተከራካሪዎችን በመመርመር መሆኑን የፍ/ሥ/ሥ/ሕ/ቁ. 241(1) ድንጋጌ ይገልጻል። ፍርድ ቤቱም ወደ ጉዳዩ ይዘት ከመሄዱ በፊት የተከራካሪ ወገኖችን ወይም ወኪሎችን ማንነት መለየት አለበት። ከተሞክሮ መናገር የሚቻለው በክስ መስማት ወቅት የቀረቡትን ተከራካሪዎች መለየት ብዙም የተለመደ አይደለም። ይህም በክስ መክፈት እና በመልስ መስጠት ወቅት በተደረገው ማጣራት ላይ በመተማመን ይመስላል። ነገር ግን በሕጉ ላይ ማሻሻያ እስካልተደረገ ድረስ ሥርዓቱ መፈጸም ያለበት ከመሆኑም በላይ ከላይ የቀረበው ምክንያት ልክም ቢሆን የቀረበው ሰው በክሱ ስሙ የተጠቀሰው ተከራካሪ ወይም ወኪሉ ስለመሆኑ ማጣራትን የሚያስቀር አይደለም። ከዚህም በላይ በዚህ ዕለት በሚሰጥ የእምነት ቃል ውሳኔ ሊሰጥ የሚችል በመሆኑ የእምነት ቃሉን የሚሰጠው ሰው ስሙ የተጠቀሰው ወይም ቢፈረድበት ፍርዱን የሚፈጽመው ሰው መሆኑን ማረጋገጥ ያስፈልጋል።

ሂደቱን ስናይ ክስ መስማት የሚጀመረው የተከራካሪዎቹ ማንነት ከተለየ በኋላ የቀረበውን ክስና የተሰጠውን መልስ በማንበብ እንደሆነ የፍ/ሥ/ሥ/ሕ/ቁ. 241(1) ይገልጻል። ይህ ሂደት ሙሉበሙሉ በዳኛ የሚመራ ነው። ክስ እና መልስ እንደሚነበብ በህጉ የተቀመጠ ቢሆንም በተግባር ግን ብዙም የተለመደ አይደለም። ከዚህ ጋር የተጠጋጋ ተብሎ ሊጠቀስ የሚችለው ተግባር አንዳንድ ዳኞች ክሱን በአጭሩ የሚገልጹ መሆኑ ነው። በአመዛኙ ግን ዳኛው እንደሚከተለው የክስ መስማት ዘይቤ በቀጥታ ወደ ማጣራት መሄዱ የተለመደ ነው። እዚህ ላይ የክስ ማንበብ አስፈላጊት ጥያቄ ሊነሳበት የሚገባ በተግባርም ብዙም የማይፈጸም መሆኑና እስከ አሁንም የጎላ ችግር አለመከሰቱ ሲታይ ሕጉን በማሻሻል ዳኞችን ከዚህ የስራ ጫና ነጻ ማድረጉ ለክስ መስማት የሚመደበውንም ጊዜ መቀነሱ የተሻለ ሊመስል ይችላል። በእርግጥ ለሌላኛው ተከራካሪ ወገን የሚደርሰውና ለፍርድ ቤቱ የሚቀርበው ማመልከቻ ይዘት ሊለያይ የመቻሉ እድል ሙሉ በሙሉ የለም ማለት በማይቻልበት ሁኔታ ማመልከቻዎቹ መነበባቸው አስፈላጊ መሆኑን መረዳት አያዳግትም። በሥራ ላይ ባለው የፍሐ ብሔር ሥነ-ሥርዓት ሕግ መነበቡ የግድ ስለሆነ ፍርድ ቤቶች ይህንኑ ተከትለው መስራታቸው የግድ ነው።

የአቤቱታ ማመልከቻዎቹ መነበብን ተከትሎ ፍርድ ቤቱ የቃል ጥያቄ በማቅረብ ተከራካሪ ወገኖችን ይመረምራል። በዚህ መሠረት የሚሰጥ የእምነት ወይም ክህደት ቃል ተመዝግቦ የመዝገቡ አካል ይሆናል። በፍትሐ ብሔር ሥነ-ሥርዓት ሕጉ መሠረት ተከራካሪዎቹ ለዳኛው ጥያቄ የሚሰጡትን መልስ ዳኛው ጽፎ እንደሚመዘግበው ሲሆን አሁን በከፍተኛው ፍርድ ቤት እና በጠቅላይ ፍርድ ቤት ደረጃ ባለው አሰራር ፍርድ ቤቶች ክርክርን በመቅረፀ-ድምፅ አስቀርተው በጽሑፍ በመገልበጥ የመዝገቡ አካል የሚያደርጉበት አሰራር እየተዘረጋ ነው። የሆነ ሆኖ ክስ መስማት በጽሑፍ ሰፍሮ ወይም በመቅረፀ-ድምፅ ተቀርጾ ከሆነ ደግሞ ወደ ጽሑፍ ተቀይሮ የመዝገቡ አካል መሆን አለበት። የዚህ ዕሁፍ አዘጋጅ እንደታዘበው ጉዳዮች በይግባኝ በበላይ ፍርድ ቤቶች በሚሰሙበት ወቅት በበርካታ አጋጣሚዎች ከሚሰሙት ቅሬታዎች መካከል በቃል ክርክር ወቅት ያላልኩት ተመዝግቧል የሚለው ነው። በመቅረፀ-ድምፅ የተያዘው ከቴክኒክ ጋር ተያይዞ አልፎ አልፎ ከሚነሳው ቅሬታ በቀር ብዙም ክርክር ሲያስነሳ አይታይም። በጽሑፍ የሚያዘው ግን ሙሉበሙሉ በእምነት ላይ የተመሠረተ ነው። በመሬት ላይ ያለው እውነታ እንደሚያረጋግጠው በፍርድ ሂደት በማንኛውም የአሠራር ሥርዓት በየትኛውም ደረጃ የሰውን ተሳትፎ ለመቀነስ ቢሞከርም ማስቀረት ግን አይቻልም። ስለዚህ የሰው ተሳትፎ ማስፈለጉ ስለማይቀር ዋናው ነጥብ የሚሆነው እምነት የሚጣልበት ሰው መሾም እና ሲሳሳትም ማረም የሚችል ሥርዓት መዘርጋት ላይ ነው። ይህም ቢሆን ከሚሰጣቸው ስልጣንና ካለባቸው ኃላፊነት አንጻር የዳኞች ታማኝ መሆን በምንም የማይተካ መሆኑ ሊሰመርበት ይገባል። ካልሆነ ግን ተከራካሪ ወገኖች ያላሉት ተመዝግቦ ሊገኝ የሚችልበት ሁኔታ በፍጹም አይከሰትም የሚባል አይደለም።

የመጀመሪያ ደረጃ መቃወሚያ በቀረበበት ሁኔታ የክርክሩ ሂደት የተለየ መልክ ሊይዝ ይችላል። ለቀረበ መቃወሚያ እልባት የሚሰጠው ከክርክር መስማት በፊት በክስ መስማት ጊዜ ነው። እዚህ ላይ መነሳት ያለበት ክስ ከተነበበ በኋላ በፍርድ ቤት የሚደረገው ማጣራት መቃወሚያው ላይ መወሰን አለበት ወይስ ወደ ዋናው ጉዳይ ይገባል የሚለው ጥያቄ ነው። በአሰራር ሁለት ዓይነት አካሄዶች አሉ። አንደኛው ሙሉውን ጉዳይ መስማት ሲሆን ሁለተኛው ግን መቃወሚያው ላይ ብቻ ማጣራት አድርጎ ብይን ከተሰጠ በኋላ ጉዳዩ ከቀጠለ በዋናው ጉዳይ ላይ ክስ የሚሰማበት አካሄድ ነው። ከፍ/ብ/ሥ/ሥ/ሕ/ቁ. 244(1) ድንጋጌ መረዳት የሚቻለው ለመቃወሚያ እልባት የሚሰጠው ከክርክር መስማት በፊት ነው። በዚህ መሠረት ክስ መስማት ተጠናቆ ወደ ክርክር መስማት ከመኬዱ በፊት በመቃወሚያ ላይ ውሳኔ የሚሰጥ በመሆኑ ክስ መስማቱ መቃወሚያውንም ሆነ ዋናውን ጉዳይ የሚሸፍን ነው ማለት ይቻላል። በሌላ በኩል የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 246(1) ጭብጥ የሚያዘው በመቃወሚያ ላይ ውሳኔ ከተሰጠ በኋላ መሆኑን ያስቀምጣል። ነገር ግን ይህ ድንጋጌ በዋናው ጉዳይ ላይ ክስ መስማት በመቃወሚው ላይ ውሳኔ ከተሰጠ በኋላ እንደሚቀጥል ምንም ፍንጭ አይሰጥም። ከዚህ መረዳት የሚቻለው ክስ መስማቱ በተሟላ ሁኔታ ከተደረገ በኋላ ጭብጥ ከመያዙና ወደ ክርክር መስማት ከመኬዱ በፊት በመቃወሚያ ላይ ብይን የሚሰጥ መሆኑ ነው።

ሆኖም ግን የፍርድ ቤት ጊዜን በአግባቡ ከመጠቀም አንጻር ተገቢነቱ ላይ ጥያቄ ሊነሳ ይችላል። ወደ ፊት አገልግሎት ሊሰጥ ያለመቻሉ ዕድል መኖሩ እየታወቀ የዳኞች፣ የተከራካሪ ወገኖች፣ የረዳት ሰራተኞች ጊዜና ጉልበት የሚባክንበት ምክንያት ሊኖር

አይገባም፡፡ በተለይም ጉዳዩ ውስብስብ ሲሆን ፍርድ ቤቶች ለክስ መስማት የሚመድቡት ጊዜ ብዙ ስለሚሆንና ይህም ትርጉም የለሽ መሆኑ ሲታይ ሂደቱን በሁለት መክፈል የተሻለ ነው፡፡ የክስ መስማት ተከታታይነት ያለው የማጣራት ስራ የሚሰራበት ሂደት ከመሆኑ አንጻር በዚህ መልክ ተከፋፍሎ የማጣራቱ ስራ ቢሰራ በማዕቀፉ ውስጥ የሚወድቅ ይሆናል፡፡

መቃወሚያው የክርክሩን ማብቃት የማያስከትል ከሆነ ቀጣዩ ክንውን ጭብጥ መመስረት ይሆናል፡፡ ነገር ግን በሁሉም ጉዳዮች ጭብጥ መመስረት አስፈላጊ ላይሆን ይችላል፡፡ በመጀመሪያ አከራካሪ ነገር ከሌለ ወይም ክሱ ከታመነ ጉዳዩ በፍርድ ያበቃል፡፡ ፍርዱ ጉዳዩን በከፊል ወይም በሙሉ የሚመለከት ሊሆን ይችላል፡፡ በዚህ ሁኔታ መፍትሔ ያላገኘ ጉዳይ ጭብጥ መያዝን የግድ ላያስከትል ይችላል፡፡ ለምሳሌ ተከሳሽ ነገሩ በመጀመሪያ በሚሰማበት ቀን ተከሳሹ የመከላከያ መልሱን ሳያቀርብ የቀረ እንደሆነ ፍርድ ቤቱ ጭብጥ እንዲይዝ አይገደድም፡፡[27] አከራካሪ ነገር ከሌለ[28] ወይም የቀረበው ክስ ከታመነ[29] ጭብጥ ሳይመሰረት ውሳኔ ይሰጣል፡፡[30] ክሱ ሙሉ በሙሉ ከታመነ የመጀመሪያው ቀጠሮ የመጨረሻውም ሊሆን ይችላል፡፡ ነገር ግን በዚህ ደረጃ በከፊል ወይም ሙሉበሙሉ እልባት ባላገኘ ጉዳይ ላይ ፍርድ ቤቱ ጭብጥ የመለየት ሥራ መስራት አለበት፡፡

ጭብጡ የሚመሠረተው በሚከናወነው የማጣራት ሥራ ላይ ተመስርቶ ነው፡፡ ተከራካሪ ወገኖች ክስና መልሳቸውን ከአቀረቡ በኋላ የማጣራት ወይም የመመርመር ሥራው የሚመራው በፍርድ ቤቱ ነው፡፡ የክስ መስማቱ የሚከናወነው በፍርድ ቤቱ ዳኛ ወይም ዳኞች ሲሆን ቁጥራቸው ምንም ቢሆን የተከራካሪ ወገኖች ምላሽ የሚመዘገበው በአንዱ ዳኛ ነው፡፡ ሶስት ወይም ከዛ በላይ ዳኞች በሚሰየሙበት ችሎቶች ክሱ መሰማት ያለበት በተሟላ ችሎት ነው፡፡[31] የተከራካሪዎች ምርመራ በዋናነት ዳኞች በሚያቀርቡት ጥያቄ መሠረት የሚመራ ነው፡፡ ተከራካሪ ወገኖች የጎንዮሽ መስተጋብር ስለማይኖራቸው ቀጥታ ምልልስ ለማድረግ አይችሉም፡፡ በአሰራር ብዙም ያልተለመደው ተከራካሪ ወገኖች አንዱ ለሌላው የሚያቀርበው ጥያቄ ነው፡፡ ሕጉ ተከራካሪ ወገኖች አንዱ ለሌላው ጥያቄ ካለው ፍርድ ቤቱ እንዲጠይቅለት ማመልከት ይችላል ሲል ይደነግጋል፡፡[32] ስለዚህ በጥያቄ ሂደት ጠያቂው ፍርድ ቤት ብቻ ቢሆንም ከተከራካሪዎች አንዱ ለሌላው የሚያነሳው ጥያቄ ካለ በፍርድ ቤት አማካኝነት መጠየቅ ይችላል፡፡

ከላይ እንደቀረበው የክስ መስማት ሂደት የሁለቱም ወገኖችን መቅረብ ታሳቢ ያደረገ አይደለም፡፡ የተከራካሪ ወገኖች መቅረብ ፍርድ ቤቱ የሚያደርገውን ማጣራት ምሉእ

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[27] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 246(2)፡፡

[28] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 254(1)፡፡ በታመነ ነጥብ ላይ ክርክር እንደማይካሄድ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔ ሰጥቶበታል፡፡ *ሳስኮ ኢንደስትሪል ንግድና ት/ት ድርጅት እና የኢ.ፌ.ዲ.ሪ. ት/ሚኒስቴር*፣ <u>የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች</u>፣ቅጽ 21 መ/ቁ. 124669፣ በ30/3/2009 ዓ. ም. የተወሰነ፡፡

[29] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 242፡፡ *የዳንግላ ወረዳ ውሃ ሐብት ልማት ጽ/ቤት እና ኤነ አቶ ሙሉጌታ ገበየሁ*፣ <u>የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች</u>፣ቅጽ 20 መ/ቁ. 107217፣ በ29/3/2009 ዓ. ም. የተወሰነ፡፡

[30] *የማርዘሃብ አቁባ ዳኛ እና ኤነ አቶ ዋለልኝ ተመስገን*፣ <u>የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች</u>፣ቅጽ 19 መ/ቁ. 112927፣ በ16/6/2008 ዓ. ም. የተወሰነ፡፡

[31] አዋጅ ቁ. 25/1988 አንቀጽ 20(2)፡፡

[32] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 142/2፡፡

የሚያደርገው ቢሆንም የአንደኛው መቅረት ሂደቱን ሊያስተጓጉል አይችልም። ለምሳሌ ከሳሽ ክስ ለመስማት በተያዘው ቀጠሮ ባይቀርብ መዝገቡ ወዲያውኑ አይዘጋም። በመጀመሪያ ፍርድ ቤቱ ተከሳሹ የቀረበበትን ክስ ስለማመን ወይም መካዱ ያረጋግጣል። በከፊል ወይም በሙሉ ከታመነ ፍርድ የሚሰጥ ሲሆን ከተካደ ግን መዝገቡን ይዘጋል።[33] በሌላ በኩል በአግባቡ መጥሪያ የደረሰው ተከሳሽ አለመቅረብ ውጤት ጉዳዩ በሌለበት መሰማት ነው።[34] ሆኖም ሁሉም ጉዳዮች በተቃራኒ የሚቆም ተከራካሪ ላይኖራቸው የሚችል መሆኑና ተቃራኒ ወገኖች ተስማምተው የሚቀርቡበት ሁኔታ ስላለ በሁሉም ጉዳዮች ላይ ጭብጥ መያዝ አስፈላጊ አይሆንም። ይህ ደግሞ ፍርድ ቤቱን ክስ መስማት ሳያስፈልገው ወደ ቀጣይ ሂደት እንዲያልፍ የሚያስችል ነው። ለምሳሌ የዚህ ዕሁፍ አዘጋጅ በተገኘበት አንድ የችሎት ውሎ በተስተናገደ አንድ ጉዳይ ስምምነታቸው እንዲጸድቅ በጋራ ያመለከቱ ተጋቢዎች ሲቀርቡ ፍርድ ቤቱ ክርክራቸውን እንዲያቀርቡ ትእዛዝ ሰጠ። ምንም የሚያከራክራቸው ጉዳይ እንደሌለ ሲያሳውቁ መከራከር እንዳለባቸውና ጉዳያቸውን እንዲያስረዱ ተጨማሪ ትዕዛዝ ተሰጣቸው። ከዚህ መረዳት የሚቻለው ከዚህ በታች ከተገለፀው የተዘበራረቀ አሰራር በተጨማሪ ክስ መስማት የክስ መስማትን ዓላማ በማያሳካ ሁኔታ የሚተገበርበት አጋጣሚ መኖሩን ነው።

የክስ መስማት ሂደት ሲጠናቀቅ ቀጠሮ የሚሰጥ ሲሆን ቀጠሮ ሲሰጥ በጣም ተደጋግሞ ከጠበቆች የሚቀርብ ጥያቄ ለምን ዓላማ እንደተቀጠረ ለመረዳት ነው። ለዚህ አሁንም ድረስ ለሚቀርብ ጥያቄ በአብዛኛው የሚሰጠው ምላሽ ለምርመራ የሚል ነው። ነገር ግን በፍትሐ ብሄር ሥነ-ሥርዓት ህጉ በተቀመጠው አካሄድ ዳኞች ምርመራ የሚያካሂዱት ተከራካሪ ወገኖችን ሰምተው ሳይሆን በጽሑፍ የቀረበውን አይተው መብራራት ያለበትን በጥያቄ እንዲነጥር በማድረግ ነው። ክስ ከተሰማ በኋላ ቀጣይ ስራ ጭብጡን መለየት ነው፤ ቀጥሎም የሚኖረው ሂደት ክርክር መስማት (trial) ነው። ይህም እስከ ክስ መስማት ድረስ ባለው ሂደት የተሰባሰቡ የጭብጥ ምንጮች ላይ የሚመሰረት ነው። ምንአልባት ጭብጡን ለመያዝ ተጨማሪ ሰነዶችን መመርመር ወይም ምስክሮችን መስማት ካስፈለገ ፍርድ ቤቱ ጭብጥ ከመያዙ በፊት ይህንኑ ማከናወን ይችላል።[35] ይህም በፍርድ ቤቱ ወይም በተከራካሪዎች የጽሑፍ ስምምነት[36] የሚወሰን ነው። ስለዚህ የፍርድ ቤቱ ትኩረት ሙሉ በሙሉ በጭብጥነት በተለዩ የሕግ እና/ወይም የፍሬ ነገር ጥያቄዎች ላይ ይሆናል። ቀጣይ ሂደቶችም እነዚህን ጥያቄዎች ለመመለስ የሚውሉ ሲሆን ይህም ወደ ክርክር መስማት ወይም ውሳኔ ሊያመራ ይችላል።[37]

6. የክስ መስማት ዘይቤዎች

ሕጉ ክስ መስማት የሚለው የፍርድ ሂደት ደረጃ ምን ሥርዓቶችን እንደሚያካትት ከላይ ተገልጿል። አተገባበሩ ሲታይ ግን በሕጉ እንደተቀመጠው ወጥ አይደለም። የዚህ

[33] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 73።

[34] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 70።

[35] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 249።

[36] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 252።

[37] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 255።

ፅሁፍ አዘጋጅ ፍርድ ቤት በቀረበባቸው ጊዜያት ያስተዋለውና ከሌሎችም የሙያ አጋሮች ጋር ካደረገው ውይይት እንደተረዳው አሁን ባለው የፌዴራል ፍርድ ቤቶች አሠራር መሠረት የሚከተሉት የክርክር አሰማም ዘይቤዎች ተለይተዋል፡፡

1. ተከራካሪ ወገኖች በጽሑፍ ያቀረቡትን ደግመው በንግግር እንዲያቀርቡ የሚጋበዙበት፤
2. ዳኛው አንብበው በመምጣት በአጭሩ ክሱንና መልሱን ካብራሩ በኋላ በአጭሩ እንዲናገሩ ለተከራካሪ ወገኖች እድል የሚሰጡበት፤
3. ዳኛው ጉዳዩን አጥንተው አከራካሪ ነጥቦችን በመለየት ጥያቄዎችን የሚጠይቁበት (ይህ በሁለት ይከፈላል፤ አንዳንዶቹ በተመሳሳይ ጥያቄ ላይ የሁለቱንም ሐሳብ የሚሰሙ ሲሆን ሌሎቹ ደግሞ ለያንዳንዱ ተከራካሪ የተለያየ ጥያቄ ያቀርባሉ)፤
4. በአንደኛው ተከራካሪ ወገን በተነሳ ነጥብ ላይ ሌላኛውን ወገን አንተስ ምን ትላለህ በማለት ማብራሪያ የሚጠይቁበት፤
5. አንዳንድ ዳኞች በክሱ ወይም በመልሱ ውስጥ የተነሱ ነጥቦችን እያነሱ ከሚመለከተው ተከራካሪ ጋር ሙግት የሚገጥሙበት ነው፡፡[38]

ከዚህ መረዳት የሚቻለው ክስ መስማትን በተመለከተ ተመሳሳይ ግንዛቤም ሆነ አሰራር የሌለ መሆኑን ነው፡፡ ሆኖም ግን በዚህ ደረጃ የሚከናወነው ያለፈውን ሰፊ መነሻ (በክስና በመልስ የሚነሱ ዝርዝር ክርክሮች) የሚጠቡበት እና የወደፊቱን ሂደት አቅጣጫ ለማስያዝ የሚረዳ ወሳኝ ምዕራፍ በመሆኑ ከፍተኛ ትኩረት ሊሰጠው እና ሂደቱ ተገማች ሊሆን ይገባል፡፡ የክስ መስማት የተነሱትን የህግና የፍሬ ነገር ነጥቦች ወደ አከራካሪ ነጥብ በማጥበብ እና ቀጣይ ሂደቱን በዚሁ ላይ እንዲያተኩር በማድረግ የፍርድ ቤትን፣ የተከራካሪዎችን እና የምስክሮችን ጊዜና የአገር ሀብት ለማዳን የሚኖረው አስተዋጽኦ ከፍተኛ ነው፡፡ ነገር ግን ከዚህ በላይ የተዘረዘሩት በተግባር የሚታዩ የክስ መስማት ዘይቤዎች የሂደቱን ተገማችነት የሚጎዱ ከመሆኑም በላይ የሚፈለገውን ውጤት ለማግኘት አያስችሉም፡፡ በእርግጥ በሕግ የተቀመጠው አሰራር መፈተሽ ያለበት መሆኑ አሌ ባይባልም ይህ ለውጥ እስኪመጣ ድረስ ሕጉን ጠብቆ ሂደቱን መምራት ያስፈልጋል፡፡

ከክስ መስማት በፊት ያለው ሂደት በተከራካሪ ወገኖች ቁጥጥር ሥር የሚቆይ ነው፡፡ በክሱ የሚዘረዘረውን እንዲሁም የሚቀርበውን ማስረጃ ከሳሹ የሚወስን ሲሆን መልሱም በተመሳሳይ ሁኔታ በተከሳሽ ይዘጋጃል፡፡ ክስ ሲቀርብ አልፎ አልፎም መልስ ሲቀርብ በአመዛኙ ከማመልከቻዎቹ ፎርም ጋር የተያያዘ ቁጥጥር የሚደረግ ሲሆን የጎደለ ቢኖር በሚሟላት የሚታለፍ ነው፡፡ ክስ መስማት ደረጃ ሲደረስ ግን ሂደቱ በዳኛው ሙሉ ቁጥጥር ስር የሚውልበት ነው፡፡ ተከራካሪ ወገኖች በፍርድ ቤቱ በሚደረግ ማጣራት ሲፈቀድላቸው ተሳታፊ ከመሆን ባለፈ ሂደቱን የመቆጣጠር ሚና ሊኖራቸው አይችልም፡፡ ፍርድ ቤቱ ግራ ቀኙ የሚያከራክራቸውን ነጥብና ከዚህ ጋር

[38] እነዚህ ተደጋግመው የሚታዩ እንጂ ሌሎች የሉም ማለት አይደለም፡፡ በተናጠል የሚገጥሙ ሁኔታዎች ዝርዝር በርካታ ናቸው፡፡ ለምሳሌ በአንድ ጉዳይ ክስ ለመስማት በተያዘው ቀጠሮ ተከሳሹን ‹‹ተከሳሽ ስለሆንክ አትናገርም›› ተብሎ የተከለከለበት አጋጣሚ አለ፡፡ በሌላ ጊዜ ከአንደኛው ተከራካሪ ንግግር ሰቀም በማድረግ ወቀሳ በመጨመር ሌላኛውን ተከራከሪ መሞገት እና በዚህ ምልልስ ከግማሽ ሰዓት በላይ የፈጀ ክርክር በአንድ የሥራ ክርክር ጉዳይ ጸሐፊው ታዝቧል፡፡

ይዛመዳሉ ያሉዋቸውን ነገሮች ለይተው ስላቀረቡለት በፍሬ ነገር ወይም በሕግ ረገድ የሚጣራውን የመለየት ስራ የሚሰራው በራሱ በሚመራ ሥርዓት ነው፡፡ ባለጉዳዮች ‹ጀምር› ተብለው የፈለጉትን እንዲናገሩ ሊጋበዙ አይገባም፣ ‹ተናገር› ተብለው በነጻት የሚለቀቁበት አሰራር ሊኖር አይችልም፡፡ በሕግ ከተደነገገው በተጨማሪ ከጊዜም ሆነ ከሀብት አጠቃቀም አንጻር ተገቢ አይደለም፡፡ በዚህ ደረጃ ፍርድ ቤቱ የተከራካሪ ወገኖችን የይገባኛል ጥያቄና መከላከያ ምን እንደሆነ ለይቷል፡፡ ስለዚህ በጽሑፍ የቀረበው በድጋሚ በተከራከሪ ወገኖች በንባብም ሆነ በአጭሩ እንዲያቀርብ ማድረግ ተገቢ አይደለም፡፡

በፍርድ ቤቱ የሚቀርበውም ጥያቄ ለማብራራት የሚረዳ በመሆኑ አስፈላጊ ሆኖ ካልተገኘ በስተቀር በአንድ ጉዳይ/ጥያቄ ላይ ግራ ቀኙ መናገር የለባቸውም፡፡ በዚህ ደረጃ የማጣራት፣ ምርት ከገለባ የመለየትና ትኩረት የሚደረግበትን ነቅሶ የማውጣት ግብ ስለተያዘ ለዚህ ዓላማ የሚጠቅም ጥያቄ ግልጽ ማድረግ ለሚጠበቅበት ተከራከሪ ወገን ከማቅረብ ማለፍ የለበትም፡፡ በሌላ በኩል ዳኛ ሐሳቡን የሚገልጸው በውሳኔ ስለሆነ ከውሳኔው በፊት አቋም ይዞ ሊሟገት የሚችልበት ሁኔታ መኖር የለበትም፡፡ ቁጥራቸው አነስተኛ ቢሆንም ተከራክሮ ለማሳመን የሚጥሩ ዳኞች መኖራቸው አልፎ አልፎ ይስተዋላል፡፡ በዚህ ደረጃ ተከራካሪ ወገኖችን የሚለያያቸውን ነጥብ ከመለየት ያለፈ አቋም የሚያዝበት አይደለም፡፡ ክስ መስማት የክርክር መስማት ሂደቱ የሚያተኩርባቸውን ነጥቦች በመለየት በማስረጃ እንዲነጥሩ የማድረግ ሥርዓት የሚከተል በመሆኑ አቋም ለመያዝ የሚያበቃ ሁኔታ የለም፡፡

ጭብጥ ለመለየት ግብዓት የሚሆኑት በተከራካሪ ወገኖች የቀረበው ክስ፣ መልስ፣ በተከራካሪ ወገኖች የቀረቡ የጽሑፍ ማስረጃዎች እና በክስ መስማት ወቅት በተከራካሪ ወገኖች የሚሰጥ መልስ ነው፡፡ ሁለቱ ምንጮች በተከራካሪ ወገኖች ተዘጋጅተው የሚቀርቡ ሲሆን ፍርድ ቤቱ ጭብጡን ለመመስረት የሚኖረው በግብዓትነት አስተዋጽዎ የማድረግ ሚና በክስ መስማት ወቅት የተወሰነ ነው፡፡ በዚህ ጊዜ ከላይ እንደተገለፀው ፍርድ ቤቱ የሚመራው የጥያቄና መልስ ጊዜ ይኖራል፡፡ በዚህ ወቅት የሚሰጠው መልስ ለጭብጥ አመሰራረት ግብዓት እንደሚሆን ከፍ/ብ/ሥ/ሥ/ሕ/ቁ. 248(ሐ) መረዳት ይቻላል፡፡ በዚህ መሠረት ክስ መስማት ተከራካሪ ወገኖች በፍርድ ቤቱ በሚቀርብላቸው ጥያቄ መሠረት ከሚሰጡት መልስ ውጭ በራሳቸው የሚያደርጉት ገለጻ ወይም የሚሰጡት ማብራሪያ የለም፡፡ ተከራካሪዎቹ ስለክስ ወይም መልስ እንዲያስረዱም መጋበዝ የለባቸውም፡፡ ተከራካሪ ወገኖች በክስ ወይም መልስ ውስጥ ከገለጹት ውጭ (extraneous information) ሊከራከሩ ስለማይችሉ እና አስፈላጊ ከሆነም ከተከራካሪ ወገኖች በአንዱ አመልካችነት ወይም በራሱ አነሳሽነት ፍርድ ቤቱ የክስ ወይም መልስ መሻሻል ማዘዝ የሚችል ከመሆኑ በስተቀር ክርክሩ በአቤቱታ ማመልከቻዎቹ ከተገለፀው ሊወጣ አይችልም፡፡[39] በክስ ወይም በመልስ የሚነሱት ክርክሮች ሰፊ ሲሆኑ ፍርድ ቤቱ ፍሬውን ከገለባው መለየት አለበት፡፡ ይህን ፍርድ ቤቱ ለማድረግ በተከራካሪ ወገኖች ከተዘረዘረው ውስጥ ግራ ቀኙ የሚስማሙበት ነገሮች ላይ ጊዜ ሊያጠፋ አይገባም፡፡ ከዚህ በተጨማሪ ሕግ ትኩረት የሚሰጠው ለማንኛውም ፍሬ ነገር ሳይሆን ለጉዳዩ አግባነት ያለው ሲሆን ነው፡፡ አንድ ነገር

[39] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 90 እና 91፡፡ *አቶ ሲዳኔ ገብረጊዮርጊስ እና ወ/ሮ አብርሃ ተስፉሆን፣* <u>የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች</u>፣ ቅጽ 6 መ/ቁ. 31547 በ20/7/2000 የተወሰነ፡፡ የክርክ ጭብጥ ባልሆነ ነገር ላይ ተመስርቶ ጭብጥ መያዝ አንደማይቻል አስገዳጅ ውሳኔ ሰጥቷል፡፡

ለጉዳዩ አግባብነት አለው የሚባለው ደግሞ የከሳሽ መብት ለመመስረት የሚያስችል ወይም የተከሳሹ መከላከያ ለመሆን የሚችል ማናቸውም በሕግ ወይም በማስረጃ የተደገፈ ፍሬ ነገር ነው።[40] ስለዚህ በፍርድ ቤቱ ለተከራካሪ ወገኖች የሚቀርበው በተከራካሪ ወገኖችም ምላሽ የሚሰጠው አግባብነት ባለው ፍሬ ነገር ላይ ብቻ መሆን አለበት።

ማጠቃለያ

የፍትሐ ብሔር ሥነ-ሥርዓት ሕጉ ግቡን በግልፅ ባያስቀምጥም ተመሳሳይ ሕጎች ከሚኖራቸው ዓላማ አንጻር አለመግባባቶች በገለልተኛ የዳኝነት ተቋም ሥነ-ሥርዓትና ፍትሐዊነት በጠበቀ ሁኔታ በፍጥነትና በአነስተኛ ወጪ መፈታታቸውን ማረጋገጥ ነው። የክስ መስማት ሂደት እነዚህን ዓላማዎች ለማሳካት በሚያስችል መንገድ መከናወን አለበት። በሕግ ማሻሻል የሚፈቱ ችግሮች መኖራቸውን ሳንረሳ ባለው ሕግ አተገባበር ላይ የሚታዩ ችግሮችን በማስወገድ የተሻለ ውጤት ማምጣት ይቻላል። ከዚህ በላይ ከቀረበው አንጻር አሁን ያለው አሰራር ወጥነት ስለሌለው ተገማች ካለመሆኑም በላይ ፍጥነትንና ወጪ ቁጠባን ለማሳካት አይረዳም። የውጤቱ ጥራት ላይ የሚኖረው አሉታዊ ተጽእኖም በውሳኔዎች ላይ ሲንጸባረቅ ይታያል። የሆነ ሆኖ ሥርዓት ለማስጠበቅ የተዘጋጀው ሕግ በተዘበራረቀና ወጥነት በሌለው ሁኔታ ሥራ ላይ ሲውል በተወሰኑ የፍርድ ቤት ውሎዎች ማንም የሚታዘበው ነው። ይህ ለምን ሆነ የሚለው ተጨማሪ ጥናት የሚፈልግ ቢሆንም የተዘበራረቀ አሰራር መኖሩ ሲስተዋል በቶሎ አለመታረሙ እና ከትምህርት አሰጣጥ ጀምሮ የተዘበራረቀ ልምድ መኖር ለዚህ ሁኔታ መቀጠል አስተዋጽኦ ማድረጉን መረዳት ይቻላል።

የፍትሐ ብሔር ሥነ-ሥርዓት ሕጉ ከሚያስገኛቸው ጥቅሞች አንዱ የፍትሕ አሰጣጥ ሂደቱ ተገማች እንዲሆን ማድረግ ነው። ባለጉዳዮች የትኛውም ፍርድ ቤት ወይም ዳኛ ዘንድ ቢቀርቡ ተመሳሳይ ሂደት እንደሚኖር እርግጠኛ መሆን አለባቸው። በየችሎቱ የተለያየ የክስ አሰማም ዘይቤ የሚኖር ከሆነ የሂደቱ ተገማችነት ብቻ ሳይሆን የውጤቱ ተዓማኒነት ጥያቄ ላይ ይወድቃል። በሕጉ ማሳካት የታሰቡትን ዓላማዎች በሂደቱ ብዝሃነት የተነሳ ማሳካት አይቻልም። በአጠቃላይ የሥነ-ሥርዓት ሕጉን ከዘመኑ ጋር እንዲሄድ የማድረጉ አስፈላጊነት እንደተጠበቀ ሆኖ ይህ እስከሚሆን ድረስ ቢያንስ በሕግ የተዘረጋውን ሥርዓት በሥራ ላይ ማዋሉ አማራጭ የለውም። ከዚህ በተጨማሪ አንዳንድ ጉድለቶችን የሥነ-ሥርዓት ሕጉን ዓላማ በጠበቀ መልኩ በትርጉም ማሟላት የሚቻል ከመሆኑም በላይ የፌዴራል ጠቅላይ ፍርድ ቤት መመሪያ የማውጣት ሥልጣኑን በተገቢው መንገድ በመጠቀም በፌዴራል ፍርድ ቤቶች የሚታየውን የአሰራር መዘበራረቅ በማረቅ ለክልል ፍርድ ቤቶች ጥሩ ምሳሌ ሊሆን ይገባል።

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[40] የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 247(2)።

Civil Cases Hearing in the Federal Courts of Ethiopia: The Law and the Practice

Tewodros Mihret[*]

Abstract

One of the phases of a civil proceeding is hearing, which is a milestone to shape the extensive agruments in the written submissions and direct the overall proceeding of the case. This phase is under the full control of the court which enables it to take decisisve actions to direct the proceeding of the case. This piece argues that in addition to the failure of the law to clearly name and define this stage of a civil proceeding, the anomaly in practice prevents the achievement of the objective of the law. Further, the irregularities in practice result in wastage of resource and time of the court and the parties, not to mention the adverse effect it has on the quality of judgments. The gap between the law and the practice has made civil case proceedings unpredicatable. Thus, this piece examines the law and the praicetice with a view to forwarding recommedations.

Key terms: The right to be heard, hearing, trial

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