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ARTICLES

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Editorial – A Message from the Editorial Committee

Dear authors, reviewers, and readers:

It gives us immense pleasure to wish you all a Happy New Year 2024 from the *International Journal of Ethiopian Legal Studies* (IJELS). We feel honored and fortunate to be a part of this peer-reviewed international journal and are working as a highly effective team to ensure it continues to be a trusted source in the field of legal science.

We are delighted to publish Volume 8 No. 1 of the IJELS. The Editorial Committee extends its gratitude to those who keep on contributing and assisting us in various ways. Importantly, we are grateful to all manuscripts contributors, reviewers, and layout editors who did the painstaking editorial work of this issue. As in our previous issue, the Committee would like to amplify that the IJELS is destined to serve as a forum for the scholarly analysis of Ethiopian law and contemporary legal issues. It encourages professionals to conduct research works in the various areas of law and practice. Research works that focus on addressing existing problems, or those that contribute to the development of the legal jurisprudence as well as those that bring wider national, regional, supranational and global perspectives are welcome. The Editorial Committee makes a call to all members of the legal profession, both in academia and in the world of practice, to assist in establishing a scholarly tradition in this well celebrated profession in our country. The past few years have shown an increase in scholarly papers from different legal practitioners. However, more needs to be done for the research and writing community to put their imprints on the legal and institutional reforms that are still underway in Ethiopia and beyond. It is highly praiseworthy to conduct a close scrutiny of the real impacts of old and new laws upon the social, political, economic and cultural life of our society today. It is equally important to study and identify areas that really demand legal regulation and to advise the legislature to issue appropriate legal instruments in time. In this process, the IJELS serves as a forum to make meaningful contributions to our society and to the international community at large.

As we move forward, we expect our readers to provide us feedback that will inform us on how we are satisfying their needs and the extent to which they feel we are fulfilling our mandate to publish a scientific journal that provides the highest quality literature that is both informative and practical for students, researchers and practitioners in the field.

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BALANCING PROPERTY RIGHTS AND REGULATORY INTERVENTIONS: ANALYZING EXCESSIVE BUT LAWFUL REGULATIONS UNDER THE FDRE CONSTITUTION: LESSON AND PERSPECTIVE

Hailemariam Belay Fenta*

Abstract

Despite the constitutional protection of property rights, the FDRE Constitution permits two forms of property intrusion under Article 40 (1 and 8): police power and expropriation (eminent domain) respectively. While expropriation involves the taking of private property on account of public purpose and against payment of adequate compensation, the police power allows the government to deprive property rights without compensation. However, the implications of such uncompensated limits through the state's police power should not be overlooked, especially when these regulations go beyond and substantially diminish the value or use of private property without outright expropriation. Without pretending to be a full comparative overview, the paper aims to assess other countries experience on balancing property rights protection and excessive regulation and draw a lesson. Accordingly, the paper finds that: while some States employ an 'invalidation' approach, challenging the constitutionality of excessive regulations and deeming them non-compensable, others opt to "judicially transform" such regulations into "regulatory taking" or explicitly recognize it as "indirect or constructive expropriation" making it compensable under the Constitution. Coming to the FDRE Constitution, arguably, excessive but otherwise regulation cannot be justified in either the police power or expropriation clause, rendering them non-compensable. In such cases, 'invalidation' becomes the likely outcome for such regulations. However, invalidation may not always be a practical option for regulations enacted for the public good. Further, the paper contends that while holding onto hope, 'neither judicial transforming nor explicit recognition of such regulation as regulatory taking' appear feasible within the current constitutional context. Instead, the paper suggests the explicit recognition of regulatory taking through specific laws (excessive regulatory laws), which safeguard property rights while aligning with broader regulatory objectives.

Keywords: FDRE Constitution, Excessive regulation, Expropriation Clause, Deprivation Clause, Regulatory taking, Property rights, Police Power

INTRODUCTION

The Federal Democratic Republic of Ethiopia (FDRE) Constitution recognizes private property under Article 40 (1) by including the right to acquire, to use and to dispose of such property by sale or bequest or to transfer it otherwise.[1] This provision tags public interest and the rights of others as a limitation on the

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The author would like to thank anonymous reviewers for their genuine and constructive comments.

[1] Murado Abdo, *Ethiopia's Property Rights Legal Regime: An Overview*, 7 Mizan L. Rev. (2013), p. 168. [hereinafter Murado A., *Ethiopia's Property Rights Legal Regime*].

property rights. This limitation is derived from the State's sovereign right to regulate property within its territory, often driven by social objectives such as environmental protection, public health, human rights, and labor protection.[2]

In addition to their police power, states can also limit property rights via expropriation or eminent domain. Like most Constitutions, the FDRE Constitution, under Article 40 (8) grants the government the power to expropriate private property for public purposes with adequate compensation.[3] Such clause, in its original text in various Constitutions, denotes a situation where the government physically takes private property from an individual, as for instance, when a residual house is taken for a school or other purpose.[4] This usually involves the transfer of the title from the owner to the government. In such case, it holds that private property has been taken by the government, thus bringing into operation the compensation requirement under Article 40 (8).

Nevertheless, intuitively, the basic premise of the expropriation or eminent domain rule is often easier stated than applied. This is because while the government employs its police power to regulate property in response to growing concerns about environmental protection, public health, and consumer rights, this power may overlap with its ability to take private property via its eminent domain. [5] This happens where while regulation on account of public interest state's unreasonably interfere on constitutionally protected property rights. This interference via regulation prompts the crucial question of whether legal remedies are provided to redress the harm suffered by property owners as a result of regulatory interference or not, especially in the context of property regulations.

In this paper, the term "excessive but otherwise lawful regulations" or "regulatory taking" refers to regulations enacted for the benefit of the general public that, nonetheless, impose a sever and disproportionate burden on private property owners.[6] These regulations remain legally valid until challenged by the property owner impacted by them. However, even when

[2] Daniel Weldegebriel, *Compensation for Expropriation in Ethiopia and the UK: A Comparative Analysis*, 3 Bahir Dar U. J. Law (2013). P. 253.
[3] The Constitution of the Federal Democratic Republic of Ethiopia, Federal *Negarit Gazetta*, 1995, Art. 40 (8) [hereinafter FDRE Constitution].
[4] Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 54 Wm. & Mary L. Rev. at 2053 (2004). https://scholarship.law.wm.edu/wmlr/vol45/iss5/4
[5] *Id*, at 2053.
[6] Bezuidenhout, Karen, *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (Ph.D. thesis, Stellenbosch University 2015), at 3.

challenged, these regulations will remain valid, provided that compensation is offered to the affected property owner.[7]

The concept of 'regulatory taking' or 'excessive yet lawful regulation' is not a novel concept within the realm of domestic Constitutional law. Notably, regulations primarily dealing with situations where a State's regulations impose restrictions on private property use to an extent equivalent to expropriation without formally depriving ownership titles, is commonly known in various jurisdictions such as United State (US) as a '*regulatory taking* or *material expropriation*' in Switzerland.[8] Unlike direct expropriation, where the government takes actual ownership of a property for public purposes with adequate compensation, regulatory taking occurs when regulations limit how the property can be used, leading to a significant loss in value or utility.[9]

Regulatory taking involves balancing two competing interests: on one hand, there is the interest of the State's to exercise its police power to regulate matters that serve the public interest, including public health, environmental protections, and other societal issues, and on the other, the interest of private property owners being protected from the state's use of its police power that unduly infringes on their constitutionally protected property rights. To counterbalance these two competing interest, states adopt various approach. For instance, as shall be discussed below, some states' invalidate such regulations by challenging their constitutionality, while others judicially transform them into constructive or regulatory expropriation, making them compensable. Some states expressly recognize excessive regulation as indirect or constructive expropriation and accompanied it with compensation under their Constitution.[10]

Coming to Ethiopia, the FDRE Constitution provides about the protection of private property under Article 40. This protection includes the rights of Ethiopian citizens to freely acquire, use, and dispose of such property. Nonetheless, these constitutionally protected property rights are not without limitations. In this regard, the Constitution allows two forms of limitations on private property, namely '*deprivation using police power*' under Article 40 (1) and *'expropriation or eminent domain'* under Article 40 (8). While the deprivation clause acknowledges reasonable property regulation without compensation, the expropriation clause

[7] *Id*.
[8] Russell Brown, *Legal Incoherence and the Extra-Constitutional Law of Regulatory Takings: The Canadian Experience*, 1 *Int'l J. L. Built Env't* 179, at 180 (2009).
[9] *Id*.
[10] *Id.*

only allows direct taking which involves the transfer of titles or ownership with compensation.

The implications of these constitutional constraints merit close consideration, particularly in light of modern regulatory domains that address critical societal concerns such as environmental safeguards, human rights protections, and public health measures.[11] These regulatory frameworks often entail interferences with individual rights, including property rights.

In this context, the paper aim to examine the provision of the FDRE Constitution's related to the treatment of "excessive but lawful" regulations that disproportionately and severely affect the rights of property owner in their use and enjoyment of their constitutionally protected private property. Here, it is worthy to note that, discussing the legal treatment of regulatory taking under the Constitution introduces a considerable challenge. This is because, Ethiopia, unlike other countries, lacks a well-developed body of case law or jurisprudence regarding the legal treatment of regulatory taking. Even studies focus on property rights discussed in the following section focus on direct taking or expropriation of property. As a result, dealing with "excessive but valid" regulations that significantly affect property owners tends to raise more questions than it answers.

This, in turn, necessitates an examination of how such excessive regulations are treated in other jurisdiction. Thus, to provide a concise examination of how Ethiopia handles excessive but valid regulations in comparison to other countries, the paper employed a qualitative doctrinal legal research methodology. To do so, the experiences of the United States, Switzerland, and South Africa are highlighted. Here it is worthy to note that the comparison is made with the intention of drawing valuable lessons rather than performing an in-depth comparative analysis.

Besides, while acknowledging the disparities of the selected countries with Ethiopia in development, culture, politics, and legal system, it is crucial to note that such differences do not render them entirely incomparable. As Cruz pointed out, two legal systems with apparent difference in legal perceptions; rights attitudes; distributive justice perspectives; or overall conceptions, can be compared at micro level, so far as the aim is to demonstrate or highlight

[11] *Cato Institute, Property Rights and Regulatory Takings*, Cato Handbook for Policymakers at 147-148 (1999), https://www.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/1999/9/hb106-21.pdf.

different response to similar challenges.[12]Similarly, Gutteridge also endorse this assertion and alludes that 'comparability' would not be a serious problem if the purpose of the comparison is to illustrate the differences that operate at different stages of legal, political and economic evolution.[13]

Thus, despite those countries selected for comparison are significantly more advanced than Ethiopia, notably in Constitutional development and protection of private property, they face the common challenge in balancing exercising police power which unduly interferes on private property rights with the constitutional protected property rights. Therefore, this micro comparison made in this paper aims to examine how these countries respond to or manage "excessive yet valid" regulations in contrast to Ethiopia, with the goal of drawing a lessons from their experience.

The paper is organized in four parts as follow. The first part discusses the conceptual framework on the notion of regulatory taking. The second part conducts a comparative analysis, drawing on the experiences of the United States, Switzerland, and South Africa in dealing with "excessive yet lawful" regulations. The third part furthers the discussion with a specific focus on the property clause of the FDRE Constitution, and the lesson learned from the experience of those countries. The paper then ends the discussion with a concluding remark and the way forward.

1. UNDERSTANDING PROPERTY TAKING

The notion that the government must compensate private property owners when taking their private property for public purposes is a well-established legal principle deeply embedded in legal traditions throughout history.[14] This principle serves as a crucial safeguard against the unjust expropriation of private property, ensuring that individuals are fairly compensated for the loss of their assets and protecting the fundamental right to private ownership.[15] By requiring just compensation, this principle upholds the balance between the public's need for infrastructure and development and the protection of private property.

[12] P. D. Cruz, *Comparative Law in a Changing World* (London: Cavendish Publishing Ltd., 1999), at 3.
[13] P. H. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge: Cambridge University Press, 1941) at 73.
[14] Epstein, Richard A., *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press 1985).
[15] T. Nicolaus Tideman & Florenz Plassmann, *Fair and Efficient Compensation for Taking Property under Uncertainty*, 7 J. Pub. Econ. Theory 401 (2005), https://doi.org/10.1111/j.1467-9779.2005.00213.x.

The term 'taking' embraces both 'expropriation' and 'compulsory acquisition'. More precisely, under the U.S. law 'expropriation' refers specifically to permanent taking of title to property, whereas 'taking' includes both expropriation and 'regulatory takings'.[16] In this context, the term 'private property', 'taking/ expropriation', and 'just compensation' are crucial term of in discussing any Taking Clause. It is also conceivable that the first term conventionally denotes ownership rights or the group of rights inhering in the citizen's relation to the physical thing, such as the right to possess, uses and disposes of it.[17]This bundle of rights which comprises ownership of a particular thing is decisive in the constitutional context.[18]

Possession, use and disposition lies at the core of a compressive and coherent idea of ownership. An individual cannot be an owner of something if any of them are removed.[19] That is why Epstein provided the impossibility to find a coherent account of ownership that can make do without any of its traditional elements.[20] In the context of the Taking Clause, when the government interferes on the property rights of the owner which affects one of the bundle of rights, the government should provide just/ adequate compensation.[21] Here it is crucial to note that, the traditional understanding of 'taking' denotes when the government mandatorily transfer the legal title from the former property owner to the state. This direct taking or expropriation involves an open, deliberate and unequivocal intent, as reflected in a formal law or decree, to deprive the owner's property through the transfer of title or outright seizure.[22] This makes direct expropriation straightforward to identify and tends to be less controversial.

Conversely, since the use of eminent domain involving direct physical seizure is both straightforward and frequently criticized, governments may opt to leverage their police powers to accomplish objectives—address escalating costs associated with environmental preservation or accommodate other emerging societal needs—that would otherwise

[16] Ruzza, Alice., *Indirect Expropriation in International Investment Law* (Ph.D. thesis, University of Trento, 2013) at 19.
[17] Epstein, R.A., *Takings*, *supra* note 14, at 59.
[18] *Cato Handbook for Policymakers* (7th ed.), *Property Rights and the Constitution*, at 347.
[19] Merrill, T.W., *Ownership and Possession*, in *Law and Economics of Possession* 9 (Y. Chang ed., Cambridge Univ. Press 2015).
[20] Epstein, R.A., *Takings*, *supra* note 14, p.59.
[21] *Id.*
[22] Lin, L. & Alison, J.R., *An Analysis of Expropriation and Nationalization Risk in China*, 19 *Yale J. Int'l L.* at 7 (1994).

necessitate compensation under eminent domain.[23]As a result, private property owners may experience heightened governmental intervention, often results the domination of their property value without compensation.[24] This makes property owners to quest the government to extend the requirement of compensation under the eminent domain when governmental regulation or actions significantly affect their property value tantamount to taking.

Regulatory taking, in this regard, designates a situation where government-imposed regulations, intended at social protection, impose such a substantial burden on property owner that their effect tantamount to a direct expropriation or ouster, even though no physical seizure of the property has occurred.[25] Regulatory taking, thus, differ from direct expropriation in that the government instead of physically seize property, via regulations, impose excessive restrictions on the owner's and crippling their ability to utilize their property rights in a particular way previously recognized in law.[26]

Nevertheless, unlike direct expropriation, regulatory taking involves complex issues in striking the appropriate balance between the government's legitimate regulatory authority via police power and the need to safeguard private property rights from excessive regulation which "in all fairness and justice" should be made with compensation.[27] This tension between public interest and private property rights lies at the heart of the regulatory takings discourse, and remains an active area of scholarly inquiry and legal debate—necessitates a closer examination of the line between acceptable regulations and unaccepted constitutional taking that requires just compensation.[28]

1.1 Police Power and Regulatory Taking

States possess the inherent sovereign authority to regulate activities within their jurisdictions, such as those pertaining to socio-economic and political matters.[29] This authority is commonly known as 'police power'. The police power, which stems from the principles of

[23] Paul Turner & Sam Kalen, *Takings and Beyond: Implications for Regulation*, 25 Energy L.J. at 25 (1998).
[24] Stroup, R.L., *The Economics of Compensating Property Owners*, 15 Contemp. Econ. Pol'y at 55 (1997). https://doi.org/10.1111/j.1465-7287.1997.tb00489.x
[25] Cole, D.H, *When Property Regimes Collide: The "Takings" Problem*, in *Pollution and Property: Comparing Ownership Institutions for Environmental Protection* 154 (Eve Darian-Smith & Richard A. Lazarus eds., Cambridge Univ. Press 2002).
[26] O'Boyle, Patrick, *Expanding the Constitutional Protection of Property Rights to Address Regulatory Takings* (B.L. thesis, 2018) at 7.
[27] Merrill, T.W., *Anticipatory Remedies for Takings*, 128 Harv. L. Rev. 1630, at 1673 (2015).
[28] Schwindt, R. & Globerman, S., *Takings of Private Rights to Public Natural Resources: A Policy Analysis*, 22 Can. Pub. Pol'y at 205 (1996).
[29] Visser, Fritz, *The Principle of Permanent Sovereignty over Natural Resources and the Nationalisation of Foreign Interests*, 21 Comp. & Int'l L.J. S. Afr. 77, at 77-80 (1988).

sovereignty and territorial principles,[30]is best described as the ability and authority to enact laws and regulations to protect, promote and promote the general welfare of the people.[31] Common application and example of the police power including measures related to public safety, health, environment, human rights, and the general well-being of its citizens.[32] As a result, the police power is considered an essential aspect of a state's sovereignty and is recognized as a core function of government under both national and international legal frameworks.[33]However, the regulatory power of the government is not without limitation, as it must be exercised with the constitutional safeguards afforded to private property rights.[34]

In the context of regulatory takings, as mentioned above, the tension between the government's right to regulate through its police power to achieve certain social goals and the need to protect private property rights has been the subject of extensive legal and scholarly debate. This tension stems from the need to counterbalance the on the one hand the state's inherent rights to regulate activities within its jurisdiction for the general welfare and on the other upholding constitutionally protected private property of owners.[35] As shall be discussed, scholars and Courts continue to grapple with the challenge of striking the balance between upholding the government's ability to enact necessary regulation on account of public interest while also safeguarding individual property rights.[36]

On one side, proponents of police power argue that the government should have broad latitude to enact regulations in the public interest— as it has a fundamental duty to safeguard the health, safety, and well-being of its citizens. Notably, the advancement of the global standards of human rights, public health and environmental protection increasingly compels states to exercise their police power, even necessitating the amendment of domestic laws comply with their international obligations.[37] Doing so may at a time necessitates interferes on the constitutionally protected rights of property. Thus, demanding the government to

[30] *Id*.
[31] Reagan, Tristan, *Dude, Where's My House: The Interaction Between the Takings Clause, the Police Power, the Militarization of Law Enforcement, and the Innocent Third-Party Property Owner*, 58 Tulsa L. Rev. 99, at 107 (2023).
[32] Tomlins, C., *Necessities of State: Police, Sovereignty, and the Constitution*, J. Policy Hist. 20, 47 (2008).
[33] Richards, Edward P. & Rathbun, Katharine C., *The Role of the Police Power in 21st Century Public Health*, 26 J. Sexually Transm. Dis. 350, at 351 (1999).
[34] Oliver, P.C., *Sovereignty in the Twenty-First Century*, 14 King's L.J. 137 (2003).
[35] Brown, Ray A. & Hall, Howard L., *The Police Power and Economic Reconstruction*, 1 U. Chi. L. Rev. at 224 (1933).
[36] Ulen, Thomas S., *Regulatory Takings: Law, Economics, and Politics; Compensation for Regulatory Takings: An Economic Analysis with Applications*, 74 Land Econ. 570 (1998).
[37] Soloway, Julie, *Environmental Regulation as Expropriation: The Case of NAFTA's Chapter 11*, 92 Can. Bus. L.J. at 102 (2000).

compensate for every change in laws or interference on property rights would undermine its capacity to act for the general welfare, as some incidental impacts on property value should be borne without compensation.[38]

Beside, some scholars have also advocated for the abolition of regulatory taking doctrine altogether. For instance, Sax noted that where the government is engaging in regulating certain acts for public purpose, i.e. engaging in zoning, nuisance abatement, conservation, business regulation, or a host of other functions, the court supposed to take it as a mere incidence of the lawful exercise of the 'police power' and thus non compensable.[39] Sax further his discussion by distinguishing 'when regulation ends and taking begins' as one of the fundamental challenge in applying regulatory taking doctrine within domestic and international investment arbitration. This distinction is crucial, as it impacts how regulations enacted for the general welfare are interpreted and whether they require compensation for the affected property owners. Commentators have also described this challenge as a *"crazy-quilt pattern of Supreme Court doctrine"*, indicating that there are no clear-cut rules or formula to determine where regulation ends and taking begins.[40]

Furthermore, Byrne also consider regulatory taking doctrine as a problematic and flawed concept that should be eliminated.[41] He supported his position referencing the established constitutional interpretation, traditions, and policies within the U.S. Context, and asserted that**;** the regulatory taking doctrine has become a powerful tool for constructive judicial activism aimed at undermining government authority over natural resource decision-making.[42] To put aptly, he contended that the doctrine has been used to challenge a wide range of environmental regulations and land use controls, often favoring the interest of property owners over the public goods. Furthermore, the author criticized the application of the compensation requirement under the Taking Clause to instances of regulatory takings, as the original drafter of the Fifth Amendment, James Madison, intended the clause to apply

[38] Mostafa, B., *The Sole Effects Doctrine, Police Powers and Indirect Expropriation Under International Law*, 15 Austl. Int'l L.J. 267, at 296 (2008).
[39] Sax, J.L., *Takings and the Police Power*, 74 Yale L.J. at 36 (1964).
[40] *Id*.
[41] Byrne, J. Peter, *The Regulatory Takings Doctrine: A Critical Overview, in Regulatory Takings and Resources: What Are the Constitutional Limits?* (1994). https://scholar.law.colorado.edu/regulatory-takings-and-resources/2.
[42] *Id*, at 1.

solely to cases of direct, physical seizure of property, rather than to regulatory actions that diminish property value without outright confiscation.[43]

Likewise Schwartz also argued that regulatory taking has coercive effect on society's tool to solve some of its pressing problems.[44] He also further his arguments by pointing out that despite the ever increasing environmental degradation or unwarranted utilization of natural resource which causes climate change and clear social problem, the dramatic expansion of regulatory actions which are necessary to avoid environmental harms and other social problems faces the risk of colliding with the regulatory taking doctrine.[45]Thus, if the Constitution is a barrier to the decisive actions necessary to protect those it governs from the effects of climate change and overconsumption of resources, it is not serving the purpose. Thus, he recommends the court to reject regulatory taking doctrine in its entirety from the US jurisprudence.[46]

In contrast, recognizing the constitutional foundation of the government's police power to regulate private property, various scholarly work and case law—both under domestic and international law, notably in investment-related cases—advocate for the concept of regulatory takings. Their argument is premised on the notion that the government's ability to regulate the use of private property is not absolute and is subject to important limitations. Thus, since private property rights are a fundamental rights protected by the Constitution, governments cannot justify its police power *per se* as a pretext to arbitrary infringes private property rights without just compensation.[47]

In this sense, the requirement of compensation for regulatory interference on private property owner is justified on consideration of *'fairness and justice'*.[48] This principle demands that when a regulation *"goes too far"* and impose a disproportionate burden on a property owner, fairness necessitates the broader community—which gains from the regulation—to share the burden and contribute to the cost via compensation.[49] Furthermore, as Flynn observed,

[43] Treanor, W. M. *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694 (1985), as cited in Byrne, *Regulatory Takings Doctrine*, supra note 41.
[44] Schwartz, A.W., *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 Stan. Envtl. L.J. 247 (2015).
[45] *Id.*
[46] *Id*, p. 251.
[47] Strong, A.L., Mandelker, D.R., & Kelly, E.D., *Property Rights and Takings*, 62 J. Am. Planning Ass'n 5 (1996), https://doi.org/10.1080/01944369608975667.
[48] Byrne, J.P., *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89, at 128 (1995).
[49] Pecorino, Paul, *Compensation for Regulatory Takings with a Redistributive Government*, 80 S. Econ. J. at 488 (2013).

constitutional limits on regulation are reached only when a law imposes a 'public burden' that an individual should not have to bear alone in a free and democratic society that treats each person with equal concern and respect.[50] Thus, when regulations enacted to benefit the public renders the property owner's existing or vested to use property rights unreasonable—create a lasting and disproportionate burden on the owner—all fairness and justice requires this burden to be shared and distributed across society.[51] And, he noted this regulation to be regarded as a regulatory taking, entitling the affected property owner to just compensation. This in turn, at least, mitigates the inequitable situation where a small number of individuals bear the financial burden that benefits the public at large.

In general, while the principle of just compensation for direct or physical taking is well-established, its application to excessive regulation which substantially deprives property owners of the use or economic value of property without physical seizure remains a source of ongoing debate. Therefore, the next section, tried to reveal how various states handle the two competing interest of regulations enacted on account of public interest via police power with the constitutional protection of private property.

2. EXPLORING 'REGULATORY TAKING' IN DOMESTIC LEGAL FRAMEWORK: BEST PRACTICE

The regulatory taking doctrine has a strong foundation in the constitutional jurisprudence of various nations.[52]This doctrine has evolved significantly across different nations, with countries grappling with the complex interplay between the protection of private property and the protection of the public welfare.[53] This in turn, reflects the diverse approach and judicial interpretation surrounding property rights and the limits of government regulation. Given this, this section is dedicated to provide a comparative analysis to explore the evolution of the regulatory takings doctrine in various jurisdictions, how countries address the issue of excessive regulations enacted on account of public interest that can be deemed as a taking of private property across diverse legal systems.

[50] Flynn, Andrew S., *Climate Change, Takings, and Armstrong*, 46 Ecology L.Q. at 673 (2019), https://doi.org/10.15779/Z380R9M45P.
[51] *Id.*
[52] Flynn. *supra* note 50, at 673.
[53] Appleton, Barry, *Regulatory Takings: The International Law Perspective*, 11 N.Y.U. Envtl. L.J. at 35 (2002).

2.1 The United State of America Approach

The U.S. domestic legal system has a long and complex history of dealing with the balance between the constitutional protection of property rights and the government's authority to regulate rights for the broader public good.[54] This ongoing tension and debate has provided a robust foundation for the development and evolution of the doctrine that is considered *sui generis* after decades of evolution.[55] The Fifth Amendment to the U.S. Constitution guarantees fundamental property rights, stipulating that interference must be for a public purpose and followed by just compensation.[56]This taking clause can be triggered with two scenarios or lawsuits: 'condemnation' and 'taking'.[57] Accordingly, while 'condemnation' involves a formal or direct expropriation, where the government takes possession of a physical asset from a private property owner through legislation accompanied by compensation, 'taking' involves a regulatory action affecting property rights and compensation can only be sought through litigation.[58]

Regulatory taking claims, involving situations where private property use is limited by governmental regulation, were initially overlooked.[59] Prior to the landmark case of *Pennsylvania Coal Co v. Mahon*, the original understanding and scope of the 'Takings Clause' of the Fifth Amendment were narrow, primarily focused on protecting physical seizure by governments.[60] In reinforcing this, Patashnik alludes that when the government imposes economic burdens on property owners through regulation, but does not physically appropriate property, courts were generally reluctant to find a taking in the regulatory context.[61]

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[54] *Id*.
[55] Pucher Holmer, Magdalena, *Regulatory Expropriation under International Investment Law – A Case-Law Analysis* (Thesis, University of Lund 2006), at 6.
[56] Kokichaishvili, Ekaterine, *Standards of Foreign Investment Protection from Indirect Expropriation: Balancing the State's Power to Regulate and Investor's Property Rights* (LL.M. Thesis, Central European University 2015), at 12.
[57] Meltz, Robert, *Takings Decisions of the U.S. Supreme Court: A Chronology* (Congressional Research Service Report 2015), at 1. [hereinafter Meltz, *Taking Decisions of the U.S. Supreme Court*]
[58] Kiratipong, Naewmalee, *Indirect Expropriation: Property Rights Protection, State Sovereignty to Regulate and the General Principles of Law* (Ph.D. thesis, University of Wollongong 2017), at 165.https://ro.uow.edu.au/theses1/157
[59] Newcombe, A.P., *Regulatory Expropriation, Investment Protection and International Law: When Is Government Regulation Expropriatory and When Should Compensation Be Paid?* (LL.M. thesis, Univ. of Toronto 1999), at 201.
[60] Miceli, Thomas J. & Segerson, Kathleen, *Regulatory Takings: When Should Compensation Be Paid?*, 23 J. Legal Stud. at 752 (1994).
[61] Patashnik, Josh, *Physical Takings, Regulatory Takings, and Water Rights*, 51 Santa Clara L. Rev. at 365 (2011).

However, after the *Pennsylvania Coal Co. v. Mahon* case the Supreme Court extended the compensation requirement of the Taking Clause to include regulatory taking.[62] Notably, in this pivotal case, the Supreme Court made a groundbreaking decision by recognizes excessive regulations that substantially deprive property owners can trigger compensation under the "Taking Clause", even without any physical occupation or enrichment of the affected property. This decision represented a major shift in the interpretation of the Takings Clause, and acknowledging the notion that when excessively burdensome regulations, despite its public use, effectively deprive property owners of the economically viable use of their property, would warrants just compensation for the affected individual.[63]

Following this, substantial case law delves into the circumstances under which a taking will attract constitutional protection, necessitating the payment of compensation.[64]Owing to this, as the U.S. case law asserts when regulation interferes with property rights and affects property owners, it transforms into regulatory taking, warranting compensation. For instance, as Justice Holmes suggested, regulatory interference on property owner should no longer justified without compensation, when a law has a "substantial impact on property owner that cannot be justified with adequate reasons unless compensation is paid".[65]

Nonetheless, while transforming such excessive regulation to regulatory taking, determining '*how much is too much'* were the major issue to distinguish regulations that fall under the 'police power' and 'taking clause or eminent domain'. In this regard, Holmes's introduced the "diminution of values"—emphasizes on evaluating the reduction in the market value of a property due to regulation—as a standard to decide whether regulation is "too far" and hence compensable under the Taking Clause. [66] However, this does not mean that the government is supposed to compensate for every regulation that deprives the property owner; rather compensation should be extended for excessive regulation that is "too far".[67]

Furthermore, building the *Pennsylvania Coal Co. v. Mahon* case, Courts have established three key considerations to determine when regulation ends and taking began. These include: the severity of the economic impact on the property owner; the degree to which the regulation interferes with distinct or "reasonable" investment-backed expectations, and the nature and

[62] Meltz. R, *Taking Decisions of the U.S. Supreme Court*, *supra* note 57, at 1.
[63] Appleton, *Regulatory Takings*., *supra* note 53, at 36.
[64] M. Sornarajah, *The International Law on Foreign Investment* 274 (3d ed., Cambridge Univ. Press 2010).
[65] Singer, Joseph W., *Justifying Regulatory Takings*, 41 Ohio N.U. L. Rev. at 634 (2015).
[66] Miceli & Segerson, *supra* note 58, at 752.
[67] *Id*.

purpose of the government action, such as whether it is physical invasion or a regulation aimed at public welfare.[68] Together, these three factors helps to assess whether a regulation has "goes too far" and substantially deprive the owners economic valuable use of their property, thereby warranting compensation just compensation under the Taking Clause.

2.2 The Switzerland Approach

The Switzerland (hereinafter Swiss) Constitution recognizes the notion of regulatory taking, referred it as "material expropriation".[69] To this end Article 22 (3) of the Swiss Constitution mandates the State to compensate property owners for regulatory limitations falling under the category of "material expropriation".[70] Section 3 specifically states that "*for an expropriation, or for restrictions on the property equal to an expropriation, full compensation is due*".[71]This provision requires the application of the compensation requirement for both direct expropriation involving physical seizure and regulatory taking. Notably, the term "*restrictions on the property equal to an expropriation"*, indicates material expropriation or regulatory taking which involve regulations which severely limits property rights in such a way that is materially similar to those in a case of formal expropriation equivalent to expropriation.[72]

Unlike other jurisdiction, the Swiss Constitution's unique approach to property regulation is featured by its explicit recognition of compensation for 'excessive' regulation under the notion of material expropriation.[73] In applying material expropriation, as van der Walt and Riva contends, need to distinguishing formal expropriation from the 'normal' uncompensated regulation of private property use through the state's police power, as well as regulatory restrictions on property use. These latter forms, described as 'material expropriations', are only considered valid when accompanied by compensation.[74]This makes compensation as a validity requirement for both direct expropriation and material expropriation. [75]

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[68] Meltz. R, *Taking Decisions of the U.S. Supreme Court*, *supra* note 60, at 3.
[69] Riva, Enrico, *Regulatory Takings in American Law and "Material Expropriation" in Swiss Law—A Comparison of the Applicable Standards*, 16 Urban Lawyer 425, at 430 (1984).
[70] *Id*.
[71] *Id*, at 427.
[72] Oriet, Thomas A. *Comparative Landowner Property Defenses Against Eminent Domain* 94 (2021), Electronic Theses and Dissertations 8611
[73] *Id*, at 429.
[74] Van der Walt, A.J., *The Property Clause in the New Federal Constitution of the Swiss Confederation 1999*, 15 Stellenbosch L. Rev. 326, at 327-28 (2004).
[75] *Id*, at 97.

Besides formal recognition, the determination to determine when regulation ends and taking or material expropriation begin is entrusted to the Court.[76] In this context, the Federal Supreme Court employs two primary tests to evaluate the concept of material expropriation. The first one involves examining whether the restrictions significantly impair the owner's ability to utilize essential right arising from the property", which followed by compensation. And the second one is the case of less intrusive but still considerable restriction of property rights, accordingly compensation is due only if single person or very few persons is affected in a way of breaching the principle of equal protection.[77]

Generally, it is crucial to highlight that the explicit recognition of compensation for indirect or material expropriation under the Constitution effectively safeguards fellow citizens, from excessive governmental regulation. The Swiss example holds value for jurisdictions lacking explicit provisions for regulatory taking or indirect expropriation under the Constitution, suggesting a potential model for amending such laws. Therefore, Swiss law serves as a valuable comparative source for developing remedies to address citizen who has been suffering from property interference owing to excessive but otherwise lawful regulations without compensation.

2.3 The South Africa Approach

Balancing between the constitutional protection of property rights and the state's authority to regulate for the public goods, which may severely impact property owners, remains an unsettled issue with in South African constitutional jurisprudence.[78] The absence of explicit provision for constructive or indirect expropriation in the Constitution contributes in complicating efforts in balancing regulatory rights with the protection of property rights.[79] Notably, Mostert and Bezuidenhout asserted that; this uncertainty is further compounded by Section 25 of the 1996 Constitution, which addresses State interference with property through

[76] R. Dolzer, *Property and Environment: The Social Obligation Inherent in Ownership, A Study of the German Constitutional Setting*, IUCN Environmental Policy and Law Paper No. 12, at 21 (1976). While he discussed the German experience on regulatory taking, he provides that "individual sacrifice" and "intensity of the regulation" as a factor to determine compensable and non-compensable regulation that imposes an excessive burden, or individual sacrifice, to that owner, altering his legal position and enjoyment of property, while bringing benefits to the 'public' at large.
[77] Riva, *supra* note 69, at 432.
[78] Mostert, Hanri, *The Distinction between Deprivation and Expropriation and the Future of the 'Doctrine' of Constructive Expropriation in South Africa*, 19 S. Afr. J. Hum. Rts. at 569 (2003).
[79] *Id*.

'deprivation'(section 25 (1)) and 'expropriation'(section 25 (2)) without providing a clear distinction.[80]

For instance, in her analysis, Bezuidenhout discussed the notion of 'regulatory taking', citing decision rendered by the South African constitutional court's in *Reflect-All case.* [81]The case involves the constitutionality of legislations pertaining to the planning of provincial roads, and whether it impugned provision arbitrarily deprives owners of their property contrary to section 25 (1) of the Constitution, hence amounting expropriation following compensation. In settling the case, the Court provided that characterizing the transportation-related regulations as amounting to expropriation would unduly constrains the government's ability to reasonably balances the interest of private landowners and the broader public goods.[82]However, the Court also acknowledges the possibility that regulations that impose more substantial or unequal regulatory burdens could potentially trigger the need for compensation in a future.[83]

Nevertheless, in *Agri South Africa v Minister for Minerals and Energy* case, the Constitutional Court established title acquisition over an object by the State or another private entity as a defining characteristic of expropriation that require compensation.[84] Accordingly, the Constitutional Court's seminal ruling in *Agri SA* recognized a formal acquisition of property by the State as a prerequisite for a successful claim of expropriation under Section 25 of the South African Constitution. Thus, arguably, by requiring demonstrated deprivation of ownership, control or possession, the Court logically closed the door to arguments relying solely on the indirect or 'constructive' effects of legislation or administrative actions upon land use.[85] Likewise, scholars, including Southwood,[86] and Gildenhuys,[87] contend that "no expropriation exists without some transfer or acquisition of rights".

[80] Mostert, *supra* note 78. See also Bezuidenhout, *supra* note 6, at 98. Deprivation within the context of section 25 includes extinguishing a right previously enjoyed, and expropriation is a subset thereof, although additional requirements must be met for deprivation to rise to the level of expropriation under 25 (2).
[81] *Reflect-All 1025 CC and Others v. MEC for Public Transport, Roads and Works, Gauteng Province Government and Another, 2009 (6) SA 391 (CC) para. 65,* cited in Bezuidenhout*, supra* note 6, at 107.
[82] Bezuidenhout*, supra* note 6, at 107.
[83] Van der Sijde, Elsabé. *Reconsidering the Relationship between Property and Regulation: A Systemic Constitutional Approach* 144 (Ph.D. thesis, Stellenbosch University 2015).
[84] *Id*.
[85] *Id*., at 105.
[86] Southwood, M.D. *The Compulsory Acquisition of Rights: By Expropriation, Way of Necessity, Prescription, Labour Tenancy, and Restitution* 15 (Juta & Co. 2000).
[87] I. Currie & J. de Waal, *The Bill of Rights Handbook* 553 (5th ed. 2005), cited in Van der Sijde, Elsabé, *supra* note 83.

Conversely, there are also other scholars who still attempt to argue that substantial or undue limitation of rights amounts to a practical or 'constructive taking', even without outright appropriation by the State. For instance, Van der Walt argues that in certain instances, expropriation might be viewed as the loss of property by its former holder rather than an acquisition by the State and suggests State acquisition should not be considered the sole defining characteristic of expropriation. [88]

Despite this, in numerous decisions, Courts have consistently required a formal appropriation or outright taking by the state in order to find an expropriation under Section 25 of the Constitution. Given this, by prioritizing demonstrated transfers of ownership, control or possession away from the individual landowner, the scope of what constitutes an expropriation has largely been confined to cases involving outright, formal deprivation of title.[89] This narrow, formalistic approach makes it difficult to argue burdensome regulation alone could trigger compensation.

Besides, it has been argued that the South African jurisprudence has established that compensation claims relying solely on indirect expropriation face a high evidentiary bar. This is because the claimants will face with a significant burden in proving that a government's regulatory action has gone beyond the permissible regulation, thus effectively deprived the substance of their property rights. This is challenging because these regulatory actions are often designed to serve the public interest, and courts tends to defer to the government's rationale for implementing such measures, thus denying compensation. Faced with this strict standard, success for novel indirect deprivation arguments seems improbable.[90]

However, the Courts do recognize other mechanisms beside expropriation claims that can provide relief. As evidenced elsewhere in case law, where regulations are found to be arbitrary or infringe rights in an unconstitutional manner, the default remedy is invalidating such actions rather than providing damages.[91]This preserves some ability to challenge

[88] Van der Walt, A.J., *Constitutional Property Clauses: A Comparative Analysis* (1999), at 338.
[89] Mostert, *supra* note 78, p. 568.
[90] *Id*, p. 576.
[91] See, R. Dolzer, *Property and Environment, supra* note 76*;* see also Karen Bezuidenhout, *supra* note 7, p. 149-159. In a similar fashion, albeit, slight difference, in Germany, Mexico, & Thailand Constitution, "regulatory interferences with property rights that exceed the limits set by the Constitution/ Basic Laws in case of German are illegal and give rise to constitutional challenge of the validity of the legislation. This type of regulatory interference cannot be used as the basis to found a claim for compensation "rather the decision seems invalidating as an option for excessive regulations.

unreasonable infringement of property interests without requiring proof of indirect expropriation.

In general, while the South African courts have been hesitant to explicitly endorse or reject the concept of constructive expropriation or regulatory taking, Bezuidenhout observes that the country's jurisprudence reflects an ongoing discussion regarding potential alternatives, such as compensation, instead of invalidating excessive property regulations on account of its unconstitutionality.[92] On the other hand, Mostert argues that, based on the current state of South African jurisprudence, the payment of compensation for cases where regulations exceed the limits cannot be envisioned.[93] However, it is important to acknowledge that the South African approach plays a crucial role in the development and formulation of the concept of constructive expropriation.

3. ESTABLISHING BOUNDARIES FOR PROPERTY RIGHTS LIMITATIONS UNDER THE FDRE CONSTITUTION

3.4 Police Power, Expropriation and Regulatory Taking

A strong property rights regime, lays the foundation for economic growth, personal freedom, and overall well-being of the society.[94] For individuals, property ownership entails opportunity, responsibility, and economic freedom, thus translate into investment, innovation, the possibility of wide scale exchange, and even improved governance which benefit the country in general.[95] That is why the protection of private property rights becomes one of the fundamental rights guaranteed in various Constitutions. In providing protection, constitutional property rights clause are designed to be flexible, often incorporation conditions that allows for limitation of these rights in order to achieve significant social objectives.[96]

In this context, the FDRE Constitution under Article 40 (1) and (8) empowers the government with two primary tools—police power (deprivation clause) and eminent domain (expropriation clause)—that enable it to regulate, restrict, or acquire private property in order

[92] *Id*, at 98. Cite *Agri SA v Minister for Minerals and Energy,* 2013 (4) SA 1 (CC).
[93] Mostert, *supra* note 78, at 567.
[94] Trebilcock, Michael & Veel, Paul-Erik, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. Pa. J. Int'l L. 397, at 400 (2008).
[95] *Id*., at 408-409.
[96] Merrill, T.W, *supra* note 27, p. 457.

to address the needs of the public welfare.[97] While the police power allows the state to regulate and restrict the right to use property, eminent domain grants the authority to acquire private property for "public purpose" with just compensation.[98]These constitutional framework underscores that property rights, while fundamental, must be balanced against broader societal interest and the rights of the others.[99]

3.4.1 Police Power or Deprivation Clause

Article 40 (1) of the FDRE Constitution while safeguards private property rights, it also empowers the government to exercise its police power and impose limitations on property rights.[100]The provision sets public interest as defined by specific law, and the need to protect the rights of others, as a prerequisite for limiting the rights to use and enjoyment of private property through police power.[101] Despite the term 'public interest' is not defined under the Constitution, regulations or actions aimed at safeguarding public health and safety, preserving cultural heritage, protecting the environment, and managing land use through measures like zoning regulations can generally be regarded as serving a public purpose.[102]

The second scenario where by property rights may be deprived under the Constitution is when 'their exercise or use infringes upon the rights of others'.[103] Put differently, in situations where the utilization of property rights may detrimentally affects the rights of others, governmental authorities may impose reasonable constraints to reconcile conflicting interests. In this regard, the term '…*in a manner compatible with the right of other*' under Article 40 (1) seems one indication of the "noxious use test".[104] The noxious use test justifies regulation

[97] FDRE Constitution, *supra* note 3, Art. 40 (1) & (8). In addition to the Constitution, the Civil Code under Article 1205 guarantees property owner to use his property rights as he think fits. These rights can only be limited when a particular law deems so. Not only this, the Civil Code under Art. 1151-1205 provides about the restrictions attached to the exercise of private property. See Ethiopian Civil Code, Proclamation No. 165/1960, Federal *Negarit Gazeta*, 1st Year, No. 3, art. 1205(1) (1960) [hereinafter Civil Code]; See also Murado A., *Ethiopia's Property Rights Legal Regime., supra* note 1, at 169.
[98] *Id.*
[99] James E. Holloway & Donald C. Guy, *Weighing the Need to Establish Regulatory Takings Doctrine to Justify Takings Standards of Review and Principles*, 34 Wm. & Mary Envtl. L. & Pol'y Rev. 315 (2010).https://scholarship.law.wm.edu/wmelpr/vol34/iss2/2
[100] FDRE Constitution, *supra* note 3, Art. 40 (1). Here conceptual clarity is central to the regulation of the use of property with reference to section 40 (1), because "deprivation" is sometimes used interchangeably in the literature with "limitation" or "regulation" to signify that the use, enjoyment or exploitation of property is or can be restricted.
[101] *Id*., Art. 40 (1).
[102] Legesse Tigabu, *Host States' Police Power and the Proportionality Test in International Investment* Law, 8 Jimma Univ. J. L. at 68 (2016). https://doi.org/10.46404/jlaw.v8i0.4112
[103] FDRE Constitution, *supra* note 3, Art. 40 (1).
[104] Robert M. Washburn, *Reasonable Investment-Backed Expectations as a Factor in Defining Property Interest*, 49 Wash. U. J. Urb. & Contemp. L. at 63 (1996).

of property rights as necessary and non-compensable when the property owner's conduct creates the need for regulatory interventions that diminishes his property value.[105]for instance, abuse of ownership rights, utilizing property rights in ways that infringe upon the rights of neighboring property owners, as provided under Article 1225 of the Civil Code—such as through excessive noise or smoke, unpleasant smell of pollution—can be taken as a typical instance for the recognition of noxious test that attracts regulatory measures aimed at uphold the rights of affected parties.[106] Sax, for instance, asserted property rights exercise or used against the interest of others should not be considered as property, thus can be regulated without compensation.[107]

Furthermore, to enforce the limitation of property rights under Article 40 (1), the requirement of public interest or protection of the rights of others must be upheld through the principle of legality. Notably, the term "…*unless prescribed otherwise by law…*" denotes the principle of legality. This requirement entails the core for the scope of property protection under the Constitution, as it emphasizes that limitation of property rights must be based on clearly defined law. Conventionally, this principle prohibits any arbitrary restrictions of a constitutional right, and requires it to be grounded in a legal norm that can be directly or indirectly traced back to the constitution itself.[108]Affirmatively, Barak argued that this principle entails a "rule of law" component—formal and substantive meaning of the term.[109] While the formal aspect requires any limitations of rights to be made with duly enacted laws (procedural quality of the law), the substantive requirement dictates these laws to be align with broader principles of justice and fairness enshrined in the constitution.[110]

Emphasizing on the substantive part, Barak interpreted the notion of "rule of law" to encompass the 'proportionality' test recognized in constitutional jurisprudence.[111] The test requires any limitation on rights must pursue a legitimate aim, be necessary as a last resort, be minimal, uphold democratic values, and curtail rights only to the extent essential for

[105] See, Thomas J. Miceli & Kathleen Segerson, *supra* note 60*,* at 442.
[106] Civil Code, *supra* note 97, Art. 1225. See also Meltz, R., *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, at 323 (2007), [hereinafter Meltz., *Takings Law Today*]
[107] Sax, *Takings and the Police Power*, *supra* note 38, at 39.
[108]Barak, Aharon. *Proportionality: Constitutional Rights and Their Limitations*. Cambridge University Press, 2012, 107–28, at 107. http://dx.doi.org/10.1017/CBO9781139035293
[109] *Id*, at 140
[110] Paul Craig*, Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework,* in *The Rule of Law and the Separation of Powers* 95, 95-115 (Richard Bellamy ed., Routledge 2017).
[111] Barak, *supra* note 108, at 129

achieving the objective.[112] Ahmed and Bulmer also asserted that the principle of 'proportionality' dictates that the limitation placed on rights must be proportional to the intended effect such a limitation.[113]The aim for tagging this requirement is to protect individuals from arbitrary interferences.[114]In this context, the term '*unless otherwise prescribed by law*' under Article 40 (1) of the Constitution, arguably, is not an open invitation to the legislator to limit property rights of individuals without appropriate justification or in an arbitrary manner. This in turn protects the property owners from unreasonable and arbitrary interference via regulatory actions.

Conversely, Adem while assessing the constitutional basis and understanding of the 'rule of law and limits on government power in Ethiopia', contended that the FDRE Constitution lacks 'proportionality test'—a feature present in most constitutions—which intends to protect individuals from unjustified and arbitrary governmental interference on fundamental rights.[115] Given this, in the absence of proportionality requirement under the Constitution, arguably, the term "…*prescribed by specific law…"* under Article 40 (1) could potentially be interpreted broadly to justify various governmental actions or duly enacted regulation on account of public interest, regardless of the burden it imposed without sufficient compensation. This in effect allows the government to uses its 'police power' to legitimatize violation of property rights, which contradicts the principles of the 'rule of law' and instead upholds a regime of 'rule by law'.[116]

In a nutshell, the deprivation clause in Article 40 (1) allows the government to exercise its police power, and regulate or limit private property rights for social welfare. However, arguably, the Constitution's reliance on 'claw back clause', which refers the limitation of these rights to specific laws, without substantive requirements regarding the type and quality

[112] Curtice, M., Bashir, F., Khurmi, S., Crocombe, J., Hawkins, T., & Exworthy, T., *The Proportionality Principle and What it Means in Practice*, 35 *Psychiatrist* 111, 111-16 (2011), https://doi.org/10.1192/pb.bp.110.032458.

[113] Ahmed, D. & Bulmer, E. *Limitation Clauses*. International IDEA Constitution-Building Primer 11, 2nd ed. (2017), at 14.

[114] Curtice *et al*., *The Proportionality Principle, supra* note 112, at 111.

[115] Adem Abebe, *Rule by Law in Ethiopia: Rendering Constitutional Limits on Government Power Nonsensical*, CGHR Working Paper No. 1, Univ. of Cambridge, at 13 (2012).

[116] *Id*, at 4. Adem argued that Ethiopia's longstanding political culture empowers the government to enact laws as it wishes. This deeply entrenched belief; combined with the public's view that the government has the unfettered right to govern and exercise its legislative power to implement policies and ideologies regardless of the Constitution reinforces the predominant notion of "rule by law" rather than the more democratic principle of "rule of law". This unchecked legislative power could led to a system where the government can pass laws and regulations that prioritize its own interests over the rights and freedoms of the people, undermining the democratic foundations of the country.

of laws used to limit these rights, renders the Constitution to offer minimal protection for property owners against excessive but valid regulations that unduly affect property rights.[117]

3.4.2 Eminent Domain or Expropriation Clause

Expropriation—eminent domain in some jurisdiction—conventionally connotes the mandatory acquisition of land or property by the state for activities that serve a public purpose; with the requirement of prior payment of fair compensation.[118] This process is a accepted legal tool that permits governments to acquire land or other property for projects deemed to be in the public interest, such as the construction of roads, public facilities, or infrastructure development.[119]The right to expropriate private property is stems from the government's authority under "eminent domain" to acquire private property. On this account, Article 40 (8) of the Constitution, without prejudice the rights of private property, empowers the government to expropriate private property for public purposes with the payment of advance compensation commensurate with the market value of the property.[120]While the term "*…without prejudice to the right to private property…"* emphasizes the importance of protecting private property rights, the requirement of compensation is set as mechanism to balance these competing interests and reduce the impact on private property owners.[121]

Nevertheless, as argued by Murado, the legal and practical implementation of expropriation in Ethiopia, including the constitutional and legislative requirements of "public purpose," "compensation," and "procedural recourse," has been characterized by significant legislative shortcomings.[122] These legislative shortcomings, such as ambiguities, vagueness, loopholes, outdated provisions, and excessive administrative power with limited judicial oversight, have undermined the clear constitutional and legal standards required to safeguard the protections of property owners. [123]

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[117] *Id*.
[118] Daniel Weldegebriel, *The History of Expropriation in Ethiopian Law,* 7 *Mizan L. Rev.* 284 (2013). http://dx.doi.org/10.4314/mlr.v7i2.4
[119]Martin Persson. *Compensation Practices in the Ethiopian Expropriation Process: A Case Study from Amhara National Regional State, Ethiopia*. (Master's Thesis, Lund University 2015).
[120] FDRE Constitution, *supra* note 3, Art. 40 (8)
[121] *Id*.
[122]Muradu Abdo, *Reforming Ethiopia's Expropriation Law*, 9 Mizan L. Rev. 304, at 327 (2015),https://doi.org/10.4314/mlr.v9i2.3.
[123] Hailu Burayu, Elias N. Stebek & Muradu Abdo, *Judicial Protection of Private Property Rights in Ethiopia: Selected Themes*, 7 Mizan L. Rev. 351, (2013). http://dx.doi.org/10.4314/mlr.v7i12.6

Responding to criticisms regarding the Constitution's lack of specific substantive and procedural requirements for the exercise of expropriation powers,[124]the current Expropriation Proclamation No.1161/2019 establishes four key principles to guide the process of expropriating property.[125]The principles dictate the authority to base expropriation on approved land use, urban or development plans; provide compensation and resettlement aid to restore and improve the livelihoods of displaced individuals; ensure consistency in compensation amount for similar properties and economic losses; and uphold transparency, participation, fairness, and accountability in the expropriation process.[126]Although these principles may not completely limit the government's expropriation authority, their proper and effective implementation could strengthen the protection of property rights by placing constraints on both the executive and legislative branches.[127]

Generally, the aforementioned sections reveal the divergent nature of police power and the expropriation clause, both in their conceptual underpinnings and purpose. However, while the justification for defining these powers differs, they nonetheless overlap to some degree.[128] This overlap often arises when the exercise of police power or regulations becomes excessive, substantially limiting the use or value of property to the point where it is no longer useful to the owner, even without formal seizure. As has been discussed above, this interplay has paved the way for the emergence and recognition of the regulatory takings doctrine within various jurisdictions.

In this context, in pursuit of addressing this overlap, the following discussion addresses whether excessive regulation that effectively deprives an owner of the practical use of their property necessitates compensation, or if such regulation can be justified through the government's police power or eminent domain power under the FDRE Constitution.

3.5 Justifying Compensation for Excessive Regulation under the FDRE Constitution

The FDRE Constitution under Article 40 (1) authorizes the government to exercise its police power and restrict property rights in the public interest. Property rights restrictions under this

[124] Muradu Abdo, *Legislative Protection of Property Rights in Ethiopia: An Overview*, 7 Mizan L. Rev. at 205 (2013). http://dx.doi.org/10.4314/mlr.v7i2.1
[125] Expropriation of Land Holdings for Public Purposes, Payments of Compensation and Resettlement of Displaced People, Proclamation No. 1161/2019, Fed. *Negarit Gazeta*, 2019, art. 4.
[126] *Id.*
[127] Muradu Abdo, *Reforming Ethiopia's Expropriation Law*, *supra* note 122, at 303.
[128] Mostert, *supra* note 78, at 573-575.

provision are imposed without compensation. This is because exercising this police power and restricting property rights is presumed be rationally related to advancing the public interest and conform to due process principles. In some cases, these limitations may also need to meet a general proportionality test. [129]Contrary to this, Article 40 (1) fails to include additional requirements or guidelines, such as a general limitation clause that incorporates the principle of proportionality, [130]to ensure that limitations on property rights are assessed for adherence to constitutional principles.

The absence of an explicit proportionality requirement under the Constitution poses critical challenges in balancing governmental police power and safeguarding constitutional rights of property owner.[131] This omission of *pram facially* grants the government latitude to justify regulatory restrictions on property rights solely on the Constitution's literal text. Consequently, any deprivation enacted through specific legislation and justified by a "public purpose" can easily meet constitutional standards outlined under Article 40 (1), potentially undermining protections for property rights. On the other, a compelling argument may be made from the perspective of normative constitutional interpretation which dictates—even without explicit proportionality requirement—limitations on constitutional rights must be guided by the principles of proportionality, rationality, and due process.[132]These principles are fundamental to ensuring that constitutional governance respects both the letter and spirit of the law. This approach affirms the core rights of property owners while harmonizing them with broader societal interests.

In this regard, Sax argued that while regulatory laws enacted on account of public interest may limit property rights, when they impose unfair burdens that are not reasonably expected in a democratic society and where the property use causes no harm to others, such regulation should not be justified without compensation, even if the regulation benefits the whole community.[133] Building upon this proposition, we can posit that despite it needs a test of case law; it can be argued that government regulations or actions that go "too far" and result in the

[129] A.J. van der Walt, *Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause*, 16 *S. Afr. J. Hum. Rts.* at 3 (2000), https://doi.org/10.1080/02587203.2000.11827587.
[130] Adem, A., *Rule by Law in Ethiopia*, *supra* note 115, at 15.
[131] See Kai Möller, *Proportionality: Challenging the Critics*, 10 *Int'l J. Const. L.* 709, 709–731 (2012), https://doi.org/10.1093/icon/mos024.
[132] Barak Aharon, *supra* note 108, at 140
[133] Singer, Joseph William. *Justifying Regulatory Takings*. 41 Ohio N.U. L. Rev. at 648 (2015).https://digitalcommons.onu.edu/onu_law_review/vol41/iss3/4.

effective deprivation of the property owner's economic benefit cannot be justified under the police power established by Article 40 (1).

However, despite the aforementioned discussion, considering the property clause of the Constitution and the constitutional jurisprudence as it stands, it would not be hard for the government to justify regulation enacted for public purposes without compensation under Article 40 (1), even if it severely restrict the ability to enjoy the property rights equivalent to expropriation.

Expropriation clause under Article 40 (8) is the other important provision which vested the government with the power to expropriation private property. Unlike the deprivation of property using police power, exercising the expropriation or eminent domain power and expropriate private property including tangible and intangible for public purpose should accompanied with compensation.[134] The compensation requirement covers not only physical assets like land and buildings, but also intellectual property and creations from labor, creativity, or capital, such as trademarks, patents, and business operations.[135]

Here it is worthy to note that, while the requirement of compensation is clear for physical expropriation—involving the government's acquisition of property rights from the former owner—the provisions is unclear regarding excessive regulations that tantamount of expropriation. However, the incorporation of intangible assets—which cannot be physically seized or expropriated but are instead affected by legal restrictions or limitations on the owner's rights to utilize, transfer, or profit from them—can be viewed as an expansion of the compensation requirement for regulatory limitations. On this sense, it is possible to hypothesize that any restriction on property rights through regulatory actions that do not entail physical seizure may trigger the compensation requirement under Article 40 (8). This is because such regulatory measures, even without physically taking possession of the property, can substantially diminish the value and utility of the intangible asset to the owner, effectively depriving them of their property rights

Beside, albeit in different context, using the Amharic and English version of the provision, Habib claimed the existence of a legal framework for applying the compensation requirement for regulatory taking under Article 40 (8) of the Constitution. Accordingly, he equated the

[134] Besides the Constitution, Article 1127 & 1128 of the Civil Code classifies goods into corporeals and incorporeals. See also Muradu Abdo, *Subsidiary Classification of Goods under Ethiopian Property Law: A Commentary*, 2 *Mizan L. Rev.* 85 (2008).
[135] FDRE Constitution, *supra* note 3, Art. 40 (8).

Amharic term "ማውረስ" with the English term "to take", thereby indicating that the compensation provision includes not only physical expropriation but it also extends to regulatory takings as well. [136]

Nevertheless, on a closer examination, Habib's claim can be viewed as overly simplistic for two reasons. On the one hand, save few countries such as Switzerland which explicitly recognize regulatory taking in its Constitution, regulatory taking is developed in the majority of jurisdiction, i.e., US,[137] Canada,[138] and arguably Germany [139] to mention a few, via judicial transformation of the 'eminent domain or Taking Clause'. This is to mean that before the interpretation of the eminent domain clause to include regulatory taking, such constitutional text were meant to include only physical or direct taking. On the other, on historical account, during the *Derg* regime the government had regularly nationalized private property without the payment of compensation.[140] Given this, the provision of the 'expropriation clause' included under the FDRE Constitution is to rectify the fears that were developed by the practice of the previous regime's confiscating or nationalizing private property without compensation.[141]

Besides, while examining the history of Ethiopia's expropriation law, Daniel argued that the compensation requirement is generally applied when the government obtained or appropriate private property for public purpose.[142]Of course there is no justification exists for the inference of this requirement of appropriation or compulsory acquisition of property by the state in the constitutional context, but it seems to be firmly embedded in the structure of Ethiopian expropriation laws.[143] For instance, considering the purpose of the Expropriation Proclamation[144]—the primary legal framework governing expropriation in modern Ethiopia—one could argue that the expropriation clause under Article 40 (8) necessitates a

[136] Habib A. Abasimel, *The Jurisprudence of the Council of Constitutional Inquiry and of the House of Federation on Property Related Claims: A Critical Study*, Thesis, at 30 (2018).
[137] Matthew P., *supra* note 4, at 2055.
[138] Russell, *supra* note 8, at 180.
[139] Dolzer, *Property and Environment, supra* note 76.
[140] Ahmed M.M., Ehui S., Berhanu Gebremedhin, Benin S. & Amare Teklu, *Evolution and Technical Efficiency of Land Tenure Systems in Ethiopia*, Socio-economics & Policy Research Working Paper 39, ILRI (International Livestock Research Institute), at 8 (2002).
[141] Danel, Compensation for Expropriation in Ethiopia and the UK, *supra* note 2, at 57-68.
[142] Daniel, *The History of Expropriation in Ethiopian Law*, *supra* note 118, at 308.
[143] Muradu, *Reforming Ethiopia's Expropriation Law*, *supra* note 124, at 302.
[144] Proclamation No. 1161/2019, *supra* note 127, Article 2 (3) used the term displacement compensation for a land holder for the loss of use rights on the land as a result of expropriation. This shows appropriation of the property as a principal feature of the Proclamation.

complete or partial acquisition of benefits by the state.[145]This is referred as the requirement of appropriation or compulsory acquisition. Furthermore, unlike Habib, using a textual analysis of the Amharic term "ማውሰድ" and equated it with physical taking or appropriation of property, Tilahun reinforced Daniel's argument that the compensation requirement under Article 40 (8) only applies to cases involving the appropriation of property—commonly referred to as "direct expropriation".[146]

Moreover, unlike police power this is regulatory in nature, acquisitive or appropriation of property—involving the transfer ownership of the property to the state for the greater public good—is the defining feature of expropriation.[147]This distinction underscores the unique nature of eminent domain, where the state's intention is to assume ownership for societal benefit, rather than merely regulating private property use. According to a strict constitutional interpretation, regulatory deprivation that does not involve the state's acquisition of some advantage or benefit might be excluded from the compensation requirement.[148] Thus, despite it requires a test of time and case laws involving the interpretation of the Constitution, Article 40 (8) arguably seems to provide compensation for direct physical expropriation, rather for regulatory takings.

In a nutshell, the Constitution's property limitation clause—police power and expropriation or eminent domain—does not require compensation for excessively restrictive regulations that significantly limit property owners' use of their property, as long as no physical appropriation occurs. This suggests that property owners' interests are subjugated to the public interest, unfairly burdening them rather than distributing the burden equitably across the public. Thus, to strike a balance, it is crucial to explore how other legal systems reconcile the exercise of police power to protect the public interest with the safeguarding of private property owners from unduly burdensome regulations. In this sense, with the aim to identify potential solutions that Ethiopia could adopt to balance these competing interest, the subsequent

[145] Muradu, *Reforming Ethiopia's Expropriation Law*, *supra* note 122, at 302.
[146] Tilahun W. Hindeya, *An Overview of the Legal Regime Governing Minerals in Ethiopia,* 3 Bahir Dar Univ. J. L. at 54 (2012).
[147] See Daniel, *The History of Expropriation in Ethiopian Law, supra* note 118, at 289. We can also understand the scope of the expropriation clause from his definition, which he defines expropriation narrowly as *the act of compelling an owner to relinquish ownership, either through the complete or partial acquisition of the property*. This suggests that compensation applies only when the state directly takes ownership or possession of the property.
[148] It is important to note, however, that even if the state does acquire some benefit as a result of the regulation, this acquisition may not necessitate compensation if it falls under Article 40 (1) of the Constitution, or if the acquisition is incidental to exercising its police power. Forfeiture of property as a result of crime or civil case is best example for this.

section explores the approaches adopted in other jurisdiction in balancing the delicate balance between safeguarding private property rights and onerous regulations that serves the public interests.

4. LESSONS FOR ETHIOPIA

As observed in the comparative overview, countries develop diverse methods in addressing excessive or 'too much' regulation that deprive individuals property rights. For instance, in the U.S., despite the 'Taking Clause' of the Fifth Amendment is originally meant to physical taking, the Supreme Court expand the compensation requirement under the 'Taking Clause' to apply for regulations that substantially affect property rights.[149]Uniquely, the Swiss approach uniquely makes such regulation compensable by explicitly providing for it in its Constitution as a "maternal expropriation" and reinforcing it with case laws.[150]Besides, the South African approach inclines to invalidating excessive regulation by challenging its constitutionality.

Coming to Ethiopia, adopting the first solution—'judicially transforming the 'Taking Clause' to cover excessive regulation as developed in the U.S, and Canada—appears challenging, if not impossible. This is because unlike other Countries which grant Constitutional interpretation to the Judiciary, the FDRE Constitution "stripped the court" from interpreting the Constitution[151] and grant exclusive authority to the House of Federation (HoF) for adjudicating all constitutional disputes.[152]In this sense, considering the inherent political composition of the HoF[153] and the expansive police powers conferred under Article 40 (1) to limit private property without corresponding proportionality requirement, it would be overoptimistic to anticipate the HoF to interpret the expropriation clause in a manner that provide compensation to property owner affected by excessively restrictive regulations imposed by Parliament or the Executive on account of the public interest.[154]Thus, arguably

[149] Josh Patashnik, *Physical Takings, Regulatory Takings, and Water Rights,* 51 Santa Clara L. Rev. 365 (2011).http://digitalcommons.law.scu.edu/lawreview/vol51/iss2/1
[150] Riva, *supra* note 69, at 425.
[151] Yared Legesse, *Court-Stripping: A Threat to Judicial Independence,* in *Ethiopian Constitutional Series VI: The FDRE Constitution: Some Perspectives on the Institutional Dimensions* 102 (Addis Ababa Univ., 2010).
[152] Getachew Assefa, *All About Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of a Constitutional Interpretation*. 24 J. Ethiopian L. 139, at 166
[153] Assefa Fiseha, *Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience*, 52 Neth. Int'l L. Rev. 1–30 (2005).. https://doi.org/10.1017/S0165070X0500001X
[154] Although the Federal Administrative Procedure Proclamation No. 1183/2020 aims to protect individuals' rights and interests by allowing courts to review the constitutionality of administrative agency actions in rulemaking and decision-making, it does not address the issue of compensation for overly restrictive regulations.

one may posit that; the Constitution's exclusion of the judiciary—an independent and impartial body uniquely positioned to safeguard individuals against the dual perils of governmental actions and regulations—from interpreting the Constitution may impede the extension of the compensation requirement under Article 40 (8) to cover regulatory takings.

Constitutional recognition of excessive regulation as 'constructive or material expropriation' and apply the compensation requirement similar to direct expropriation is another method adopted in Switzerland to address the issue of regulatory takings. This approach acknowledges that overly restrictive regulations can effectively deprive property owners of the economically viable use of their property, warranting just compensation, even in the absence of direct physical appropriation by the government.[155]However, adopting this approach, explicit recognition of regulatory taking, in Ethiopia, particularly with respect to the Constitution, may face challenges. Constitutional amendment is one clear challenge. Since the Constitution sets a high bar for amendments, requiring a two-thirds majority in both houses of parliament as well as the consent of the states as stipulated in Article 104[156]—which effectively preventing it from being amended 'legally'—[157]makes it impractical to explicitly recognize excessive regulation as a constitutional taking in the short term, though future possibilities remain hopeful.

As a last resort, invalidating excessive regulation by questioning its constitutionality is the other approach under consideration. The FDRE Constitution, as claimed by Adem, imparts on the supremacy of the Constitution by demanding both the legislative and the executive organ to ensure their measures in line with the constitutional constraints including the human rights provisions.[158]In this sense, by referencing Article 9 (4) and 13 (2) of the Constitution—which require the consideration of human rights standards in the interpretation and enforcement of constitutional rights—despite the absence of proportionality requirement in limiting rights under the Constitution, it can be argued that regulations enacted for the public good, but which substantially impair individual property rights, in all fairness and justice,

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Notably, the explicit exclusion of Proclamations and Regulations—the key instruments of agency delegation—from such judicial review weakens oversight mechanisms. This limitation makes it unlikely that the expropriation clause could be expanded to cover regulatory takings, thereby restricting protections for individuals against governmental overreach in this domain. See, Federal Administrative Procedure Proclamation No. 1183/2020, Fed. *Negarit Gazeta* (2020).

[155] See Riva, *supra* note 69.

[156] FDRE Constitution, *supra* note 3, Art. 104.

[157] Yared Misrak, Yohannes Genet & Kassaye Muluye, *The Demands and Contests of Constitutional Amendment in Ethiopia: Analysis on the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution*, 15 *Insight on Afr.* 88 (2023), https://doi.org/10.1177/09750878221114384.

[158] Adem A., *Rule by law in Ethiopia*: *supra* note 115, at 4.

contravene the protections enshrined in Article 40 (1). Consequently, individuals adversely impacted by such regulations may invoke Article 9 (1) to challenge their constitutionality[159] and advocate for the invalidation of such excessive regulations. [160]

Nonetheless, invalidation of valid regulation that favors other social purposes such as environmental protection, health, consumer protection, etc., is not prudent and might not serve both the interest of individual property owners and the interests of the government to further other social ends. On the other, such nullification would not restore lost core property rights for those already affected, nor would it offer a viable solution for individuals who have reached a point where recovery of their property is no longer feasible. This is because the Constitution does not explicitly authorize the HoF to provide additional remedies or compensation for individuals who have suffered damage as a result of these invalidated regulations because of their unconstitutionality. This implies that property owners facing undue government interference often find themselves without recourse for constitutional damages, leaving them with no remedy.[161]

Furthermore, even challenging the constitutionality of excessive regulations may often prove unsuccessful. This is primarily attributable to the composition of the HoF[162]—whose members are elected by State Councils—rendering it a predominantly political entity.[163] Given this, when interpreting the Constitution and deliberating on legal matters involving tensions between public interests and individual rights, the House is unlikely to demonstrate the impartiality and autonomy typically associated with judicial institutions, and invalidate regulations enacted by the Parliament or Executive, even if these regulations substantially affect property owners.

Therefore, expanding the compensation requirement under Article 40 (8) to cover excessive regulations—whether through judicial interpretation or constitutional interpretation, or expressly acknowledging regulatory takings via constitutional amendment—could offer more robust protection for property owners from overregulation. Nonetheless, as previously noted, given the current legal structure, these approaches appear less viable for balancing property protection and public interest competing priorities. Furthermore, invalidating legitimate

[159] FDRE Constitution, *supra* note 3, Art. 9 (1); See also *Id*.
[160] Chi Mgbako, Sarah Braasch, Aron Degol, Melisa Morgan, Felice Segura, & Teramed Tezera, *Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights*, 32 Fordham Int'l L.J. at 285 (2008).
[161] See Habib, *supra* note 136, at 42.
[162] FDRE Constitution, *supra* note 3, Art. 62 (1).
[163] Assefa, *Federalism and the Adjudication of Constitutional Issue, supra* note 153.

regulations is unlikely to strike the appropriate balance. While these options are not completely off the table, it is crucial to explore alternative mechanisms that effectively safeguard both the public and private interests.

In this sense, explicit recognition of regulatory takings in specific laws offers a viable solution to strike a balance by safeguarding individuals from excessive government interference while still enabling the state to pursue legitimate public objectives. Not only this, it also provides clarity and predictability for both property owners and regulators thus promotes more balanced regulations and constrains judicial overreach, ensuring just compensation is awarded only where regulations disproportionately burden property rights, which helps address the inconsistency observed in the application of this doctrine in other jurisdictions.[164]

CONCLUDING REMARKS

This paper has examined the complex interplay between the protection of individual property rights and the state's authority to regulate private property for public welfare—via police power and expropriation or eminent domain—as embodied under Article 40 (1) and (8) of the FDRE Constitution. The analysis has highlighted the critical need for a more nuanced approach to excessive regulations, which despite their intended purpose of promoting the common good, can unjustly undermine the rights of property owners. In this regard, the experiences of other countries in balancing these two competing interests were analyzed to draw valuable lessons.

Accordingly, examination of other countries experience, particularly from jurisdictions such as U.S., Switzerland, and South Africa, has provided valuable insights into how courts and constitutional provisions can effectively safeguard property rights against excessive state regulation. For instance, transforming the compensation requirement to regulatory taking with robust judicial review framework in U.S. and the explicit recognition of excessive regulations as compensable regulatory takings under the Constitution in Switzerland, serve as important benchmarks for considering potential reforms. Furthermore, although still evolving in expanding the compensation requirement, the South African courts' approach of invalidating unreasonable regulations serves as a valuable lesson.

[164] Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L. J. 525 (2009) http://scholarship.law.ufl.edu/facultypub/64

Coming to Ethiopia, the Ethiopian Constitution permits property regulation for public purposes without compensation, while only allowing for compensation in cases of direct expropriation where property ownership is transferred to the state under Article 40 (1) and (8) respectively. This omission leaves property owners vulnerable to regulations that can drastically diminish the economic value of their property without any recourse. Furthermore, the lack of proportionality test to limit constitutional rights grants the legislature considerable discretion to enact potentially overreaching laws under the guise of public interest, further eroding protections for property owners.

A brief comparative analysis between the experiences of these countries and Ethiopia's constitutional framework has revealed significant gaps. To address these deficiencies, this paper advocates for the introduction or adoption of mechanisms that recognize the importance of property rights in the context of regulatory actions. In this context, judicial transformation, coupled with an explicit constitutional acknowledgment of regulatory takings, could provide essential safeguards for property owners as well as furthering the public goods. Adopting these approaches, though not feasible in the current constitutional context, would not only enhance individual rights but also fosters a more equitable approach to property regulation. Invalidating excessive regulation by challenging its constitutionality has become a common tool at an individual's disposal. This approach empowers property owners and citizens to assert their rights against overreaching governmental actions. However, invalidating regulation is not a prudent option for both the government and individuals.

Additionally, legislative reforms that classify excessive regulations as forms of indirect expropriation should be seriously considered. This would create a clearer legal pathway for property owners to seek compensation when faced with burdensome regulatory measures. Importantly, these changes would not undermine the state's capacity to pursue legitimate public welfare objectives; rather, they would establish a more balanced framework that protects property owners from undue hardships imposed by overregulation. Achieving this balance is crucial to ensuring that public interest initiatives are pursued without disproportionately infringing on individual rights.

Here it must be noted that; the paper does not advocate for absolute protection of property rights, as this could hinder the democratic process of enacting laws for the public good. Rather, it seeks to highlight the necessity of extending constitutional safeguards for property

rights against excessive or overly burdensome regulations. In doing so, the paper argues for compensation when regulations are arbitrary, excessively onerous, or impose individual sacrifices that should be borne by the general public.

ANALYZING THE PRE-TRIAL DETENTION LAW AND THE JUDICIAL PRACTICE OF ETHIOPIA IN LIGHT OF HUMAN RIGHTS STANDARDS

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Abstract

In Ethiopia, Pre-trial detention is supposed to be conducted based on the rules stated in the 1961 criminal procedure code; anti-corruption proclamation No.882/2015; and the Federal Supreme Court Cassation Bench precedent. These laws and cassation court precedent together provide the rules on permissible justifications for pre-trial detention, exceptions on the right to bail; and limits on duration of pre-trial detention. On the other hand, the FDRE constitution, and treaties ratified by Ethiopia provide principles and rules on the limitations on the right to bail and duration of pre-trial detention. This article examines the compliance of the statutory rules and the cassation court precedent to the human rights principles on pre-trial detention in Ethiopia. Besides, this piece has examined the propriety of the judicial practice in Bahir Dar ena Akababiwa High Court and Bahir Dar town Woreda Court in their application and interpretation of pre-trial detention statutes as illustrations. As such, the work employs a legal doctrinal methodology. The empirical information is gained through the observation of the criminal benchs in Bahardar Ena Akababiwa High court, and Bahir Dar town District Court. Besides, we use human rights situations reports as source of empirical data. Consequently, the article argues that the statutory laws and the precedent of the cassation court don't comply to the human rights standards. And, the judicial practice regarding regulation of pre-trial detention is normatively dissatisfying.

Keywords: Pretrial detention, Right to personal liberty, Bail, Prolonged detention, Presumption of innocence

INTRODUCTION

According to the World Prison Brief report, as of February 2020, almost three million people are held in penal institutions throughout the world as pre-trial detainees/remand prisoners. [1]

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[1] ROY WALMSLEY, WORLD PRE-TRIAL/REMAND IMPRISONMENT LIST, (4TH ed., 2020), Institute for Crime and justice Policy Research, at1.

According to the report ,"taking into account also those in the other eight countries on which official information is unavailable and of the pre-trial detainees in police facilities who are omitted from national totals, there will be well over three million held in pre-trial detention and other forms of remand imprisonment throughout the world."[2] Out of this figure, as of 2010/11, 49,000 are from Ethiopia. This figure constitutes 36% of the total prison population of Ethiopia.[3] The pre-trial prison population in Ethiopia has been increasing by the rate of 47% in 2000/01, 26 % in 2005/06 and 17% in 2010/11.[4]

There are a lot of reasons why examination and discussion of pre-detention is needed.[5]First of all, there are the numbers: it is estimated that on any given day around 2.5 million people are being held in pre-trial detention and other forms of remand imprisonment throughout the world[6] and that in the course of a year approximately 10 million people will pass through pre-trial detention. [7] Second, the application of pre-trial detention is problematic in the context of universally recognized human rights norms. Particularly relevant in this respect are the right to liberty, the presumption of innocence, the right to humane treatment, and the prohibition of torture and ill treatment.[8] Third, pre-trial detention is a burden on society and the detainee's family: pre-trial detention is costly to the tax payer; it hinders the detainee from contributing to the economy and might, for instance, lead to loss of job and home.[9]Fourth, it must also be recognized that no adequately functioning criminal justice system that is able to effectively prevent and repress crime can presently do entirely without detaining any suspects. Fifth and finally, there are several relatively new developments related to international legal cooperation between States that merit attention from the aspect of pre-trial detention.

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[2] *Id*.
[3] *Id*.
[4] *Id*, at 4.
[5] Piet Hein van Kempen , Pre-trial detention in national and international law and practice: A Comparative Synthesis And Analyses, in PIET HEIN VAN KEMPEN, (ED), *HUMAN RIGHTS, CRIMINAL PROCEDURAL LAW AND PENITENTIARY LAW, COMPARATIVE LAW* , Cambridge, Antwerp, Portland: Intersentia, (2012), at 1.
[6] ROY WALMSLEY, supra note 1.
[7] See David Berry Et Al., *The Socioeconomic Impact Of Pretrial Detention*, New York: Open Society Foundations/United Nations Development Program, (2011), <Www.Soros.Org/Initiatives/ Justice/Articles_Publications/Publications/Socioeconomic-Impact-Detention-20110201>at 12.
[8] See MORITZ BIRK ET AL., PRETRIAL DETENTION AND TORTURE: WHY PRETRIAL DETAINEES FACE THE GREATEST RISK,(2011), New York: University Of Bristol/Ludwig Boltzmann Institute/Open Society Foundations,), at 18 .
[9] See David Berry Et Al, supra note 7.

Due to the above problematic nature of pre-trial detention, international human rights instruments ratified by Ethiopia and the FDRE constitution stipulate strong regularly framework on the use of pretrial detention with more or less similar terms. This article aims to assess the compliance of the pre-trial detention regime of Ethiopia as defined statutes and interpreted by the Federal Supreme Court cassation bench from human rights perspective. As such, it is a legal doctrinal research. The work incidentally encompasses commenting to the judicial interpretation and application practices of selected courts. As such, this article involves a two-step analysis enterprise. First, it outlines the normative framework on pre-trial detention drawing from international human rights supervision bodies, such as the Human Rights Committee (HRC) and scholarly works. The ultimate goal is to critically analyze the legal framework on pre-trial detention in Ethiopia as prescribed in the 1961 criminal procedure code (CrimPC), and the Revised Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No. 88212015. It focuses on the function of pre-trial detention; duration and frequency of pretrial detention, and the available conditions on bail/custody decisions.

This article is organized into six sections. Section I makes the introductory remarks. And, section II is devoted to the discussion of the normative theoretical framework on pre-trial detention. The discussion in this section draws from the jurisprudence of the HRC, the soft human rights principles, and scholarly works. Sections III, IV, and V addresses the challenges on the pre-trial detention law of Ethiopia focusing on the policy justifications for pre-trial detention, the bail justice legal framework, and duration of pre-trial detention respectively as prescribed in Ethiopian relevant legislations and the Federal Supreme Court Cassation Bench jurisprudence. Finally, Section VI deals with the concluding remarks.

1. PERMISSIBLE GROUNDS, PROCEDURES AND CONDITIONS FOR DETENTION IN CRIMINAL PROCESS CONTEXT IN INTERNATIONAL HUMAN RIGHTS LAW

1.1 Permissible Grounds for Detention of the Suspect/Accused

Article 9(1) of the ICCPR provides that no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. As to the principle of legality, the Human Rights Committee has held that "it is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation"; in other words,

the grounds for arrest and detention must be "established by law".[10] In a case where a person was arrested without a warrant, which was issued more than three days later, contrary to the domestic law that lays down that a warrant must be issued within 72 hours after arrest, the Committee concluded that "article 9(1) had been violated because the author had been deprived of his liberty in violation of a procedure as established by law".[11]

Besides, under Article 9(1) of the ICCPR, "no one shall be subjected to arbitrary arrest or detention." Hence, whether pre-trial detention is a permissible deprivation of liberty depends on whether it falls within the prohibition on arbitrary arrest and detention. The United Nations Human Rights Committee (1964) (HRC) has stated that '"arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law'.[12] In one case the African Commission on Human and Peoples Rights held that the "indefinite detention of persons can be interpreted as arbitrary as the detainee does not know the extent of his punishment"; article 6 of the African Charter had been violated in this case because the victims concerned were detained indefinitely after having protested against torture.[13] Furthermore, it constitutes an arbitrary deprivation of liberty within the meaning of article 6 of the African Charter to detain people without charges and without the possibility of bail; in this particular case against Nigeria the victims had been held in these conditions for over three years following elections.[14]

Detention before conviction is arguably in conflict with the right to presumption of innocence recognized in article 14 of the ICCPR. Yet, the right to presumption of innocence is not absolute. It can be limited to the effective operation of the criminal justice process. in this section aims to strike the balance between the two interests drawing from the jurisprudence of HRC and scholars works. As such, this section identifies the compelling public interests that justify pre-trial

[10] Communicaton No. 702/1996, C. McLawrence v. Jamaica (Views adopted on 18 July 1997), in UN doc. GAOR, A/52/40 (vol. II), pp. 230-231, para. 5.5.
[11] Communication No. 770/1997, Gridin v. Russian Federation (Views adopted on 20 July 2000), in UN doc. GAOR, A/55/40 (vol. II), at175, para. 8.1.
[12] Communication No 1134/2002 FongumGorji-Dinka v Cameroon (views adopted on 10 May 2005) U.N. Doc. CCPR/C/83/D/1134/2002 (2005), para 5.1.
[13] ACHPR, World Organisation against Torture and Others v. Zaire, Communications Nos. 25/89, 47/90, 56/91 and 100/93, decision adopted during the 19th session, March 1996, para. 67; for the text see http://www.up.ac.za/chr/.
[14] ACHPR, Constitutional Rights Project and Civil Liberties Organisation v. Nigeria, Communication No. 102/93, decision adopted on 31 October 1998, para. 55 of the text published at the following web site: http://www1.umn.edu/humanrts/africa/comcases/102-93.html.

detention as articulated by international human rights law standard setters and authoritative scholars. In this regard, the HRC recognizes the purposes of pre-trial detention as to prevent flight, interference with evidence or the recurrence of crime stating "the detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime."[15]

Piet Hein, Van Kempen drawing from the jurisprudence of HRC, summarizes the grounds which represent acceptable functions of pre-trial detention, including the prevention of: absconding (the risk that the suspect will fail to appear for trial); interference with establishing the truth (the danger that the suspect will take action to prejudice the administration of justice); Immediate recidivism (the risk that the suspect will commit further offences); and, Threat of public disorder (the risk that public disorder will be caused if the suspect is not detained or if he were to be released).[16]

In addition to the binding case laws, there are some UN Level soft laws that outlines justified public interests for pretrial detention. The United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)[17]provides for "the investigation of the alleged offence", "protection of the victim,"[18]"the protection of society"[19] as justifications for pretrial detention. The UN Body of Principles endorses administration of justice[20] and crime prevention[21] as justified grounds for pretrial detention. The UN Human Right Council Principles on deprivation of liberty in article 3 it states detention is justified by prevention of the risk that the accused "evade the processes of the law or prejudice the results of the investigation."[22]

[15] Human Rights Committee (HRC), General Comment 35, CCPR/C/GC/35, para.38.
[16] Piet Hein van Kempen , supra note 5.
[17]United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), Adopted by General Assembly resolution 45/110 of 14 December 1990.
[18] *Id*., Section, 6.1.
[19] *Id*, 2.3.
[20]The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Adopted by General Assembly resolution 43/173 of 9 December 1988.Principle 39.
[21] *Id*, at 6.2.
[22] *Id*, at .3.

Similarly, the Principles and Guide lines on The Right to A Fair Trial and Legal Assistance stated that unless there is sufficient evidence that deems it necessary.[23]

Regarding the question, 'what ought to be the reasons that justify keeping a defendant in custody before his guilt has been formally adjudicated?' Packer argues that it varies depending on the criminal justice model one follows.[24] According to Packer's due process model "a person accused of crime is entitled to freedom except to the extent necessary to serve the legitimate ends of a legal system."[25] And "the only legitimate end that is threatened by an absolute right to be free pending trial is the assurance that a defendant will not subvert the orderly processes of criminal justice by deliberately absenting himself at the time and place appointed for trial.[26]

According to Packer, in a Due Process view of criminal justice, the suspect "is to be arrested so that he may be held to answer the case against him, not so that a case against him that does not exist at the time of his arrest can be developed.[27]

Duff is a leading opponent to the use of pretrial detention from presumption of innocent perspective.[28]According to Duff, "we cannot justify detention on the ground that the defendant might if left free commit offences other than absconding or obstructing justice."[29]For Andrew Ashworth "the justifications for this must be strong and pressing, in view of the deprivation of liberty involved."[30] For him, a low probability of a very serious offence ought to have more weight than a probability of less serious offence.[31]Victor Tadros dismissed the claim that in "assessing interference with the presumption of innocence it is important to strike a fair balance between 'the rights of the individual and the wider interests of the community."[32]He correctly

[23] African Commission on Human and People's Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Para. M(1)(E).
[24] Hebert L. Packer, Two Models Of The Criminal Process, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, volume 113, No.1.(1964).
[25] Id.
[26] *Id*.
[27] *Id*., at 3.
[28]R. A. Duff, Pre-Trial Detention And The Presumption Of Innocence, in A.J. ASHWORTH, L. ZEDNER, P. TOMLIN, (ED), PREVENTION AND THE LIMITS OF THE CRIMINAL LAW,,(2013),Oxford University Press, at 5.
[29] *Id*., at 128.
[30] ANDREW ASHWORTH, *THE CRIMINAL PROCESS: AN EVALUATIVE STUDY*, 2ND ED.(1998),Oxford University Pressat .210-212.
[31] *Id*.
[32] Victor Tadros, Rethinking the presumption of innocence, CRIM LAW AND PHILOS,(2007), at .211.

argues that the wider interests of the community will be served by conviction on an insecure epistemic basis.[33]For Pamela R. Ferguson, for more invasive extended detentions it require a court warrant, with the grounds for suspicion being verified by a member of the judiciary.[34] In General, though there has been growing scholarly resistance to crime prevention policy of pretrial detention for allegedly being conflicting with the principle of presumption of innocence.

1.2 Right of Arrested Person to Be Brought Before A Court

Art. 19(3) of the Constitution provide that arrested persons have "the right to be brought before a court within 48 hours of their arrest". Likewise, under article 9(3) of the ICCPR "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power." The purpose of the review before a judicial or other authority includes to assess whether sufficient legal reason exists for the arrest; assess whether detention before trial is necessary; determine whether the detainee should be released from custody, and the conditions, if any, for such release; safeguard the well-being of the detainee; prevent violations of the detainee's fundamental rights; and, give the detainee the opportunity to challenge the lawfulness of his or her detention and to secure release if the arrest or detention violates his or her rights.[35]

In the case of Wolf v. Panama, the author was never brought before a judge after his arrest, and, the HRC concludes that article 9, paragraph 3, was violated because "the author was not brought promptly before a judge or other judicial officer authorized by law to exercise judicial power."[36]

The Constitution requires courts to take into consideration the right to speedy trial of arrested persons and the interests of justice when they order law enforcement agents to release arrested persons, or order the arrested person to remain in custody, or grant remand upon requests, which should be "for a time strictly required to carry out the necessary investigation," as stated under Art. 19(4). When the investigating police officer could not complete investigation and apply for remand to obtain sufficient time for investigation, the court may grant remand for not more than

[33] *Id*.
[34] Pamela R. Ferguson, the Presumption of Innocence and Its Role in the Criminal Process, CRIMINAL LAW FORUM 27, (2016), at 151.
[35]African Commission. Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003. Available at <ccpr.pdf>
[36] CCPR/C/44/D/289/1988 (Wolf v. Panama),para.6.2.

14 days on each occasion as provided under Art. 59 of the Criminal Procedure Code. However, the Criminal Procedure does not limit the number of remands or the maximum time to be given for investigation.

The right to be brought before court is also guaranteed in international human rights treaties ratified by Ethiopia.[37] Courts should be empowered to review and assess whether sufficient legal reason exists for the arrest, assess whether detention before trial is necessary, determine whether the detainee should be released from custody, and the conditions, if any, for such release, safeguard the well-being of the detainee, prevent violations of the detainee's fundamental rights, give the detainee the opportunity to challenge the lawfulness of his or her detention and to secure release if the arrest or detention violates his or her rights.[38]

1.3 The Right to Release on Bail

1.3.1 Bail Must Be the Principle

The Constitution guarantees the right to bail because individuals should not be deprived of the right to liberty even when suspected of committing a crime unless the deprivation of liberty is absolutely necessary (Art. 19(6) of the Constitution). However, all arrested persons may not be granted bail as there are conditions to be met as laid down by the Criminal Procedure Code. Accordingly, article 63 indicates non-bailable crimes (e.g., when arrested person is suspected of committing serious crimes punishable with more than 15 years of rigorous imprisonment or death). The right to bail is also recognized in the international human rights treaties ratified by Ethiopia.(ICCPR, Art 9(3). States must ensure that it is not the general rule that individuals arrested, detained or charged with a criminal offense are held in custody pending investigation or trial. Persons charged for a criminal offence should not be kept in detention while their trial is pending unless there is sufficient evidence showing that it is necessary to prevent them from fleeing, interfering with witnesses or posing a clear and serious risk to others.

Article 9(3)of the ICCPR requires release from custody must be the principle and such release may be subject to guarantees of appearance, including appearance for trial, appearance at any

[37] ICCPR, Art. 9(3); ACHPR, Art. 7(1(d)).
[38] ACHPR Principles and Guidelines section M principle 3(b).

other stage of the judicial proceedings and (should occasion arise) appearance for execution of the judgment. In this case, for the HRC, detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.[39] The relevant factors should be specified in law and should not include vague and expansive standards such as "public security."[40]

The HRC rightly suggest that courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case.[41] If the defendant is a foreigner, that fact must not be treated as sufficient to establish that the defendant may flee the jurisdiction.[42] With regard to article 9(3) of the Covenant, the Human Rights Committee has consistently held that "pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party".[43]Arrest and detention must be used "as an exceptional measure and a measure of last resort, only to be used if absolutely necessary, and if it is in proportion to the offence and reasonable."[44]In the determination of 'proportionality' and necessity' the considerations must "the suspect's behavior, the alleged offence (serious or minor), whether the offence has a custodial penalty, whether the suspect belongs to a vulnerable group, and whether an alternative is available."[45]

1.3.2 Judicial bail: consideration on bail proceedings

The type of the offence shall be taken into account in bail proceedings. In this case, pretrial detention should not be mandatory for all defendants charged with a particular crime, without

[39] 1502/2006, Marinich v. Belarus, para. 10.4; 1940/2010, Cedeño v. Bolivarian Republic of Venezuela, para. 7.10; 1547/2007, Torobekov v. Kyrgyzstan, para. 6.3.
[40] See concluding observations: Bosnia and Herzegovina (CCPR/C/BIH/CO/1, 2006), para. 18
[41] 1178/2003, Smantser v. Belarus, para. 10.3.
[42] 526/1993, Hill and Hill v. Spain, para. 12.3
[43] Communication No. 526/1993, M. and B. Hill v. Spain (Views adopted on 2 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 17, para. 12.3.
[44] The Luanda Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa, adopted by the African Commission on Human and Peoples' Rights (ACHPR), In May 2014.
[45] *Id*.

regard to individual circumstances.[46] Neither should pretrial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity. After an initial determination has been made that pretrial detention is necessary, there should be periodic re-examination of whether it continues to be reasonable and necessary in the light of possible alternatives.[47] If the length of time that the defendant has been detained reaches the length of the longest sentence that could be imposed for the crimes charged, the defendant should be released.[48]

The Committee is also of the opinion that "the mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial".[49] Furthermore, "the mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in" article 9(3); consequently, in a case where the State party provided no information to substantiate its concern that the accused would leave the country and as to "why it could not be addressed by setting an appropriate sum of bail and other conditions of release", the Committee concluded that article 9(3) had been violated.[50]

The criminal justice system should provide "a wide range of noncustodial measures, from pre-trial to post-sentencing dispositions."[51] The number and types of noncustodial measures available should be determined in such a way in order to provide "greater flexibility consistent with the nature and gravity of the offence."[52]arrest/detention except on "a serious offence for which a penalty involving loss of liberty is prescribed by law" is prohibited. In cases where "an offence does not carry a custodial penalty, the offender should not be held in pre-trial detention."[53]

The committee on the Study of the right of everyone to be free from arbitrary arrest, detention and exile notes that "it has become global practice that detention should not be made mandatory;

[46] See HRC, concluding observations: Argentina (CCPR/CO/70/ARG, 2000), para. 10; Sri Lanka (CCPR/CO/79/LKA, 2003), para. 13.
[47]Communication No. 1085/2002, Taright v. Algeria, paras. 8.3–8.4.
[48] General comment No. 32, para. 42; see Committee on the Rights of the Child, general comment No. 10, para. 80.
[49] Communication No. 526/1993, M. and B. Hill v. Spain (Views adopted on 2 April 1997), UN doc. GAOR, A/52/40 (vol. II), at 17, para. 12.3.
[50]Communication No. 526/1993, M. and B. Hill v. Spain (Views adopted on 2 April 1997), UN doc. GAOR, A/52/40 (vol. II), at 17, para. 12.3.
[51] Tokyo rules(1990), supra note 17, Section, 2.3
[52] *Id*.
[53]The Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial (Luanda Guidelines).

even in those cases in which the circumstances may legally justify detention."[54] In this regard, the committee urges states that the competent authority concerned should be able to take into consideration "the personal circumstances of the suspect or accused, such as his age, health, occupation and family status".[55]

It requires "sufficient evidence" to arrest or detention.[56] preventive pretrial detention should not be based on mere anticipation of criminal behavior;[57] that to allow deprivation of liberty, without trial, on mere anticipation of future criminality can lead to arbitrary action of all kinds".[58] Detention from the outset must be grounded on "sufficient cause" of action; and what constitutes sufficient cause for arrest may depend, to a large degree, on the view that is taken regarding the legitimate purposes of pretrial custody: If arrest is permitted for the purpose of holding a suspect for questioning, almost any circumstance of suspicion may suffice; If on the other hand the suspect cannot be subjected to questioning upon arrest, he should not be taken into custody until the evidence available constitutes a substantial prima facie case against him.[59]

Reported behavior of the defendant implicates judicial bail release/ detention decision. The criminal justice system should provide "a wide range of noncustodial measures, from pre-trial to post-sentencing dispositions."[60] The number and types of noncustodial measures available should be determined in such a way in order to provide "greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment." [61]

Status of the investigation is another factor in bail/remand decisions. According to the HRC, the right to bail release recognized in the ICCPR "applies to persons awaiting trial on criminal charges, that is, after the defendant has been charged, but a similar requirement prior to charging

[54] United Nations Department of Economie and Social Affairs (UNECOSOC) , Study of the right of everyone to be free from arbitrary arrest, detention and exile,(1964) E/CN. 4/826/Rev.1, UNITED NATIONS PUBLICATION, Sales No : 65. XIV. 2.para.223.
[55] *Id*.
[56] Principles And Guidelines On ,supra note 23.
[57]UNECOSOC(1964),supra note 60.
[58] *Id*.
[59] *Id*, para.217.
[60] The Tokyo Rules(1990), supra note 17,Section, 2.3
[61] *Id*.

results from the prohibition of arbitrary detention in paragraph 1."[62]This interpretation of the committee gives an insight that there is a separate treatment of detention before charge and after charge, the right to unconditional or conditional release pending investigation is not recognized expressly in the convention. It is derived by interpretation of prohibition of 'arbitrary detention' in general. The permissibility of pre-charge detention in the ICCPR itself is controversial, that no one will expect standards on its use, like release with/without bail. In this regard, the Tokyo rules suggest that alternatives to pre-trial detention shall be employed at "as early stage as possible.

1.4 The Right to Trial within A Reasonable Time Or To Release

The second requirement expressed in the first sentence of paragraph 3 of article 9 of the ICCPR is that the person detained is entitled to trial within a reasonable time or to release.[63]According to the HRC, that requirement applies specifically "to periods of pretrial detention that is, detention between the time of arrest and the time of judgment at first instance."[64]

According to the HRC, extremely prolonged pretrial detention endangers the presumption of innocence under article 14, paragraph 2.[65]Due to this reason, the HRC rightly argues that Persons who are not released pending trial "must be tried as expeditiously as possible", to the "extent consistent with their rights of defence."[66] The reasonableness of any delay in bringing the case to trial has to be assessed "in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused during the preceding and the manner in which the matter was dealt with by the executive and judicial authorities."[67] Impediments to the completion of the investigation may "justify additional time," but "general conditions of understaffing or budgetary constraint do not."[68] When delays become necessary, the judge must reconsider "alternatives to pretrial detention."[69]

The right of all persons charged with a criminal offence to (c) To be tried without undue delay enshrined in article 14 (3 (c)), is among the minimum guarantees in criminal proceedings of

[62] HRC, supra note 15,para.38.
[63] HRC, supra note 41, para.37.
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*.

article. The HRC makes nexus between article 14 (3 (c)), and article 9 of the Covenant (pre-trial detention). According to the HRC, "The right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice."[70]

On the relationship between article 14(2)(presumption of innocence) and article 9 of the Covenant (pre-trial detention), The HRC reiterates its concern that the maximum period for preventive detention set by reference to the penalty for the offence of which the person stands accused. In the view of the Committee, this may constitute an infringement of the presumption of innocence and of the right to a fair trial within a reasonable time or to release (arts. 9 and 14). According to the committee "It should restrict the grounds for preventive detention to those cases in which such detention is essential to protect legitimate interests, such as the appearance of the accused at the trial."[71]

The African commission on human and people's rights concurs with the HRC regarding the negative repercussion of prolong pretrial detention on the right to presumption of innocence. According to the commission, "the prolonged imprisonment without conviction of the Victims for a period of about 16 years clearly violates their right to be presumed innocent in that it was meant as a sanction prior to the delivery of the judgment."[72]

2. JUSTIFICATIONS FOR PRE-TRIAL DETENTION IN ETHIOPIA

The FDRE constitution in article 19(4) authorizes the court to remand the arrested person to police custody, when requested, to "carry out the necessary investigation." For the FDRE constitution, "where the interest of justice requires, the court may order the arrested person to remain in custody." The constitution leaves for the court to define "the interest of justice." In article 67, the 1961 criminal procedure code lists three purposes of pre-trial detention. It states: "an application for bail shall not be allowed where: (a) the applicant is of such nature that it is

[70] HRC's General Comment 32,para.35.
[71] Concluding observations, Italy, CCPR/C/ITA/CO/5 (2006), para. 14 ,
[72] Communication 301/O5 – Haregewoin Gabre-Selassie And IHRDA (On Behalf Of Former Dergue Officials/Ethiopia),Para. 209. available at <AFRICAN UNION>

unlikely, that he will comply with the conditions laid down in the bail bond; (b) the applicant, if set at liberty, is likely to commit other offences; (c) the applicant is likely to interfere with witnesses or tamper with the evidence."

The foregoing three functions of pre-trial detention are reproduced in Article 4 of the Revised Anti-Corruption Special Procedure and Rules Proclamation No. 434/2005. In this regard, Article 4(4) reads:

> Without prejudice to the provision in sub article 1 of this Article, the court may not allow an application to be released on bail of the accused or the suspect as per sub-article 3 of this article, where;
>
> a) The suspect or the accused, if released on bail, is likely to abscond
>
> b) The suspect or the accused, if released on bail, is likely to tamper with evidence or commit other offences.

The existing criminal procedure code recognizes preventive pre-trial detention policy in article 67(b).The other two policies that are provided in article 67(a), ensuring appearance of the defendant before court, and 67(c) preventing tampering with evidence are legitimate grounds in international law and democratic states. The crime prevention function of pretrial detention law adopted the criminal procedure of Ethiopia is against the existing scholarly recommendations. Although international law doesn't expressly object to the crime prevention policy of pretrial detention, international law sets out the minimum standards on the protection of human rights. And, nothing prevents states from adopting human standards that are more favorable than those stated in the international law.

As Laura Whitehorn and Alan Berkman rightly argue that "more frightening still is the prospect that our society is moving one more step toward bartering its most important liberties for a "law and order" non-solution to its problems and injustices."[73] It is worth noting, however, that it is not plausible from the perspective of the genuine peace concerns of the society to remove crime

[73] Laura Whitehorn *And Alan Berkman, Preventive Detention. Prevention Of Human Rights*? ,<https://openyls.law.yale.edu/bitstream/handle/20.500.13051/7727/07_2YaleJL_Lib29_1991_.pdf?sequence=2&isAllowed=y>

prevention policy of pretrial detention altogether. So, the authors argue that crime preventive pre-trial detention could be at least maintained for terrorism offences. The reason for this is that terrorism by its nature is committed consecutively over a range of time unless law-enforcement agencies interrupt its consummation. Besides, the cost of terrorism is high and the damage that results from terrorism is irreparable. . If the accused is released, and if the probability is high that he/she will pursue the crime to further his/he goal. In conclusion, it is undisputed that there should be a balance between the liberty interests of the accused and the public interest regarding preventive pre-trial detention in Ethiopia. And, we argue that the right balance is that preventive pre-trial detention shall not be altogether eliminated. But, its use must be restricted to the prevention of offences that naturally are susceptible to repetition. It must be applicable to recidivists with a clear definition of recidivism in advance.

3. THE RIGHT TO RELEASE ON BAIL IN ETHIOPIA

3.1 Scope of Application of the Right to Bail Release

The Constitution guarantees the right to bail because individuals should not be deprived of the right to liberty even when suspected of committing a crime unless the deprivation of liberty is absolutely necessary (Art. 19(6) of the Constitution). The right to bail is also recognized in the international human rights treaties ratified by Ethiopia. However, all arrested persons may not be granted bail as there are conditions to be met as laid down by the Criminal Procedure Code.

In this regard, article 28 of the code authorizes the police to release the suspect on bail where:

> the offence committed or complained of is not punishable with rigorous imprisonment as a sole or alternative punishment; or where it is doubtful that an offence has been committed or that the summoned or arrested person has committed the offence complained of, the investigating police officer may in his discretion release such person' on his executing a bond with or without sureties that he will appear at such place, on such day and at such time as may be fixed by the police.

Article 28 is problematic. This is due to the fact that article 28 narrows the constitutionally guaranteed right to bail of the suspect with the discretion of the police. The issue becomes more

contentious when we consider the crimes are simple. If the crimes are punishable with simple punishment (not rigorous punishment) i.e. the public interest is less, the right to bail must be obligatory to the police. The other critique concerns the criteria: "where it is doubtful that an offence has been committed. "In this case, the benefit of the doubt must be to the accused not to the police. Due to this, we argue that the discretion given to the police in article 28 is unconstitutional.

Article 63 of the 1961 criminal procedure code distinguishes between bailable and, non bailable offences from the outset. Accordingly, article 63 of the 1961 criminal procedure code denies bail right to persons "charged with an offence that carry the death penalty or rigorous imprisonment for fifteen years or more and where there is possibility of the person in respect of whom the offence was committed dying."[74] We argue that classification of charges into bailable and non-bailable is not contemplated in the constitution and in the international law.

The problem of identified in article 63 of the code, is exacerbated in the anti-corruption proclamation No. 882/2015. According to article 3 of the anti-corruption proclamation No. 882/2015:

> a person charged or suspected with corruption offence punishable for more than 10 years will not be released on bail; where there are concurrent crimes punishable with more than 4 years and less than ten years and the punishment of the two crimes is more than ten years, the arrested person shall not be released on bail.[75]

The seriousness of the offence requirement is broadened in the anti-corruption proclamation No. 882/2015. The threshold of severity of punishment is lowered to 10 years and concurrent crimes. Even though the offences in isolation are minor, their concurrent occurrence will be aggravating ground not only to enhance punishment, but also to be ground to deny release on bail opportunity.

[74] Art. 63(1) States that in principle ' (I) Whosoever has been arrested may be released on bail where the offence with which he is charged does not carry the death penalty or rigorous imprisonment rigorous imprisonment for fifteen years or more and where there is no possibility of the person in respect of whom the offence was committed dying.

[75] The Revised Anti-Corruption Special Procedure And Rules Of Evidence (Amendment) Proclamation No.882/2015.

3.1 Clarity of the Rules on Bail Release

3.2.1 The Meaning of 'The Person In Respect Of Whom the Offence Was Committed Dying'

Art. 63(1) of the 1961 criminal procedure code states that:

> (I) Whosoever has been arrested may be released on bail where the offence with which he is charged does not carry the death penalty or rigorous imprisonment for fifteen years or more and where there is no possibility of the person in respect of whom the offence was committed dying.

In this provision the meaning of the bail exception 'where there is no possibility the person in respect of whom the offence was committed dying' is not self-evident." It requires scientific evidence to verify the possibility of death or otherwise of a wounded victim of crime. The first author is a practicing lawyer in Bahir Dar and has had the chance to observe the practice in Bahir Dar *ena Akababiwa* High Court. According to the author's observation, in this court, the judges rely on the opinion of medical doctors to assess the legally required 'possibility of death'. The problem with this technique is that the doctors usually only describe the sustained injury instead of stating the threshold. In other cases the doctors state it only in statistical percentage without interpretation what the numbers means. They are reluctant to conclusively say that the victim is possibly dying or the contrary. So, this vague evidence in practice leads judges to inconsistent inferences. The other problem is the doctors are willing to respond promptly impinging on the rule that "the court shall make its decision within 48 hours" decision on application for bail stated in article 66 of the criminal procedure code.

3.2.2 The Interpretation of 'Unlikely/Likely' In Article 67 of the Criminal Procedure Code

According to article 67 of the criminal procedure code, an application for bail shall not be allowed where:

> (a) The applicant is of such nature that it is unlikely he will comply with the conditions laid down in the bail bond; (b) the applicant, if set at liberty, is likely to

commit other offences; (c) the applicant is likely to interfere with witnesses or tamper with the evidence.

As it can be seen from the wordings of the provision the chance of grant for bail or denial of bail hangs on the interpretation of the words 'likely' or 'unlikely.' As we have discussed earlier, the international human rights law has introduced a bundle of considerations in interpreting risk in general. These are, among others, the seriousness of the offence; the 'Personal circumstances of the suspect or accused; and, the Status of investigation. International human rights law recommends states to adopt the above guidelines through domestic legislations. However, Ethiopia has not incorporated these guidelines in laws. So, ordinary courts are tasked with the assessment of risk in article 67.

According to proclamation No.1234/2021, the Federal Supreme has the power of cassation over cases when they contain basic or fundamental error of law.[76]Based on article 10/2/ of this proclamation "interpretation of law rendered by the Cassation Division of the Federal Supreme Court with not less than five judges shall be binding from the date the decision is rendered." Therefore the decisions of this court are treated as one source of law on pre-trial detention and treated accordingly in this section.

The Federal Supreme Court Cassation Bench[77] has been called in a number of cases to interpret article 67 of the 1967 criminal procedure code pertaining to the appropriate considerations that the lower court shall take into account in the determination of risk. In all of the cases the court do not adopt comprehensive criteria that help to determine the test of ' unlikely' or 'likely' enshrined in article 67 of the 1961 criminal procedure code to adjudicate bail. The practice of cassation court is full of wrongful cases that its jurisprudence can't be relied on to guide the lower courts. I will show the wrongs the court made in the following discussion.

In *Asnake Bekelle vs. Prosecutor*[78] - instead of discharging the legally mandated obligations to interpret such type of vague rule, the court held that it is the discretion of every lower court to

[76] Proclamation No.1234/2021 Federal Courts Proclamation, Federal *Negarit Gazette* of the Federal Democratic Republic of Ethiopia,2021, Art. 10(1).
[77] Based on Art. 10/2/ Interpretation of law rendered by the Cassation Division of the Federal Supreme Court with not less than five judges shall be binding from the date the decision is rendered.
[78] *Asnake Bekelle vs. Prosecutor*, Federal Supreme Court Cassation Bench Decisions Journal, Vol.7, file No. 31734, at .283,

interpret what amounts to be a risk of abscond. The court rightly noted that there must be sufficient reasons to predict abscond under article 67(a) of the 1961 criminal procedure code. And, for the court; the determination of what is sufficient is the discretion of the court which is entertaining the case. Contrary to the above reasoning the court overruled the lower court's decision arguing that the fact that the accused has possessed foreign passports and different country's visas are not sufficient grounds to deny bail. The court argues that this risk can be averted by other means. We argue that there is incoherence between the arguments and the conclusion of the court in this case. Merit wise, the court's argument that it is the discretion of the lower courts is to asses risk is unsound. Because, the cassation bench has the obligation to interpret such type of vague laws to ensure uniformity and certainty of the meaning of the rule, article 67(a) in this case.

In Mr. *Ayalew Tessema et al vs. Prosecutor*[79] the federal supreme court cassation bench upheld the lower court's interpretation of article 67(a) of the 1961 criminal procedure code arguing that the concurrence of the charged offences and the gravity of the offence are sufficient grounds to predict risk of abscond under article 67(a) of the 1961 criminal procedure code and deny bail accordingly. My comment in this case is that it is not the concurrence of offences but the seriousness of the offence that shall be a justified ground to detention before wrongful conviction.

In W/ro *Liwiza Forbeta vs Prosecutor*[80] the Federal supreme court ruled that threatening the witnesses of the prosecutor is sufficient ground to revoke the bail right based on article 67(b,c) and 74 of the criminal procedure code. In Mr. *Elias Geremew vs. Prosecutor*[81] the court revokes the bail grant due to the alleged act of threatening the witness of the prosecutor. However, the court do not substantiate its argument that threatening a witness triggers the application of article 67(b)i.e. refusing release on bail grounding on risk of reoffending.

[79] Mr. *Ayalew Tessema et al vs. Prosecutor*, Federal Supreme Court Cassation Bench Decisions Journal, Vol. 12, file No. ,59304. At .171.
[80] W/ro *Liwiza Forbeta vs Prosecutor*, Federal Supreme Court Cassation Bench Decisions Journal, volume 12, File No., 59855 , 28/03/2003 e/c, at 174
[81] *Elias Geremew vs. Prosecutor*, Federal Supreme Court Cassation Bench Decisions Journal, Vol. 12, file No. 61275 ,at .226 miyazia 18 2003 e/c.

In *Tsigiebirhane Tesera et al vs. Ethiopian Revenue and Customs authority Prosecutor*[82], the Supreme Court unwisely took the economic status of the defendant into consideration to predict risk of tampering with the criminal process under article 67. In another case[83], the Supreme Court upheld the lower court's denial of bail decision basing the severity of punishment and the prospect of tampering evidence such as bribing and hiding prosecutor's witnesses. The grounds for believing that the accused will bribe the witnesses are that the accused is economically powerful.

In the case *W/ro Wulta Desalign vs Oromia Regional State Anti-Corruption Commission*[84] the applicant invokes her health condition to allow release on bail. In one case the court was called to grant bail on the ground of the health condition of the defendant and refused to do so. the defendant requests release on bail arguing that she is a cancer patient that she has to be granted bail so that to be able to look for medical treatment. The court rejected the applicant's application arguing that the defendant is charged with non-bailable offence according to the anticorruption procedure and evidence law. In this case, the Supreme Court should have noted the HRC's ruling that the consideration on bail/detention decisions shall not be solely the gravity of the offence. Plus, the Supreme Court should have noted that national law will not be an excuse to violate the international laws. The court disregarded such higher norms and denied the applicant the right to release on bail due to her health conditions.

In *Ahmeded Derbachew vs. Federal Prosecutor,*[85] the court is called to judge on the aptness of the lower court's refusal of bail on the ground of previous convictions. The court overruled the bail refusal on previous conviction grounds. It bases its decision on article 138 of the criminal procedure code which states "Unless otherwise expressly provided by law, the previous convictions of an accused person shall not be disclosed to the court until after he has been convicted." We argue that this argument of the court is unsound. The forgoing rule is applicable to the determination of the guilt of the defendant as it is stated under the section, 'evidence and judgments of guilt/not guilty' at the trial stage. This rule is not intended to govern pre-trial

[82]W/ro *Wulta Desalign Vs Oromia Regional State Anti-Corruption Commission, Tsigiebirhane Tesera et al vs. Ethiopian Revenue and Customs authority prosecutor*, no. 67874, *Supreme Court Cassation Decisions Journal*, Vol. 13, at.243 23/2/2003 e/c.
[83] Case no. 67874 , at .243 23/2/2003 e/c.
[84] File no. 68407, Vol. 12, p.273 ,
[85]*Ahmeded Derbachew vs. Federal Prosecutor*, Journal of Cassation Cases, Vol. 23, October 8/2009 e/c,at. 473.

detention which is one of the pre-trial legal areas. The rules on determination of refusal/daunting bail are different.

In *Semachew Abyu vs Federal Prosecutor*[86] the prosecutor requested for pretrial detention /refusal bail on the grounds of 'concurrence of charges, the amount of the money that become reason for charge, The type of the offence, and seriousness of the charge. The cassation court accepted the reason made by the prosecutor arguing that "there is no legal prevention to raise these grounds for refusal of bail." this argument is unsound. Because, the court should have assessed in the first place the probability of risk of failure to appear on the alleged grounds. In another case[87], the court ruled that holding foreigners passport is not sufficient ground to refuse bail without reasoning. This is contrary to the position of international law treaty bodies.

In the *Habtamu Deju vs. Prosecutor*[88] the Federal Supreme Court interprets article 75(1) in a way that allows the right to the prosecutor against bail grant. Article 75(1) provides the right to appeal to the defendant stating - "where bail has been refused by a court, the accused may apply in writing within twenty days against such refusal to the court having appellate jurisdiction." The court earlier in file no. 113436 argued that the fact that article 75 expressly provides the right to appeal to the defendant and its silence about the prosecutor need not have be interpreted to mean the prosecutor has no the right to appeal. This interpretation of the court is unconstitutional and against the intention of the drafters of the code. If that was the intention of the drafters they would expressly provide such right.

In general, the meaning of the words 'likely'/'unlikely' in article 67 of the 1961 criminal procedure code are not self-evident. This is against the legal certainty requirement envisaged by the HRC jurisprudence. And, the jurisprudence of the Federal Supreme court cassation bench precedent is not reliable to ensure certainty on the interpretation and application of the provision.

[86] Ato *Semachew abyu vs Federal Prosecutor*, file No. 134228 , journal of cassation cases ,Vol. 20, 08/6/2009 e/c.
[87] See Federal Supreme Court Cassation Case no. 31734, Journal of Cassation Cases, Vol. 20, .at 398.
[88] *Habtamu Deju vs. Prosecutor* (File No. 110969), Journal of Federal Supreme Court cassation decisions, Vol..18, 2008, at.309.

4. DURATION OF PRE-TRIAL DETENTION IN ETHIOPIA

4.1 Article 59(2) Of the 1961 Criminal Procedure Code

According to article 59(2) of the 1961 Criminal Procedure code 'where the investigation is not completed', the investigating police officer may apply for a 'remand' for a sufficient time to enable the investigation to be completed.[89] This provision requires that "no remand shall be granted for more than fourteen days on each occasion."[90] This law allows the indefinite detention as long as the investigation requires. This is contrary to the HRC's statement that "Persons who are not released pending trial must be tried as expeditiously as possible, to the extent consistent with their rights of defence."[91]While the article 59(2) implies the indiscriminate application of the law, the HRC rightly recommends that "the reasonableness of any delay in bringing the case to trial has to be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused during the preceding and the manner in which the matter was dealt with by the executive and judicial authorities."[92] In practice, some governments authorities acknowledge the practice of prolong pretrial detention in some prisons and attribute it to "lack of logistics in police detention centers, particularly during the 'law enforcement operation."[93] This is not an excusable practice as "general conditions of understaffing or budgetary constraint do not."[94]

Another problem that originates from the application of article 59(2) is that the court suspends temporally the right to release on bail to suspects who are on remand according to article 59(2) of the code. This is the practice in Bahardar Ena Akababiwa High Court and Bahir Dar Woreda District court according to the author's long time observation. This issue has been entertained by the HRC. The Committee noted that the right to bail recognized in article 9(3) is applicable to only persons who are already charged. In this interpretation persons who are on remand

[89] The 1961 Criminal Procedure Code ,article 59.
[90] *Id*., art. 59(3).
[91] General comment No. 32, para. 35; 818/1998, Sextus v. Trinidad and Tobago, para. 7.2.
[92] 1085/2002, Taright v. Algeria, paras. 8.2–8.4; 386/1989, Koné v. Senegal, para. 8.6; see also 677/1996, *Teesdale v. Trinidad and Tobago*, para. 9.3 (delay of seventeen months violated paragraph 3); 614/1995, Thomas v. Jamaica, para. 9.6 (delay of nearly fourteen months did not violate paragraph 3); general comment No. 32, para. 35 (discussing factors relevant to reasonableness of delay in criminal proceedings).
[93] Ethiopian Human Rights Commission, National Inquiry into deprivation of Liberty, (2024), p.74, available at <www.ehrc.org. >
[94] 336/1988, *Fillastre and Bizouarn vs. Bolivia*, para. 6.5; 818/1998, *Sextus vs Trinidad and Tobago*, paras. 4.2 and 7.2.

detention based on article 59(20) of the code are not yet charged so can't avail themselves to the enjoyment of the right. However, the committee adds "a similar requirement (due to t release on bail) prior to charging results from the prohibition of arbitrary detention in paragraph 1.[95] the FDRE constitution guarantees the right to bail in article 19(6) starting from the moment of arrest i.e. prior to formal charge is made based on article based on 42 (1A) and 94 of the criminal procedure code. The reading of article 28 that empowers police bail supports this interpretation. Due to these reasons we argue that the practice on the contrary is unacceptable.

While arrested or detained persons have constitutional right for their criminal investigation to be completed without unnecessary delay, the Criminal Procedure Code (Cr. Pro. C.) does not provide a hard and fast rule on the period of criminal investigation. I share Wondwossen's concern that the law regulating the duration of police investigation is susceptible to abuse.[96] However, I do not agree with his recommended solution i.e. advising the courts to avert it. We argue that the Courts in Ethiopia are part of the problem[97] and the solution is to redraft the law.

4.2 Article 109 of the 1961 Criminal Procedure

The criminal procedure code in article 37 directs that when the police officer finishes its investigation, he/she shall hand over the file to the public e prosecutor. And, according to article 109 (1) "the public prosecutor shall within fifteen days of the receipt of the police report (article 37) or the record of a preliminary inquiry (article 91) frame such charge as he thinks fit, having regard to the police investigation or preliminary inquiry, and shall file it in the court having jurisdiction."

The law is silent on the effect of this provision on the remand detention decision made according to article 59(2) of the criminal procedure code. From the strict reading of article 59(2), it can be argued that since the crime investigation, which caused the remand, is over, the detainee must be released. Others can also argue that the duration of the remand detention ordered in article 59(2) shall extend beyond the complementation of the investigation and the expiry of the fifteen day

[95] 1128/2002, *Marques de Morais v. Angola*, paras. 6.1 and 6.4.
[96] Wondwossen (PhD), Commentary: The government's massive law enforcement response: a litmus test for the courts, August 3, 2020, https://addisstandard.com/?p=16339
[97] That is the case for instance, in practice, in Bahir Dar ena Akababiwa High Court I observed.

requirement stated in article 109 of the criminal procedure code. This is the practice, for instance, in Bahir Dar town District Court. We argue that the latter interpretation is unsound.

Because the very reason why the remand detention in article 59(2) is ordered is to enable the investigating police officer complete the crime investigation. So, the investigation is over and the detainee is not anymore necessary for the investigation under article 109 since the police admitted that the investigation is over and handed over the file to the prosecutor. Therefore, the court shall review its detention decision immediately after the detention is completed without waiting for the expiry of the fifteen days period stated in article 109.

The fifteen days delay of the trial in article 109 is caused by impediments out of the control of the defendant. This can be due to caseloads, budgetary issues and the like. And, according to the HRC, "general conditions of understaffing or budgetary constraint do not justify continued detention."

If we connect the interpretation of article 59(2) with article 109, the problem gets worse if the prosecutor breaches the fifteen days requirement under article 109. This unintended consequence supports the interpretation that we have to treat the two provisions above independently.

Hence, we argue that the practice in Ethiopia which supports the former interpretation is unlawful under the criminal procedure code, the constitution and the ICCPR.

4.3 Article 94 of the 1961 Criminal Procedure Code

In Ethiopia, the law doesn't regulate the duration detention time pending trial. It is left for the mercy of the judge. Its length depends on external factors such as the length of the trial. There are many grounds for adjourning hearing the trial in Ethiopia without due regard for the length of detention. According to article 94 of the 1961 criminal procedure code ,the court may of its own motion or on the application of the prosecution or the defence adjourn any hearing at any stage thereof where the interests of justice so require.[98]The law says nothing about the fate of liberty interest of the defendant whose case is under adjournment now and again for the above reasons.

[98] Art. 94(1) of the 1961 Criminal Procedure Code. The conditions for granting an adjournment are stated in this article from (a) - (I)

The law doesn't prioritize between the timely ordering of the adjournments when the defendant is in custody and when he/she is on bail.

While in theory, "no adjournment under paragraphs (a) and (f)- (h) inclusive shall be granted for more than one week,"[99] in practice due to caseloads, in Ethiopia courts, adjournments last for weeks, months, and years. In fact the practice is characterized by "Delay in investigation and extended time for investigation; Detention based on inadequate evidence and incomplete charges; Denying bail, refusing to release detainees on bail, and demanding payment by police officers to release a detainee on bail (corruption); Detention based on political opinion, or identity of a person."[100]

These prolong detention, as HRC rightly says "jeopardize the presumption of innocence." These prolong adjournments have no legal grounds for reviewing the proportionality/necessity of the continued pre-trial detention decision in Ethiopia/ this is against the HRC's position that "general conditions of understaffing or budgetary constraint do not justify detention" that when delays become necessary, the judge must reconsider "alternatives to pretrial detention."

COCLUDING REMARKS

We have established that there are a bundle of standards on the use of pre-trial detention in the FDRE constitution and the international treaties Ethiopia is party to. This piece has examined the compliance of the statutorily laws and Federal Supreme Court cassation cases to these standards. Particularly, the authors have examined the permissibility of the grounds for pre-trial detention, the legality of the restrictions on the right to bail, and the legality of the duration of pre-trial detention as found in the statutes and cassation laws. In this research it is argued that crime prevention grounds for pre-trial detention violates the right to presumption of innocence; the legal exceptions stated in the code and the anti-corruption proclamation are unlawful in the constitution and the treaties ratified by Ethiopia; the judicial considerations in bail/detentions decisions are vague violating the requirement of legal certainty; and the law duration of detention is unlawful both in the constitution and in the treaties. Finally, the paper has examined the

[99] Art. 94(3) of the 1961 Criminal Procedure Code.
[100] Ethiopian Human Rights Commission, National Inquiry into persons deprived of liberty, 2024, available at <www.ehrc.org.>

practice of the judiciary in the interpretation of pre-trial detention laws and we argue that the practice has flaws.

PRODUCT LIABILITY UNDER UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) AND ETHIOPIAN LAW

Yosef Workelule Tewabe*

Abstract

This article explores product liability by analyzing its treatment under the United Nations Convention on Contracts for the International Sale of Goods (CISG) and Ethiopian law, specifically focusing on claims related to property damage and personal injuries caused by defective products. The study begins by outlining the theoretical frameworks of product liability to underscore its complexity and significance. A crucial distinction is made between the two legal frameworks: while the CISG addresses claims for property damage, it does not encompass personal injury claims, thereby creating gaps in consumer protection. The methodology employed in this analysis includes a descriptive approach, which allows for a thorough examination of each legal framework, alongside a comparative study to highlight differences and similarities between the CISG and Ethiopian law. The findings indicate that Ethiopian law provides a more comprehensive basis for addressing both types of harm, in contrast to the limited scope of the CISG. This limitation suggests a need for reform. The study advocates amending the CISG to explicitly cover personal injury claims, enhancing Ethiopia's product liability framework, and improving legal awareness among relevant stakeholders. Ultimately, this article aims to clarify legal ambiguities and strengthen product liability protections, thus benefiting businesses, consumers, and the global marketplace.

Keywords: CISG, Product Liability, Ethiopian law, Defective Products, Personal Injury, Property Damage

INTRODUCTION

In an increasingly interconnected global economy, individuals and businesses find it challenging to independently fulfill all their needs without relying on trade. A different factor, including resource scarcity, geographical limitations, time constraints, and differing levels of technological access, necessitate the exchange of goods and services across borders. This trading activity not only strengthens connections among individuals within the same region but also bridges gaps across different jurisdictions. However, as international trade expands, so does the risk of product liability issues, emphasizing the need for established regulatory frameworks to ensure accountability and safety in commercial exchanges.[1]

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[1] Christensen, B.J., Kowalczyk, C. (2017). Introduction to Globalization: Strategies and Effects. In: Christensen, B., Kowalczyk, C. (eds) Globalization. Springer, Berlin, Heidelberg. https://doi.org/10.1007/978-3-662-49502-5_1

In international and domestic commercial transactions, a well-regulated relationship between buyers, sellers, and third parties is essential for achieving the primary objectives of commerce.[2] The essence of these transactions lies in the exchange of goods and services, where one party possesses a surplus of a specific product, while another faces scarcity.[3] To optimize the benefits of international commerce and mitigate risks, it is crucial to establish clear liability and rights frameworks that govern the actions of all parties involved.[4] Countries like Ethiopia have enacted laws designed to regulate these relationships, facilitating smoother commercial interactions within their domestic jurisdictions.[5]

Significant efforts have been made to create a comprehensive international commercial law framework, culminating in the establishment of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in 1980. The CISG has garnered extensive support, with a majority of UN member states signing the convention.[6] In alignment with its constitutional commitments, Ethiopia has made strides to become a signatory to the CISG. The House of Peoples' Representatives of the Federal Democratic Republic of Ethiopia ratified the CISG on June 25, 2020, and tasked the Ministry of Trade and Industry with overseeing its implementation in collaboration with other government institutions. However, Ethiopia has yet to submit the formal instrument of accession to the Secretary-General of the United Nations, as required by Articles 91(3) and (4) of the CISG. Until this essential step is completed, Ethiopia remains classified as a non-contracting state under the CISG. This status underscores the need for urgent action to finalize its accession process, which would enable Ethiopia to fully engage in the benefits and obligations outlined in the CISG framework. [7]

Product liability emerges as a critical concern in business transactions, whether domestic or international. Effective regulation of product liability is essential to safeguard consumers and

[2] Paul L. Joskow, Roger G. Noll, (1981), Regulation in Theory and Practice: An Overview, *the MIT Press*, pp. 1 – 78. Available at http://www.nber.org/chapters/c11429.

[3] Vesna Grozdanovska, et.al, (2017), International Business and Trade, *International Journal of Sciences: Basic and Applied Research (IJSBAR)*, Vol. 31, No 3, at 105-114.

[4] Michael Joachim Bonell, (2018), the law governing international commercial contracts and the actual role of the Unidroit Principles, *Uniform Law Review*, Vol. 23, Issue 1, March 2018, Pages 15–41, https://doi.org/10.1093/ulr/uny001.

[5] This regulatory framework often includes provisions for contracts, liability, and dispute resolution to create a transparent and equitable marketplace.

[6] Larry A. DiMatteo, (2013), Harmonization of International Sales Law, Cambridge University Press, Commercial Contract Law Transatlantic Perspectives, pp. 559 – 580, DOI: https://doi.org/10.1017/CBO9781139235662.030.

[7] United Nations Convention on Contracts for the International Sale of Goods Ratification Proclamation, (2020), *Federal Negarit Gazette*, Proclamation No. 1220/2020, 26th Year No. 73, Addis Ababa 25th July, 2020.

ensure that businesses are held accountable for the products they sell. With the global economy in mind, the implications of Ethiopia's delayed accession to the CISG become significant. Once Ethiopia finalizes its formalities, the rules governing international sales of goods will significantly influence transactions involving both Ethiopian businesses and international stakeholders.

In this context, understanding the legal frameworks that govern product liability in both the CISG and Ethiopian domestic law is paramount. Analyzing these frameworks provides valuable insights for various stakeholders, including legal practitioners, policymakers, and businesses, as they navigate potential disputes arising from defective products.

Defective products pose notable risks that can result in serious consequences. These risks encompass:

1. Personal Injury: Harm sustained by individuals due to defective products, which can range from minor injuries (like cuts and bruises) to serious harm (including broken bones or poisoning). Such injuries underscore the urgency of effective regulations to protect consumers.
2. Property Damage: Damage to physical belongings or property resulting from defective products, such as a faulty appliance causing a fire that damages a house, a defective car part leading to an accident, or malfunctioning electronic devices ruining other items. Property damage can extend to damage suffered by the sold goods themselves and other physical assets.

In light of these risks, countries have developed product liability clauses within their legal frameworks to provide compensation and enforce accountability. The CISG serves as a pivotal instrument in regulating the international sale of goods, particularly concerning issues of defective products and associated liabilities.

Moreover, Ethiopian laws also recognize product liability through various legal instruments, including the Civil Code, Criminal Code, and consumer protection proclamations. This legal recognition is vital for creating a comprehensive understanding of product liability issues.

This article aims to conduct a comparative analysis of the regulations related to product liability in both the CISG and Ethiopian domestic laws. The study will focus on identifying key strengths and weaknesses in each framework and propose strategies for bolstering strengths while addressing existing gaps.

Through this analysis, the article aims to inform and guide policymakers, legal practitioners, and businesses by elucidating the interplay between international and domestic regulatory approaches. Ultimately, the insights gained can contribute to enhanced consumer protection and accountability within Ethiopia's evolving commercial landscape.

1. THE CONCEPT OF PRODUCT LIABILITY

Product liability refers to the responsibility of a manufacturer or seller of goods to compensate for injury caused by defective merchandise that it has provided for sale. Black's law dictionary defines product liability as "[a] manufacturer's or seller's tort liability for any damages or injuries suffered by a buyer, user, or bystander as a result of a defective product. Product liability can be based on a theory of negligence, strict liability, or breach of warranty." [8]

During the early industrial revolution, product liability was characterized by an emphasis on "privity" between buyer and seller, with the remote manufacturer ordinarily being shielded from direct liability. The theory of caveat emptor—let the buyer beware—that pretty much-governed consumer law from the early eighteenth century until the early twentieth century made some sense.[9]

In his commentary on the McKean work regarding product liability, Grant Gilmore observed that "Product liability is a relatively new term. Lawyers used to talk about liability for breach of warranty in a more complex manner, without bothering to specify whether they were talking about blame in contract or tort. […] In this century, the barriers have been positioned largely on the contract side—the defenses of privity of contract, disclaimer, and the plaintiff's failure to give timely notice of the defect—so that we have become accustomed to thinking of tort as providing the escape route." [10]

Gilmore's quotation highlights the evolving nature of product liability law and its distinction from traditional concepts of liability. Historically, discussions around liability often conflated contract and tort principles, making it difficult to navigate the legal landscape surrounding defective products. However, as product liability has become more defined, the focus has shifted towards contractual frameworks, where defenses such as privity of contract and

[8] Black's Law Dictionary 1328 (9th ed.2009).
[9] Hosmanek, Smith, and Dayton, (2022), Business Law, Ethics, and Sustainability, the University of Iowa pp. 438 -440. Accessed at: https://iro.uiowa.edu/esploro/outputs/textbook/Business-Law-Ethics-and-Sustainability/9984376757702771
[10] Grant Gilmore, (1970), Products Liability: A Commentary, The University of Chicago Law Review, Vol. 38, No.103, at 109, last Para.

disclaimers have gained prominence. These defenses can limit a plaintiff's ability to seek redress for defective products, thereby creating a perception that tort law serves as a fallback option when contractual claims fail.

Product liability is considered a descendant of both tort and contract law. Typically, product liability claims are not associated with international sales transactions; they usually involve two parties a consumer and a manufacturer who are generally not connected by a contract.[11]

Product liability is fundamentally understood as the claims a buyer can make against a seller, typically arising under the terms of a contract. As Denis W. Stearns articulated in his work "Product liability law evolved from contract law, with the first decisions strongly favoring manufacturers. For a very long time, the "general rule" was that a manufacturer could not be sued, even for negligence, by someone with whom he had no contract."[12] Recently, however, domestic legislation has begun to evolve by incorporating both tortious and contractual aspects of product liability into their legal frameworks.

Under Ethiopian law also there is the same experience with other jurisprudence as the details discussed below in a separate section. In the case of CISG as well, without disregarding its inapplicability for personal injuries, there are some implications for claiming compensation for defective product damage on the buyer or the third party property without a binding contractual relationship as the CISG Advisory Council clearly stipulated in its opinion No. 12.[13] Current incidents in various jurisdictions involving defective products highlight the urgent need for states to strengthen their regulatory frameworks in this area. By doing so, they can better protect their citizens and prevent the harsh consequences that arise from such incidents.[14]

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[11] Vinluan, M. (2022). Product Liability. In: Pasha, A.S. (eds) Laws of Medicine. Springer, Cham. https://doi.org/10.1007/978-3-031-08162-0_10

[12] Denis W. Stearns, (2005), Winterbottom v. Wright. Product Liability History. Available at Product Liability: A Brief History of Its Early Origins | Marler Clark. s

[13] See CISG-AC Opinion No. 12, Liability of the Seller for Damages Arising Out of Personal Injuries and Property Damage Caused by Goods and Services under the CISG, Rapporteur: Professor Hiroo Sono, School of Law, Hokkaido University, Sapporo, Japan. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013

[14] Such as; In the United States, Toyota recalled 412,000 passenger cars, mostly the Avalon model, for steering problems that reportedly led to three accidents; Portable baby recliners that are supposed to help fussy babies sleep better were recalled after the death of an infant: the Consumer Product Safety Commission announced the recall of 30,000 Nap Nanny recliners made by Baby Matters of Berwyn, Pennsylvania; More than 70,000 children and teens go to the emergency room each year for injuries and complications from medical devices. Contact lenses are the leading culprit, the first detailed national estimate suggests; Smith and Noble recalled 1.3 million Roman shades and roller shades after a child was nearly strangled: the Consumer Product Safety Commission says a five-year-old boy in Tacoma, Washington, was entangled in the cord of a roller shade in May 2009.FindLaw, AP reports; The Consumer Product Safety Commission reported that 4,521 people were

In general, product liability refers to the remedies available when a defective product causes personal injury or property damage. The category of product liability might differ in different international and domestic jurisdictions. It may include liability in the contract, tort/delictual liability, or both categories. To determine the scope and proper category of product liability, scholars have proposed three different but supportive theories on product liability. Thus, product liability can be based on a theory of negligence, strict liability, or breach of warranty. Warranties theory is representative of contractual remedies and the rest of the two have more of extra-contractual character.[15]

2. THEORIES OF PRODUCT LIABILITY

2.1. Warranties Theory of the Product Liability

The Oxford Dictionary defines a warranty as "a written guarantee, issued to the purchaser of an article by its manufacturer, promising to repair or replace it if necessary within a specified period." [16] From this definition, we can argue that agreement is the primary condition of a warranty, which is designed to provide repair or replacement for a defective product within a specified timeframe. If the seller breaches the terms of the agreement, the buyer retains the right to pursue alternative remedies provided by the law. Such claims fall under product liability, rooted in a pre-existing and binding contractual relationship.

In this context, the seller can be held liable for breaching promises regarding the quality, conformity, or title of the product, to the extent of commitments outlined in the contract. However, it is important to note that beyond these parameters, the buyer cannot rely solely on the warranty as grounds for their action. Warranties can be categorized into express and implied warranties. [17] An express warranty refers to the clear affirmations made by the seller within the contract concerning the product's features, such as quality, expiration date, content

killed in the United States in consumer-product-related incidences in 2009, and millions of people visited hospital emergency rooms from consumer-product-related injuries.US Consumer Product Safety Commission, 2009 Report to the President and the Congress, accessed March 1, 2011, http://www.cpsc.gov/cpscpub/pubs/reports/ 2009rpt.pdf; Reports about the possibility that cell-phone use causes brain cancer continue to be hotly debated. Critics suggest that the studies minimizing the risk were paid for by cell phone manufacturers. Matt Hamblen, "New Study Warns of Cell Phone Dangers," Computerworld US, August 9, 2009, accessed March 1, 2011, http://news.techworld.com/ personal-tech/3200539/new study-warns-of-cell-phone-dangers1.

[15] Hylton, Keith N., the Law and Economics of Products Liability (July 25, 2012). Boston Univ. School of Law, Public Law Research Paper No. 12-39, Boston Univ. School of Law, Law and Economics Research Paper No. 12-39, Available at SSRN: https://ssrn.com/abstract=2117245 or http://dx.doi.org/10.2139/ssrn.2117245

[16] Warranty noun - Definition, pictures, pronunciation and usage notes | Oxford Advanced Learner's Dictionary at OxfordLearnersDictionaries.com

[17] Don Mayer, et al, (1970), Basics of Product Liability, Sales, and Contracts (v. 1.0), available at http://2012books.lardbucket.org/attribution.html?utm_source=heade

description, and other relevant issues. Claims of breach of express warranty fundamentally represent claims of misrepresentation.[18] Conversely, an implied warranty encompasses characteristics or standards of the product that are not explicitly articulated in the agreement but should be recognized by the seller during the performance stage. These implied warranties may stem from the contract itself or from established business practices. While some implied warranties necessitate specific actions for compliance, many are derived from long-standing business customs or practices.[19]

The implied warranties can be classified into three main sub-categories: the implied warranty of merchantability (which is only applicable to merchants), the implied warranty of fitness for a particular purpose, and the implied warranty of title. Both forms of warranties are acknowledged under Article 35 of the United Nations Convention on Contracts for the International Sale of Goods (CISG). Additionally, Ethiopian law contains provisions addressing warranties provided by the seller in the general contract and special sales contract law sections of the civil code.[20]

However, the theory of warranty does not encompass all claims related to product liability due to its privity requirement, which necessitates an agreement or contractual relationship between the claimant and the defendant. In the trade of goods and services, particularly in international commerce, defective products can affect not only the buyer who has direct contact with the seller or manufacturer but also third parties who lack such direct contact. The product may pass through various hands before reaching the final consumer, and at each stage, its defects could potentially injure one or more parties with no contractual relationship with the manufacturer.[21]

Given these circumstances, two additional theories have been proposed to address issues arising outside the strict contractual relationship between the seller and buyer. These theories serve to highlight the limitations of warranty as a sole basis for liability in cases involving defective products, particularly in complex distribution channels.

2.2. Negligence Theory of the Product Liability

[18] *Ibid*.
[19] *Ibid*.
[20] *Ibid*.
[21] Andrew F. Daughety and Jennifer F. Reinganum, et.al, (2013), Economic Analysis of Products Liability: Theory, Research handbook on the economics of torts, (pp.69-96). DOI:10.4337/9781781006177.00011.

Unlike in the case of warranty theory, on the seller's side, there are no either express or implied undertakings whereas, the seller or the manufacturer would be liable for his/her negligence. Negligence theory advocates the fault-based tortious liability of the seller/manufacturer irrespective of the existence or non-existence of a contract.[22] Privity is no longer relevant. The responsibility of the defendant in the negligence theory is inherited from his fault for not giving due care and diligence.[23]

The concepts of reasonableness and standard of care form the foundation of negligence theory. In the context of product liability, negligence theory is particularly relevant in two types of cases: defective design and inadequate warnings. In cases involving defective design, manufacturers and safety engineers are often held liable. The product designer should reasonably design the product for safe foreseeable use. The reasonableness of the design will be evaluated through an individual assessment for each case. In negligence claims concerning inadequate warnings, the seller or manufacturer generally has the obligation to inform the buyer of any potential risks related to a product. Assessing foreseeability will also require a case-by-case evaluation, akin to the method applied in defective design cases.[24]

In both cases, when the seller or the manufacturer fails to fulfill their duty to inform about potential dangers associated with a reasonable design, they may face tortious liability for any damages incurred by the buyer due to their negligence. However, proving negligence can be a challenging task for the claimant. The rationale behind these rules is rooted in the principles of accountability and consumer protection, ensuring that manufacturers and sellers prioritize safety in their designs and adequately communicate potential risks to consumers. This theory seeks to balance the interests of manufacturers with the need to protect consumers from harm due to defective products.[25]

This basis for liability is commonly utilized and is not restricted by the limitations associated with breach of warranty. In cases of negligence, any party whose carelessness contributed to the product causing the injury can be held liable, not just the seller. Efforts to limit warranties have no bearing on a negligence claim.[26]

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[22] Kiely, Terrence F. and Ottley, Bruce L., Understanding Products Liability Law (April 1, 2006). Understanding Products Liability Law, 2006, Available at SSRN: https://ssrn.com/abstract=1327927.
[23] *Ibid*.
[24] Clark Alistair, (1985), The Conceptual Basis of Product Liability, The Modern Law Review, Volume 48 (3), at 325-339.
[25] *Ibid*.
[26] Three Legal Theories for Products Liability, Available at: https://www.yourwisconsininjurylawyers.com/articles/three-legal-theories-for-products-liability/.

One challenge with using negligence as a basis for liability is identifying the individual or entity responsible for the product's defect. In other words, it can be difficult to determine the specific negligent act, which often requires thorough investigation. Just being a product is defective does not necessarily prove the manufacturer breached a duty of care. Even if there was some negligence, the plaintiff must prove her damages flowed proximately from that negligence.[27]

2.3. Strict Liability Theory of the Product Liabilities

The Strict Liability theory represents a distinct approach compared to the previous two theories. The doctrines of breach of warranty and negligence often failed to offer sufficient relief to individuals suffering damages or injuries in product liability cases due to their perquisites of a contractual engagement and negligent activity respectively. Consequently, various legal systems have developed the tort theory of strict product liability, which holds sellers and manufacturers accountable for product defects without requiring a contractual relationship or proof of negligence.[28]

The shortcomings in warranty and negligence theory have led to the development and necessity of an alternative theory, the theory of strict liability. Under strict liability, if goods sold are deemed unreasonably dangerous or defective, the merchant-seller is liable for any resulting property damage and personal injuries. Strict liability is a legal principle that holds sellers and manufacturers accountable for product defects without requiring a contractual or fault-based relationship with the injured party.[29] However, the theory is not without limitations and criticisms. Disclaimers of liability remain a concern, as they can undermine the effectiveness of strict liability. Additionally, the actions or modifications made by the plaintiff regarding the goods may limit or restrict recovery.[30]

3. PRODUCT LIABILITY UNDER CISG

The CISG is one of the results of harmonization efforts of the commercial laws in international jurisprudence. The divergence of laws is one of the fundamental obstacles to stable international commerce. Harmonizing the substantive and procedural laws in the area has substantial importance in creating an efficient and effective global market. For this

[27] *Ibid*.
[28] John W. Reis, (2003), Product Liability Law Basic Theories and Recent Trends, COZEN O'CONNOR, Charlotte, NC 28202, pp. 1-12.
[29] *Ibid*.
[30] Zahr K. Said, (2024), Tort Law: A 21st Century Approach, University of Washington, https: biz.libretexts.org/Bookshelves/Civil Law/Tort Law, section 5.5.

purpose, countries adopted CISG to rule the buyer's and seller's rights and obligations at the international level.[31]

In terms of scope, CISG has two forms of scope of application; territorial and subject matter.[32] In the case of territorial jurisdiction, the CISG would apply if one of the three circumstances exists; when the sale contract made between parties has different places of business in the different territory of member countries; when the choice of law of the forum refers the law of member state(which is subject to member state reservation); and when the parties of international sales contract refers the convention to apply irrespective of the membership of the states where their place of business situate.[33]

Additionally, the CISG outlines certain subject matter restrictions regarding its applicability. Specifically, it does not apply to the sale of goods for immediate consumption, the provision of services, transactions involving goods where the buyer contributes a substantial part of the product's raw materials, sales conducted by auction, and sales executed under legal judgment, among others. Furthermore, the CISG establishes a category of excluded goods.[34] Further, the convention provides that it is not concerned with certain legal questions, namely the validity of the contract and transfer of property issues, but only governs the formation of the contract and the buyer and seller's obligation.[35]

Even within the framework of buyers' and sellers' obligations, the convention excludes certain subject matters from its jurisdiction. Notably, Article 5 specifically states that the CISG does not encompass product liability claims for personal injuries sustained by any individual.[36] The specificity of this exclusion has sparked ongoing debate among scholars in the field since the convention's adoption.

The rationale behind these exclusions lies in the belief that domestic legal frameworks can provide better protection for these subject matters than international jurisprudence. The exclusion of product liability claims under Article 5 is also justified by the same rationale.[37]

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[31] United Nations Convention on Contracts for the International Sale of Goods/CISG/, Apr. 11, 1980, 1489 U.N.T.S. 3. (Here in after CISG)
[32] Art. 1-6 of the CISG.
[33] Art. 1 of the CISG.
[34] Art. 2 of the CISG.
[35] Art. 4 of the CISG.
[36] Art. 5 of the CISG
[37] IICL/Institute of International Commercial Law Repository: Legislative History: 1980 Vienna Diplomatic Conference. Available at: Legislative History: 1980 Vienna Diplomatic Conference | Institute of International Commercial Law (pace.edu)

Article 5 of the convention explicitly restricts personal injury claims related to sales contract agreements, regardless of whether the injured party is a third party or one of the contracting parties. However, the convention does not clarify its applicability or exclusion regarding product liability for property damage. Either on the contracting party's property or/and on the third party. This has been creating disagreement among scholars in the area about the issue of whether the convention has totally excluded property damages through silence or whether its claims for personal injury have relevance to property damage in effect excluding property damages as well.

Many writers are doing a contrary reading to resolve the controversy.[38] Since there is no restriction made in other parts of the convention on it, by a contrary reading we can conclude that the rules of CISG are not excluded from governing product liability claims when the defective product causes damage to the property. The CISG advisory council also provided its opinion in Article 5 by characterizing the underlying issues under three sections.[39]

The first opinion of the advisory related to the warranty theory of product liability and stated: "When loss is caused to the buyer by delivery of non-conforming goods, the seller is liable to the buyer for damages under Article 45(1)(b). The buyer is entitled to full compensation subject to the limitations as outlined in Article 74." [40]

In the second section of their opinion, the advisory council was concerned with interpreting the phrase 'personal injury' under Art 5 of the convention. In this section, they stipulate that:

> "According to Article 5, the CISG does not govern the liability of the seller for death or personal injury caused by the goods to the buyer or any other person. When a contract entailing labor or other services is a contract of sale in accordance with Article 3(2), the CISG does not govern the liability of the seller for death or personal injury caused by such services to the buyer or any other person according to Article 5. Claims of the buyer against the seller to be indemnified against the buyer's liability for death or personal injury of a third person caused by goods or services supplied by the seller are claims for pecuniary loss of the buyer, and are not claims for "liability of the seller for

[38] Eun-Bin Kim, (2023), Exclusion of personal injury in the CISG and application of the common law, Korea Trade Information Society, Trade Information Research, Vol. 25, Issue 3, 2023.09, at. 155 – 172.
DOI : 10.15798/kaici.2023.25.3.155
[39] CISG Advisory Council Opinion No. 12 Available at: CISG_Advisory_Council_Opinion_No_12.pdf (cisg-online.org).
[40] *Ibid*.

> death or personal injury caused by the goods to any person" under Article 5. These claims are governed by the CISG to the exclusion of any claims based on the applicable domestic law, whether contractual or not."[41]

In the 3rd section, they also addressed the possibilities for using CISG to claim compensation for the buyer's property damage by stating;

> "Liability of the seller for damage to the property of the buyer caused by goods or services supplied by the seller is governed by the CISG. If the damage is caused to the goods themselves, the liability of the seller is governed by the CISG to the exclusion of any claims based on domestic law, whether contractual or not. The same applies if the damage is caused to property that is attached to the goods, or with which the goods are combined or commingled, or which are processed by the goods, in the normal course of business or in the course of normal use. However, if the damage is caused to other property of the buyer, any liability under the applicable domestic law is not excluded by the CISG." [42]

The problem here is not interpreting the provision in such a way and providing a solution whereas, it is in the nature of the liability. In most of the cases product liability, whether it is for personal injury or property damage is part of the domestic law regime of tortious liability, and this may create a jurisdictional competition between the two different regimes. In such a case Joseph Lookofsky analyzed the circumstances and provided solutions in the following manner: "Because such claims for buyer's property damage traditionally have been regulated by domestic rules of delict (tort, negligence, strict product liability, etc.), a question arises as to whether the application of these older rules should now be displaced by the new CISG regime, or whether the two rule-sets should be permitted to 'compete'. Although there would seem to be good reason to at least allow some degree of competition (concurrent claims), the question will ultimately have to be resolved by the various national courts on a case-by-case basis."[43]

The CISG explicitly excludes product liability, with Article 5 primarily addressing personal injuries, as highlighted in the advisory council's opinion and the writer's understanding.

[41] *Ibid*.
[42] *Ibid*.
[43] Joseph Lookofsky, (2005), WALKING THE ARTICLE 7(2) TIGHTROPE BETWEEN CISG AND DOMESTIC LAW, JOURNAL OF LAW AND COMMERCE, Vol. 25:87, at 87-105.

When it comes to property damage whether to the sold item itself or to other properties owned by the buyer the buyer has the right to seek damages from the seller based on the provisions of the CISG. However, this should be viewed as an alternative to domestic remedies, and buyers should not be precluded from pursuing domestic remedies when deemed necessary.[44]

As a whole, the scope of the CISG applicability of the product liability claim is limited to the property damage of the buyer. The property damage compensation claim of the buyer may be based on the strict liability of the seller, negligence, or breach of warranty as it is inferred in the CISG advisory opinion.

4. PRODUCT LIABILITY UNDER THE ETHIOPIAN LEGAL SYSTEM

Under Ethiopian law, defective products can result in either civil, administrative, or criminal liabilities or a combination of these. [45] To provide readers with a thorough understanding of the extent and characteristics of product liabilities in Ethiopian law, an examination of the pertinent provisions in the Civil Code, Criminal Code, Trade Competition Law, and the Consumer Protection Proclamation of Ethiopia is undertaken. The Civil Code provisions provided the circumstances for both contractual and extra-contractual product liability of the seller/manufacturers. The Trade Competition and Consumer Protection Proclamation also provided administrative, civil, and criminal measures for the sale of defective products as one form of consumer protection instruments. The criminal code, on the other hand, incorporated provisions within the Production and Distribution of Substances Hazardous to Human and Animal Health and offenses against public health and Hygiene section as criminal remedies for providing defective products that cause damage to the general public. This sentence should be rewritten for clarity.

Ethiopian law does not impose any boundary restrictions. Regardless of whether the product is manufactured in Ethiopia or if the involved parties are based in a foreign country, these domestic regulations will still apply.

Under Ethiopian law, the manufacturer, the importer, the distributor, and the retailer could be potentially liable to compensate a claimant to the extent of their liability. Under Trade

[44] *Ibid*.

[45] See the civil code on sellers' obligation from Art 2274-2302, transfer of risk provisions from Art 2323-2328, and provisions on non-performance of the sales contract from 2329-2367, Trade Competition and Consumers Protection Proclamation, 2014, Federal Negarit Gazeta, proclamation No. 813/2014, 20th Year, No. 28, provisions about consumers protection. See also criminal code provisions cited below from Art. 525-534.

Competition and Consumer Protection Proclamation No. 813/ 2013 (Consumer Protection law) the consumer has the right to claim compensation or related rights thereof, either jointly or severally from the persons who have participated in the supply of goods as manufacturers, importers, wholesalers, retailers or in any other way for the damage he has suffered because of the purchase or use of the goods or services.[46] Unlike in the case of CISG, which intended to regulate only contracting parties, the seller and the buyer, in Ethiopian law, both the consumer buyers and the professional buyers are treated equally. However, the consumer protection proclamation discussed only the consumer buyer; this resulted from its purpose of establishment. Since it is legislated to control the trader's relationship with consumers, it is not expected to govern the professional buyers as well. Moreover, Ethiopia's product liability legal framework is equally applicable to both personal and property injuries, lacking any restrictions on its scope. Hence, product liabilities under Ethiopian law can be further elaborated as contractual and tort-based product liabilities.

4.1. Contractual Product Liability/ Warranty Theory under the Ethiopia Law

According to the Ethiopian Civil Code of 1960 ('Civil Code'), the seller should guarantee to the buyer that the thing sold conforms to the contract and is not affected by defects. If the thing sold to the buyer is defective the seller has the obligation to repair the defect or replace the defective product with the new one.[47] If neither is done, the buyer may bring a claim against the seller invoking non-performance of the contract. These obligations of the seller, have three categories; seller liabilities to warrant the buyer against defect, non-conformity, or dispossession of the product. These can be implied or express warranties. Some are explicitly provided in the law and others require inclusions in the parties' contract.[48]

Under the provisions of the civil code, both the buyer and the seller have the ability to define the scope of their liabilities within their agreement. However, any contractual clause that seeks to exclude or limit warranty liabilities will be rendered ineffective if the seller has fraudulently concealed defects in the product from the buyer. Additionally, the seller cannot absolve himself of liability for damages arising from his own negligence, except in instances of strict liability.[49] Whereas the Consumer Protection Law of Ethiopia, as outlined in the

[46] Trade Competition and Consumers Protection Proclamation, (2014), Federal Negarit Gazeta, proclamation No. 813/2014, 20th Year, No. 28, Addis Ababa, 21st March, 2014, Article 14(5). (Here in After TCCPP).
[47] CIVIL CODE OF THE EMPIRE OF ETHIOPIA PROCLAMATION, (1960), NEGARIT GAZETA Gazette Extraordinary, PROCLAMATION No. 165 OF J960, Issue No.2 11th day of September, 1960(Here in after the Civil Code), Art. 2273-2302. and the TCCPP Art. 20.
[48] The Civil Code Art. 2287-2300.
[49] The civil code Art. 2297.

Trade Competition and Consumer Protection Proclamation (TCCPP), nullifies any agreements between the consumer buyer and the seller that seek to limit the seller's liabilities under the law, including those pertaining to warranties against defects.[50] So, Under Ethiopian law, the ability of parties to limit a seller's liabilities through their agreement is restricted to sales contracts involving professional buyers, rather than ordinary consumers.

Both the Civil Code and the Consumer Protection Proclamation mandate that buyers—whether consumers or professionals—must notify the seller or manufacturer of any defects in the product before pursuing product liability claims in court. The Civil Code stipulates that notifications should be made immediately,[51] While the Consumer Protection Proclamation allows for a notification period of 15 days from the discovery of the defect.[52]

Under Ethiopian law, remedies for defective products may include repair, replacement, refund, or compensation. The burden of proof rests with the party alleging a breach of warranty. In both cases—whether involving a professional buyer or a consumer—the buyer must file their claim in court within one year from the date of notification of the defect. Claims related to warranty cannot be brought to court after this one-year period has elapsed. [53]

In general, the warranty theory of product liability is recognized under Ethiopian law; however, it is not the sole remedy available for product liability claims. While warranties necessitate an agreement or privity between parties, issues of product liability often extend beyond contractual relations, necessitating additional remedies to address consumer needs. To this end, the theories of negligence and strict liability provide alternative solutions. Both of these remedies are acknowledged within the tort regime of Ethiopian law..

4.2. Tortious Product Liability under the Ethiopia Law /Strict and Negligence Theory/

[50] The TCCPP Art. 21.
[51] Art. 2292. -- Notification unless the thing is likely to perish of defects.
(1) Where examination discloses nonconformity with the contract or a defect in the thing, the buyer shall without delay give notice thereof to the seller.
(2) In notifying the defect, the buyer shall indicate its nature in accordance with custom and good faith.
[52] Art. 20(4).
[53] Art. 2298.- Period for suing on a warranty.
(1) The buyer shall, under pain of losing his right, bring proceedings on a warranty against defects within one year from his having given notice to the seller unless the seller intentionally
(2) The parties may not shorten this period. (3) Where specified qualities misled him. or the good working condition of the thing have been warranted by the seller for a specified period, the time within which the buyer may bring proceedings shall be reckoned from the day when this period has expired.

Under Ethiopian law, tort liabilities can be classified as either fault-based or non-fault-based. Unlike in criminal cases, the mental state of the offender whether intentional or negligent does not influence the final remedy in instances of fault-based liability. Non-fault-based liabilities may encompass either vicarious liability or strict liability.[54]

Regarding product liability for sellers and manufacturers, Ethiopian law recognizes both fault-based and non-fault-based liabilities. This distinction is affirmed by provisions in both the Civil Code and the Consumer Protection Proclamation.[55]

The civil code under Art 2027(1) and 2029 recognized fault-based tortious liabilities it can be either negligently or intentionally. Further, it may be an act or omission.[56] If the offenses proved by the court the offender would be extra-contractually liable for the injured. In case of a defective product also this fault-based rule of tortious liability would have applicability. Any seller/manufacturer, that causes damage or injury to another party, irrespective of the existence of a contract would be subject to extra-contractual liability.[57]

The fault may arise from either negligence or intentional misconduct and can pertain to various aspects, including product design, labeling, or warnings. Accordingly, under Ethiopian law, a buyer has the right to invoke a negligence or intentional fault-based product liability theory in cases where their claim extends beyond the contractual scope, provided that. The seller or manufacturer is found to be at fault.[58]

The second ground for extra-contractual liability/tort claim for defective products causing damage to the users or the buyers of the product is within the category of non-fault-based liabilities which is known as a strict liability of the manufacturer.[59].

[54] See the Civil Code Art. 2027-2179.
[55] Art. 20 of the TCCPP;
1 / Any consumer may report defects in goods and services purchased and the damage to the
2/ A consumer may, without prejudice to warranties or legal or contractual provisions more advantageous to him, demand the seller, within 15 days from the date of purchase:
a) in the case of defective goods, to replace the goods or refund the price paid; or
b) in the case of defective service, to re-deliver the service free of charge or to refund the fee paid.
3/ Any consumer shall have the right to claim, in accordance with the relevant laws, payment of compensation for any damage resulting from the use of the defective goods or service or from the failure of the seller to meet his demand presented pursuant to sub-article (2) of this Article. Furthermore, under Art 14(5) it is stated about the joint and several liability of manufacturer and chains of sales of the product. However, its application is limited to consumer buyers' claims, unlike the Civil Code provisions.
[56] The Civil Code Art. 2027(1) and 2029.
[57] *Ibid*
[58] *Ibid*
[59] The Civil Code Art. 2085.

The strict liability of manufacturers is clearly articulated in Article 2085 of the Ethiopian Civil Code. This provision establishes that manufacturers are held liable for damages caused by defects in their products, irrespective of negligence as the following; "

> (1) A 'person who manufactures goods and sells them to the public for profit shall be liable for any damage to another person resulting from the normal use of the goods. (2) No liability shall be incurred where the defect which has caused the damage could have been discovered by a customary examination of the goods."[60]

In order to establish strict product liability under the Ethiopian tort law regime, all elements stipulated under this provision should be fulfilled.

The first condition for establishing strict liability is that the defendant must both manufacture and sell the product. This requirement highlights that strict liability primarily holds the manufacturer accountable, as only they can fulfill these cumulative criteria. Subsequent sellers, who do not engage in manufacturing the product, are exempt from strict liability. For example, in the case of the Ethiopian Airlines crash, although the matter is currently pending if a passenger decides to pursue a strict liability claim under Ethiopian tort law, the Boeing Company would be held liable as it is both the manufacturer and seller of the airplane. In contrast, Ethiopian Airlines would only be liable for claims based on fault or breaches of contractual obligations.[61]

The second precondition for a manufacturer's strict liability under Ethiopian tort law stipulates that a product must be sold to the public an interpretation that encompasses private individuals and entities with the intention of making a profit. Consequently, if a manufacturer provides a product for free or without any form of consideration, they would not be held liable for damages resulting from a defective product. For instance, if Boeing were to donate a plane to Ethiopian Airlines free of charge, it could potentially exempt them from strict liability, even if both the manufacturer and the user are involved. However, in the case at hand, since Ethiopian Airlines purchased the airplane rather than receiving it gratuitously, and given that Boeing sells the aircraft for profit, the second requirement of the manufacturer's strict liability under Ethiopian tort law is satisfied.[62]

[60] *Ibid*.
[61] *Ibid*.
[62] *Ibid*.

The third precondition for establishing manufacturer liability under Ethiopian tort law is that the damage must arise from the product's normal use. This requirement serves an important purpose: it ensures that the responsibility for the harm rests solely with the manufacturer, rather than the victim's actions. In essence, if a victim has contributed to the incident through misuse or negligent behavior—such as using the product in a way that it was not intended to be used—they would be ineligible to pursue a claim under the principle of strict liability. For a claim to be valid, the damage must occur when the product is being used in alignment with its intended purpose and in accordance with any provided instructions or standard practices. This requirement underscores the expectation that products should perform safely under normal operational conditions, reflecting the manufacturer's responsibility to ensure the product's safety when utilized as intended. For instance, in the context of a potential strict liability claim against a manufacturer of Boeing airplanes, the law mandates that the harmed parties—such as Ethiopian Airlines and its passengers—must demonstrate that the aircraft was being operated according to standard operating procedures at the time of the crash. If evidence suggests that the aircraft was deliberately misused or that the airline failed to adhere to established protocols, this could negate the plaintiff's ability to claim that the manufacturer is strictly liable for the damages incurred. Thus, the emphasis on normal use underscores the need for accountability while recognizing the limitations of liability when misuse or negligence is involved.[63]

The final precondition outlined in Article 2085 for establishing the strict liability of manufacturers under Ethiopian tort law is that the claimant must demonstrate that the damage defect, which resulted in the harm, could not have been identified through customary examination of the product. If the defect was indeed discoverable through standard practices, the producer may be absolved of liability. The determination of whether a defect is customarily discoverable should be assessed on a case-by-case basis. In our example, if the airline crash occurred under conditions that were typically discoverable, Ethiopian Airlines would be found at fault for negligence, while Boeing would be relieved of liability.[64]

These four preconditions are cumulative requirements; if any one of them is not satisfied, the manufacturer is absolved of liability. However, if all four conditions are met, the manufacturer will be held liable for any damages caused to another person. The term "any damages" encompasses both property damage and personal injuries, which can include both

[63] *Ibid*.
[64] *Ibid*.

physical and moral harm. Additionally, the phrase "another person" applies to both the buyer and third-party victims. In the Ethiopian tort law framework, unlike the regime established by the CISG, the product liability of manufacturers extends beyond property damage to include personal injuries as well. Additionally, the Ethiopian product liability regime, particularly concerning tortious liability, is not restricted to professional buyers; it also applies to consumer buyers and third-party claimants.

From the consumer's perspective, the provisions of the Civil Code offer less protection compared to those in the TCCP. Under the TCCP, consumers have the right to hold all stakeholders involved in the sale of a product jointly and severally liable. In contrast, the Civil Code provisions only acknowledge the personal liability of the seller in cases of negligence and limit the manufacturer's liability to strict liability situations. Although, compared with the international frameworks of product liability we can proudly conclude that the Ethiopia product liability protection regime, except the 1000 ETB limit for moral injury,[65] has a better position to compensate the injured.[66]

CONCLUSION

Product liability plays a crucial role in governing the relationship between parties involved in business transactions, both within domestic frameworks and across international borders. These provisions primarily aim to compensate buyers for any injuries or damages caused by defective products. Depending on the specifics of the laws in a given jurisdiction, liability may fall on either the manufacturer or the seller.

Traditionally, product liability has been approached under three primary theories: warranty, negligence, and strict liability. While warranty focuses on contractual obligations, negligence requires proof of fault, and strict liability imposes liability without fault. Ethiopian law incorporates elements of all three theories, while the CISG primarily operates within a contractual framework.

Ethiopia has established an all-inclusive legal framework encompassing contractual, extracontractual, and consumer protection provisions to safeguard consumer interests. Unlike the CISG, Ethiopian law does not distinguish between personal injuries and property damage. Consequently, both types of harm are addressed under this legal framework.

[65] Art 2116 of the Civil Code.

[66] NB; for criminal liability of the producers, readers of this paper can consult the relevant provisions of the criminal code and the trade practice and consumer's protection proclamation provisions. Since the aim of this article is to analyze the civil aspect of product liability the writer didn't provide a detailed analysis of this matter.

In contrast, the CISG's scope is restricted, primarily addressing property damage while excluding personal injury claims. This disparity underscores the potential gaps in consumer protection within the international legal landscape. The CISG excludes product liability claims related to personal injuries. This exclusion is justified by the availability of better remedies within domestic legal systems.

However, debates persist regarding the CISG's stance on product liability for property damage. Some argue that since domestic legislation already covers property injuries, there is no need for additional protection under the CISG. Others contend that the CISG should apply to property damage, as it explicitly excludes only personal injuries.

This ambiguity has far-reaching implications for determining the applicable law in international trade involving CISG member states, particularly regarding property damage. The absence of clear guidance on product liability within the CISG may also pose practical challenges for countries like Ethiopia, which has ratified the convention.

To enhance consumer protection and ensure accountability, policymakers must prioritize the following recommendations: Clarification of CISG Scope: The CISG should be amended to explicitly address personal injury claims and provide clear guidance on the treatment of property damage. Strengthening Domestic Frameworks: Ethiopia should continue to fortify its product liability regime by enhancing enforcement mechanisms, expanding remedies for affected consumers, and aligning domestic law with international standards. Fostering International Cooperation: Collaborative efforts among nations are crucial for developing harmonized standards and best practices in product liability, facilitating smoother cross-border trade. In conclusion, harmonizing legal approaches and bolstering consumer protection benefit both local and global markets. By addressing gaps and fostering cooperation, we can navigate the complexities of product liability effectively.

ADMINISTRATION OF JUSTICE BY SOCIAL COURTS IN ETHIOPIA: NORMATIVE AND COMPARATIVE ANALYSIS

Disassa Desalegn Deresso*

Abstract

Social courts have been grassroots judicial institutions, for a long time, playing their role in ensuring justice concerning petty matters. Despite debates on their constitutionality, social courts are still operating as the judicial wing of the lower administrative unit. The administration of justice by a social court is one of the under-researched issues. To fill this gap, this study employed a combination of normative and empirical methods to examine the effectiveness of social courts and the challenges they faced. Normative approaches were used to comparatively study regional social court laws while empirical approaches were employed to examine practices and challenges of social courts in the administration of justice. As the findings of the study revealed, despite its contribution to access to justice, the administration of justice by the social court is subject to multifaceted challenges attributable to the incompetence of judges, jurisdictional ambiguity, and lack of access to necessary facilities that negate its effectiveness and question its very existence. To overcome these challenges this article recommends a comprehensive reform that includes revisiting the laws and implementing capacity-building programs. The study also calls for a nationwide study of the administration of justice by the social court to fill gaps and facilitate the transfer of good practices.

Keywords: Social court, Local judge, People court, Bale gult, Atbia danga

INTRODUCTION

The development of the social court took a different shape in the history of Ethiopia. The social court has been a grass-root actor in the judicial system of Ethiopia for a long time under different nomenclatures. It was during the last days of the Dergue regime, following the promulgation of the Social Court Establishment Proclamation in 1989, which the name "social court" came into use for the first time in Ethiopia. To ensure access to justice, reduce regular court caseload, render speedy justice, provide a flexible and friendly judicial environment, and reduce litigation costs the establishment of judicial actors like social court at the lowest level of administration level is essential. Despite this, the status of the social court in the administration of justice throughout the period remains problematic and controversial. Its place, jurisdiction, applicable laws, constitutionality, independence, competency, and accountability remain largely blurred.

The issues relating to the administration of justice by social courts became more controversial following the adoption of the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution which introduced a federal state structure with three tiers of courts.[1] Despite the silence of the FDRE constitution, the social courts are recognized as a judicial organ of Kebele (the lowest administrative division) by all regional constitutions and city charters.[2] In this sense, the social court is a grass-root judicial organ that outnumbers the regular court and daily routine affairs of society. The effectiveness of social courts and the challenges they face amid of administration of justice have not been adequately explored. Despite few pieces of research conducted on selected aspects of social courts (like jurisdiction and defendant rights,) or specific areas (like Addis Ababa and Oromia), the matter is not comparatively and holistically addressed.[3]

In this context, this article tries to explore the effectiveness and challenges of social courts in Ethiopia through normative and comparative analysis of regional laws, court decisions, and scholarly writings. The normative approach was utilized to comparatively analyze the social court laws of regional states and city administrations. Assessment of the administration of justice is a complex task which requires multi-methodological approaches that supplement legal data with interview-based evaluation and courtroom observation to measure effectiveness using multi-layer indicators. Accordingly, to substantiate the findings of normative analysis, data collected through courtroom observation and interviews of relevant respondents from Addis Ababa, Oromia, and Benishangul Gumuz Region (BGR) were utilized.[4] For the empirical study, these regions were purposely selected with the conviction that their level of socio-economic setting and development represents the diverse picture of social courts in Ethiopia. To have a multi-dimensional view of the issues, data were collected from different stakeholders including social court judges, first instance

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[1] FDRE Constitution, Art. 78.

[2] FDRE Constitution, Art.79 and ff; Oromia Cons, Art 61 and ff; Afar Const, Art 64 and ff; BGRS Cons, Art 65 and ff; Somali Cons, Art 65 and ff; Harari Cons, Art 67 and ff; Tigray Cons, Art 59 and ff; Amhara Cons, Art.64 and ff; Gambella Cons, Art.67 and ff; Dirdawa City Charter, Art 31 and ff; Addis Ababa City Charter, Art. 39 and ff; Southern Region Cons, Art. 72 and ff.

[3] Tesfaye W-Amanuel, '*The Need to Re-Visit the Jurisdiction of Social Courts in Addis Ababa City (The Law And Practice,'* (LL.B Thesis, St.Mary University, 2008); Tassew Gurmu, '*Problems of Social Courts in Oromia Regional State and Its Implication on the Right of the Defendant'*, (LL.B Thesis, St. Marry University, 2008); Dereje Tilahun, *'Jurisdiction of Social Courts in Addis Ababa the Law and the Practice'* (LL.B Thesis, St. Marry University, 2010).

[4] Though they make the empirical study more representative, Tigray and Amhara region are not included due security concerns.

judges, justice bureau officers, members of the judicial administration, supreme court judges, attorneys, Keble Administrators, members of the Kebele Council, and customers of social court services. At the point of saturation, data was collected through interviews with a total of 53 relevant individuals with rich data and observation of 18 social courts. After data collection and analysis, inductive inferences were used to generalize the findings.

This article is structured into four sections. Section I provides a historical account of social courts by exploring their institutionalization process and historical development from the past unitary setting to the present federal regime. Section II discusses the level of effectiveness of social courts in the process of administration of justice in light of commonly established standards and principles. Section III presents challenges facing social courts in the administration of justice. The last section provides concluding remarks and recommendations.

1. THE INSTITUTIONALIZATION AND DEVELOPMENT OF SOCIAL COURT

In Ethiopia, the administration of justice had been dominated by the traditional system in which elders dispose of cases based on local customs and norms.[5] For a long period, there was a mingling of executive and judicial functions in which the governor acted as a lawmaker, enforcer, and judge at the same time.[6] The 1931 constitution was the first to vest courts with powers to deliver justice. Following this, in 1947, through the Establishment of Local Judges Proclamation, a system of *Atbia Dagna* (local judge) was introduced at each locality to reduce court congestion caused by minor disputes.[7] As Allen's description of the role of *bale gult* clearly shows, the *Atbia Danga* was created out of the preexisting institution of *bale gult* (literally landlord).[8] As a result of this, Norman Signer describes the institutionalization process of *Atbia Dagna* as an imposition of a traditional Amhara[9]

[5] Abera Jembere, Teteyeqi: Traditional Ethiopian Litigation System (translation mine), Ethiopian Journal of Law, Vol, (), PP-221-23; Norman J. Singer, 'A Traditional Legal Institution in a Modern Legal Setting: The Atbia Dagnia of Ethiopia' (1970) 18 UCLA L Rev 308.

[6] Robert Allen Sedler, 'The Development of Legal Systems: The Ethiopian Experience', 53 Iowa L. Rev. 562 (1967).

[7] Administration of Justice Proclamation No.2/1942; Local Judges Establishment Proclamation.No.90/1947; Robert Allen Sedler, '*The Development of Legal Systems: The Ethiopian Experience'*, 53 Iowa L. Rev. 562, 565 (1967).

[8] Robert Allen Sedler, The Development of Legal Systems: The Ethiopian Experience, 53 Iowa L. Rev. 562 (1967).

[9] Here the term "Amhara" refers Christian highlander (including Christian Oromo) and not specific ethnic groups in the way in defined as the present time. See also Norman J. Singer, 'A Traditional Legal Institution in a Modern Legal Setting: The Atbia Dagnia of Ethiopia' (1970) 18 UCLA L Rev 317-318.

institution over the entire Ethiopian. [10]Unlike *Atbia Dagna,* the power of *Bale Gult* was not limited to the judicial function; however, it provided free judicial function. In the post-1947 era, the *Bale Gult* ceased to exist by that name but merely continued to function as the *Atbia Dagna* in the area where it previously existed. This continued until the abolition of the feudalism system following "land for the tiller".[11]

The jurisdiction of local judges was limited to petty civil and criminal cases.[12] The local judge first tries to reconcile the parties and continues to adjudicate the case if reconciliation fails.[13] The decision was appealable to the Woreda Court, which would try the case as *de novo*.[14] The role of the Woreda court is not limited to determining whether the law was applied correctly in the trial court. It goes beyond investigating the question of fact and hears the case as fresh. The trial of the case as fresh by the Woreda Court upon appeal put the status of the local judge under question. In fact, the local judge does not strictly follow the formal law in the process of disposing of the case. Rather, it follows the local custom and tradition that was built up on the principle of natural justice and equity. In such a case, it is not feasible for the Woreda Court as an appellate forum to limit itself to the determination of issues of law, which was not at the core of the local judge's decision.

As the local judge was an attempt to institutionalize the arbitration practices of local elders, in some areas, elders jealously employed community sanctions to prevent the parties from bringing their case before *Atbia Danga*.[15] There were also areas in which local judges and elders cooperated to render decisions concerning petty matters. In this area, the local elders work as assessors while the *Atbia Danga* act as judges to decide the case. Because it assimilated with the government, the local judge got no respected status like local elders. Especially, because of the lack of interest among the southern tribes to assimilate themselves with the oppressive government, getting a person who could act, as a local judge was challenging, and even after the assumption of the post, the rate of resignation was

[10] Norman J. Singer, 'A Traditional Legal Institution in a Modern Legal Setting: The Atbia Dagnia of Ethiopia' (1970) 18 UCLA L Rev 317-318.
[11] Sedler (9) 600&ff.
[12] Administration of Justice Proclamation, Proclamation No. 2 of 1942, Negarit Gazeta 1st Year No. 1 (March 30, 1942); Norman J. Singer, 'A Traditional Legal Institution in a Modern Legal Setting: The Atbia Dagnia of Ethiopia' (1970) 18 UCLA L Rev 317-318.
[13] Sedler (9) 606.
[14] *De novo* is a Latin expression used in English to mean 'from the beginning', 'anew'. In this sense, the term it used here to indicate the appellate court will see the case as freash or new disregarding all proceeding undergone before at the social court. *See* Sedler (9) 613.
[15] Sedler (9) 612, 613.

remarkably high.[16] The *Atbia Danga* provided gratuitous services, and this was another discouraging factor.[17] Some argued for the abolition of *Atbia Dangas* by empowering elders to hear cases instead.[18] Despite this, the criminal jurisdiction of the social court remains intact under the Criminal Procedure Code of 1961.[19] It also retained its jurisdiction under the 1962 Court Proclamation.[20]

Later on, in 1965, the Civil Procedure Code impliedly repealed the civil jurisdiction of *Atibia Dagna* by establishing only four levels of court and dividing civil jurisdiction among them.[21] Despite this, the then Ministry of Justice, however, took the position that *Atibia Dagna* may exercise civil jurisdiction where the parties consent to submit to them. Following this, local judges continue to entertain civil matters based on the consent of parties to the dispute.[22] In other words, the *Atibia Dagna* lost compulsory jurisdiction over civil matters following the promulgation of the 1965 Civil Procedure Code.

The local judge got back its compulsory jurisdiction over civil matters following the enactment of Proclamation No.104/1976. This proclamation reestablished *Atibia Dagna* with different nomenclature i.e., Kebele and Peasants' Association tribunals (aka people court) with the power to hear and dispose of civil and criminal matters as well as all matters relating to land distribution and expropriation.[23] Judges were elected by and from members of peasant or urban associations. The decision of peoples' tribunals was appealable. The People's Court was established as a means of ensuring public participation in the administration of justice. The 1987 People's Democratic Republic of Ethiopia (PDRE) Constitution kept the jurisdiction of the People's Court unaffected.[24] Later, the Social Courts Establishment Proclamation No.37/1989 repealed the people tribunal and introduced a 'social court'.[25] This was the time when the name "social court" came into the picture. Despite the change of name, the essence (such as jurisdiction) remains the same throughout

[16] Norman J. Singer, 'A Traditional Legal Institution in a Modern Legal Setting: The Atbia Dagnia of Ethiopia' (1970) 18 UCLA L Rev 317-318.
[17] Sedler (9) 612.
[18] Sedler (9) 606.
[19] The Criminal Procedure Code of the Empire of Ethiopia (1961), Art.223.
[20] The Courts' Proclamation No. 195/1962, Article 15.
[21] Sedler *supera note* 9,,612; The Civil Procedure Code of the Empire of Ethiopia, Art.4 (1965)
[22] Norman J. Singer, 'A Traditional Legal Institution in a Modern Legal Setting: The Atbia Dagnia of Ethiopia' (1970) 18 UCLA L Rev 317-318.
[23] The Penal Code of Ethiopia (1957), Art. Art 471,522, 544.
[24] PDRE Constitution, Art.100(1).
[25] Social Courts Establishment Proclamation Pro.No.37/1989, *Negarit Gazeta,* 1989-10-16, Vol. 49, No. 5, pp. 58-7; Dereje Tilahun, *Jurisdiction of Social Courts in Addis Ababa the Law and the Practice*, (LL.B Thesis at St.Mary University, 2010).

the period. The judges of social courts were elected by a majority vote of the general assembly of residents of the Kebele. Apart from the civil cases whose pecuniary value does not exceed birr 500, social courts also entertain petty offences and impose a sentence of imprisonment not exceeding one month. Any party aggrieved by the decision could appeal to the Awurja court whose decision was final.

Following the downfall of the Dergue regime, the 1995 FDRE Constitution established three levels of regular courts vested with judicial power at the federal and regional levels.[26] In addition to this, it gave recognition to religious courts, customary courts, and other institutions like administrative tribunals with judicial functions.[27] It has also prohibited the establishment of special or *ad hoc* courts.[28] After the Dergue regime, Addis Ababa was the first region to establish a Social Court during the transitional period in 1993.[29] Since then, by their constitutions, most regions have established social courts as a judicial wing of the lowest level administration division (Kebele) to handle petty civil and/or criminal matters.[30] Despite this, the stand of the federal constitution as well as the legitimacy of the regional constitutions that established social courts remains debatable. Amid this confusion, based on the number of Kebele, over ten thousand social courts were estimated to exist in Ethiopia.

2. EFFECTIVENESS OF ADMINISTRATION OF JUSTICE BY SOCIAL COURTS

As boldly noted by the President of the International Criminal Court, Silvia Fernández de Gurmendi, "Developing indicators for a judicial institution is not an easy task as it requires assessing and understanding complex factors."[31]In recent years, globally (including in Ethiopia) there has been a move from a single-dimensional, productivity-focused approach towards a multidimensional, mixed-method approach to evaluate the performance of judicial institutions. In this context, the effectiveness of judicial services offered by the social court

[26] Federal Democratic Republic of Ethiopia Constitution Proclamation No.1/1995 (hereafter *FDRE Cons*, Art.50(2),78-81.
[27] FDRE Cons, Art 37(1), and 78(5).
[28] FDRE Cons, Art. 78(4).
[29] Dereje Tilahun, *Jurisdiction of Social Courts in Addis Ababa the Law and the Practice*, (LL.B Thesis at St. Mary University, 2010).
[30] FDRE Cons, Art.78 and ff; Oromia Cons, Art 61 and ff; Afar Const, Art 64 and ff; BGRS Cons, Art 65 and ff; Somali Cons, Art 65 and ff; Harari Cons, Art 67 and ff; Tigray Cons, Art 59 and ff; Amhara Cons, Art.64 and ff; Gambella Cons, Art.67 and ff; Dirdawa City Charter, Art 31 and ff; Addis Ababa City Charter, Art.39 and ff; Southern Region Cons, Art. 72 and ff.
[31] J Selen Siringil Perker, 'Judicial Performance Evaluation in Ethiopia: Local Reforms Meet Global Challenges'

was examined against standards and principles established through practice and used by countries and organizations to evaluate the effectiveness of justice. Accordingly, this section examines the effectiveness of social courts in the administration of justice against the criteria of competencies of judges (legal knowledge and skills), public confidence (trust, perception and satisfaction), accessibility, independence, accountability and transparency, professionalism, competencies, good conduct, speedy or time-effectiveness, cost-effectiveness, quality of judgment, and impartiality.

2.1 Competencies of Judges

The competency of judges plays a critical role in determining the quality of justice delivered by a judicial system.[32] Competency here refers to judges' legal knowledge, interpretive skills, impartiality, and the ability to apply law thoughtfully and consistently. A correlation exists between judicial competency and the quality of justice because well-qualified, competent judges are more likely to interpret laws accurately, deliver fair judgments, and uphold principles of equity, thus strengthening public trust in the legal system. In this sense, the establishment social court alone does not ensure justice unless individuals with relevant knowledge and skills are appointed as judges. Ensuring access to justice requires competent judges who render decisions based on the relevant law, fact, evidence, and logical reasoning. In this sense, the quality of justice offered and the effectiveness of social courts in the administration of justice is highly dependent on the competencies of judges. Despite this, the competencies of social court judges are the subject of hot controversies within the wider society and scholars. It is evident from relevant provisions of law that, in contrast to judges of the regular court, social court judges are not required to have a law degree or diploma to be appointed as such. However, in Addis Ababa, only people trained in law can be judges of the social court.

Though the expression differs slightly, the competencies requirements for social court judges are essentially the same. Among others, the law requires the person to be a resident of the particular Kebele, willing to serve as a judge, diligent, of good conduct, and of ability to discharge judicial function.[33] In the Amhara region, the law does not set diligence, good

[32] Santiago Basabe-Serrano, The Judges' Academic Background as Determinant of the Quality of Judicial Decisions in Latin American Supreme Courts, Justice System Journal 2019, VOL. 40, NO. 2, 110–125, https://doi.org/10.1080/0098261X.2019.1613201.
[33] Oromia Social Court Proclamation No.128, Art 9; Benishangul Social Court Proclamation No.126, Art. 13.

conduct, and honesty as proprieties test. [34]What is needed is the consent of the nominee and public trust. The public trust here may be broad (not clear) enough to include the requirement of good conduct and diligence. The minimum age limit differs across regions, ranging from none in the Amhara region, 18 years in Southern Region, 25 years in the BGR, to 30 years in Oromia.

The law is not clear about the educational qualifications of a judge of a social court. Though a degree or diploma is not required, the BGR law recommends that the law of Amhara region oblige the judge to have writing and reading skills.[35] Uniquely, in the South region, a minimum of Grade 10 and 6 completion is required to be appointed as a judge of urban and rural Kebele respectively.[36] Despite this, especially in rural areas, it is not uncommon to see judges without reading and writing skills. This is mainly because of the lack of incentives which can attract educated people. Judges without language fluency are significant in regions like BGR, Gambella, and Southern Region where the working language is different from the first language of residents. Because of inadequate writing skills, there are courts in which Kebele executive writes the judgment and serves to judges only for signature.

No social court laws expressly stipulate graduating in law and knowledge of the law as a prerequisite. Judges must be conversant in at least the basics of relevant substantive laws and procedures. However, none of the social court judges who participated in the study were law graduates. Given the purpose of social court which goes beyond providing effective and accessible justice to promote public participation in judicial function, thereby building public confidence, it may be illogical to expect judges of social court to be law graduates. However, at least they should attend short-term training on the basics of substantive and procedural laws. The law must be (but not) clear about the right of the judge to be trained and the duties of concerned bodies to render training. Though it is not enough, practically, the Woreda court sometimes provides training for judges of social courts on the basic substantive and procedural laws as well as fundamental rights and freedoms.

[34] Amhara Social Court Proclamation No.246, Art. 9.
[35] Benishangul Social Court Proclamation No.126, Art. 13(2); Amhara Social Court Proclamation No.246, Art. 15(1).
[36] Southern Social Court Proclamation No.66, Art. 13(1(C).

2.1 Jurisdiction of Social Court

Generally, the material jurisdiction of the social court is limited to petty matters which frequently happen within the society. The difference across the region is minimal regarding the pecuniary material jurisdiction of the social court.[37] In the Sothern region, Benishangul Gumuz, Oromia, Dire Dawa, and Addis Ababa without distinction based on the type of property the pecuniary jurisdiction is limited to 500, 1000, 1500 2500, and 5000 birrs respectively.[38] In the Amhara region, the pecuniary jurisdiction of the social court is different based on the movability of property. Accordingly, the social courts have material jurisdiction on civil cases involving moveable property up to 15,000 and immovable property up to 25,000.[39] The law of the Amhara region is silent about the pecuniary jurisdiction of the social court over civil matters like tort which does not involve property. Relatively, social courts in the Amhara have higher pecuniary jurisdiction. As the real value of money is decreasing because of inflation, higher pecuniary jurisdiction is reasonable. During the interview, most social court judges and Woreda court judges believed in the necessity of increasing pecuniary jurisdiction.[40] During the enactment of the proclamations, the jurisdiction of the social court may be fair. In recent years, because of the devaluation of money, both federal and regional governments have increased the pecuniary jurisdiction of first-instance courts under their respective court establishment proclamations. The same logic should work for the social court. During the interview, a few judges called for improved performance of social courts through competencies development and structural

[37] Oromia Social Court Proclamation No.128, Art. 15; Benishangul Social Court Proclamation No.126.

[38] Oromia Social Court Proclamation No.128, Art. 15; Southern Social Court Proclamation No.65, Art.17; Benishangul Social Court Proclamation No.126, Art. 24.
Amhara Social Court Proclamation No.246, Art.19; Oromia Social Court Proclamation No.128; Southern Social Court Proclamation No.65; Benishangul Social Court Proclamation No.126;, Ababa City Government Revised Charter Proclamation No. 361/2003.

[40] Interview with Gemechu, Benishanul Gumuz Metekel Zone Dibate Woreda Galessa Kebele Social Court Judge, January 10, 2023; Interview with Fekede Belina, Benishanul Gumuz Kemash Zone, Kemash Woreda Kemash City Social Court Judge, January 10, 2023; Interview with Wajira Habte, Benishanul Gumuz, Metekel Zone Dibate Woreda Bereber Kebele Social Court Judge, January 11, 2023;Interview with Lemesa Adimassu, Benishanul Gumuz, Metekel Zone Dibate Woreda Bereber Kebele Social Court Judge, January 15, 2023; Interview with Yiber Tadesse, Benishanul Gumuz, Metekel Zone Dibate Woreda Berber Kebele Social Court Judge, January 15, 2023; Interview with Fikadu Godesso, Benishangul Gumuz Region Metekel Zone Bullen Woreda Judge, January 16, 2023;Interview with Jebessa Woljira, Benishangul Gumuz Region Metekel Zone Manudra Woreda Judge, January 16, 2023; Interview with Melkamu Aki, Benishangul Gumuz Region Metekel Zone Mandura Woreda Court Judge, January 16, 2023;Interview with Timket Kefyalew, Benishangul Gumuz Region Metekel Zone Ura Worda Court Judge, January 17, 2023;Interview with Limnew Worku, Benishangul Gumuz Region, Assosa Zone, Asssosa City Court Judge, January 17, 2023; Interview with Desalegn Gure, Benishangul Gumuz Region Assosa Zone Bambassi Worda Court Judge, January 17, 2023; Interview with Gabule Galo, Benishangul Gumuz Region Metekel Zone Dibate Woreda Court Judge, January 18, 2023; Interview with Alemberhan Misikir, Benishangul Gumuz Region, Assosa Zone, Ura Woreda Court Judge, January 18, 2023.

adjustment (which includes fulfilling necessary facilities) before increasing the pecuniary jurisdiction. [41]

The social courts have also jurisdiction to examine and adjudicate non-pecuniary civil matters concerning branches and roots of trees, repairing fences and houses, search for lost property (things or animals), installation of water pipes and electric lines, the right of way (servitude), abuse of ownership rights,[42] rainwater, preventing running water, and duties of above and below landowners.[43] Social courts have jurisdiction to issue a certificate that indicates the true status of residents including financial status, residential status, unemployment certificate, and marital to facilitate service offered by the government. [44]In the latter cases, usually, there is no party to appear as a defendant, and hence the social court hears witnesses, investigates the petition, and passes judgment. Additionally, in the BGR region, social courts have the jurisdiction to entertain disputes between members of the Kebele administration or cooperatives.[45]

Regions followed a different approach in stipulating non-pecuniary civil subject matters that fall within the jurisdiction of the social court. In Oromia, the law separately defined each civil matter that falls under the jurisdiction of social court and this may pose the problem of contradiction with the relevant civil code provisions.[46] In the BGR region, the law has not referred to the civil code provisions but simply lists those civil matters that fall under the jurisdiction of the social court. As data collected through interviews with social courts and woreda court judges revealed, the failure of the law to define the civil matters falling under the jurisdiction of the social court has challenged social court judges to understand what it means.[47] This is one of the reasons why the social courts usually entertain matters which are out of their jurisdiction. In SNNPR, the law is silent about non-pecuniary subject civil matters (except for the issuance of the financial status of the

[41] Interview with Bayualem Adimassu, Benishanul Gumuz, Assosa Zone, Ura Woreda Assosa City Kebele Social Court Judge, January 15, 2023; Interview with Amanuel Baye, Benishangul Gumuz Region Assosa Zone Ura Woreda Judge, January 16, 2023; Interview with Amare Genet, Benishangul Gumuz Region Metekel Zone, Mandura Woreda Court Judge, January 18, 2023.
[42] Oromia Social Court Proclamation No.128, Art. 21.
[43] Oromia Social Court Proclamation No.128, Art. 14-23; Amhara Social Court Proclamation No.246, Art. 19; Benishangul Social Court Proclamation No.126, Art. 24.
[44] Oromia Social Court Proclamation No.128, Art. 15(2); Benishangul Social Court Proclamation No.126, Art. 24(2); Amhara Social Court Proclamation No.246, Art. 19(3); Southern Social Court Proclamation No.65, Art. 17(2).
[45] Benishangul Social Court Proclamation No.126, Art. 24(1(e)
[46] Oromia Social Court Proclamation No.128, Art. 14-23. See also Art.1218-1222, and 1245-1247 of the 1960 Civil code which deal with the same matters.
[47] Benishangul Social Court Proclamation No.126, Art. 24(2).

applicant) over which the social court assumes jurisdiction. [48]In the Amhara region, the laws referred to relevant civil code provisions to clarify the matter concerning the social court assuming jurisdiction.[49] The best approach is the one adopted by the Amhara region. The social court has also jurisdiction to handle petty criminal matters.[50] In some regions like Oromia and the Southern Region, the jurisdiction of the social court is limited to civil matters. However, in other regions, social courts have jurisdiction over petty offences defined under the Criminal code.

The social court shall hear only matters that fall within its jurisdiction. At any stage of the proceeding, where it is aware that it has no jurisdiction over the matter, the social court shall dismiss and refer the case to legitimate tribunals. [51] However, because of the ambiguity of the law and the incompetence of judges, the social court on many occasions entertains matters that fall out of their jurisdiction.[52] The major reason for revocation of the judgment of the social court by the appellate court relates to entertaining matters that fall out of jurisdiction. Deciding on matters that fall out of their jurisdiction like possession of land, the boundary of land, and possessory action are common problems of social court.[53]

[48] Southern Social Court Proclamation No.65, Art. 17.
[49] Amhara Social Court Proclamation No.246, Art. 19(3).
[50] Amhara Social Court Proclamation No.246, Art. 19(3); Southern Social Court Proclamation No.65,
[51] Oromia Social Court Proclamation No.128, Art., Art.31; Benishangul Social Court Proclamation No.126, Art., Art.38.
[52] *G/Meskel Demoze vs Astede Mokenen,* Cassation File No.36338 Tire 25, 2001 E.C; *Mulatu Anberber vs Tamneche Yosef,* Cassation File No.41608 Hamile 22, 2001 E.C, *Farming Machineries and Tech S.C vs Ethiopian Insurance Corporation,* Cassation File No.52041 Sene 29 2002 E.C; E*thiopia Telecommunication Corporation vs Markos Abebe,* Cassation File No.54990 Hidar 18, 2004 E.C; *Ethiopia Telecommunication Corporation vs Worknesh W/mariam,* Cassation File No.56118 Hidar 16, 2003 E.C; *TATN Constructions and Business Activities Organization vs Eyayu Dejene*, Cassation File No.89530, Tikemet 21 2006 E.C; Interview with Fikadu Godesso, Benishangul Gumuz Region Metekel Zone Bullen Woreda Judge, January 16, 2023;Interview with Jebessa Woljira, Benishangul Gumuz Region Metekel Zone Manudra Woreda Judge, January 16, 2023; Interview with Amanuel Baye, Benishangul Gumuz Region Assosa Zone Ura Woreda Judge, January 16, 2023;Interview with Melkamu Aki, Benishangul Gumuz Region Metekel Zone Mandura Woreda Court Judge, January 16, 2023;Interview with Timket Kefyalew, Benishangul Gumuz Region Metekel Zone Ura Worda Court Judge, January 17, 2023;Interview with Limnew Worku, Benishangul Gumuz Region, Assosa Zone, Asssosa City Court Judge, January 17, 2023; Interview with Desalegn Gure, Benishangul Gumuz Region Assosa Zone Bambassi Worda Court Judge, January 17, 2023; Interview with Gabule Galo, Benishangul Gumuz Region Metekel Zone Dibate Woreda Court Judge, January 18, 2023; Interview with Amare Genet , Benishangul Gumuz Region Metekel Zone, Mandura Woreda Court Judge, January 18, 2023; Interview with Alemberhan Misikir, Benishangul Gumuz Region, Assosa Zone, Ura Woreda Court Judge, January 18, 2023; Interview with Zelalem Tadele, Attorney at Law, Benishangul Gumuz Region, Assosa, January 15, 2023; Interview with Kassahun Addisu, Attorney at Law, Benishangul Gumuz Region, Assosa, January 15, 2023; Interview with Tolassa Mitiku, Attorney at Law, Benishangul Gumuz Region, Assosa, January 15, 2023; Interview with Desalegn Tefera, Attorney at Law, Benishangul Gumuz Region, Assosa, January 15, 2023.
[53] Azzanee Indaalammaa fi Abdii Tasfaa, Bu'a-qabeessummaa Mana Murtii Hawaasummaa Gandaa Mootummaa Naannoo OromiyaaAbdi Tesfa, Oromia Journal of Law Vol 9 No.1, (151-1881), at 176.

2.2 Procedural Fairness

Procedural fairness is one key factor in ensuring judicial accountability and transparency, and effectiveness and quality of justice. Numerous studies found that people's trust in law and judiciary is more sensitive to the perceived fairness of the procedures and treatment of "procedural justice" than the outcomes or decisions derived from the proceedings.[54] In this sense, the process of administration of justice by the social court is more relevant than substantive justice. The key elements of procedural justice and its actual state in the administration of justice by social court are examined as follows.

2.2.1 Hearing of Parties

Fair trial is the fundamental pillar that is essential to ensure quality justice.[55] The effectiveness and quality of the administration of justice are dependent on the existence of a fair trial. A fair trial includes a fair hearing of parties to dispute. Despite this, there are many limitations concerning the hearing of parties. Every party to the dispute has a human and constitutional right to be heard. As data collected through interviews, observation, and analysis of cases revealed, it is not uncommon for the social court to pass judgment without hearing the other party, usually the defendant. This creates not only injustice but also ruins public confidence.

2.2.2 Issue framing

Issue framing is the most crucial step that determines the quality of judgment rendered by the court. Defects in the issue framing affect the entire process including the hearing of witnesses. To pass the right judgment, the court should have to correctly frame the issue or point of dispute between parties. Issue framing is the basic determinant of the quality of justice rendered. Mistakes in issue framing are the main cause of defective judgment by social courts. Based on observation and interview, the widespread problem associated with framing issues in the study area includes framing the wrong issue (failure to point out the point of dispute between parties), framing the different issues for the defendant and plaintiff, and framing issues on matters not denied by the defendant and hearing witness. These

[54] J Selen Siringil Perker, 'Judicial Performance Evaluation in Ethiopia: Local Reforms Meet Global Challenges'.
[55] Christos Rozakis, The Right to a Fair Trial in Civil Cases, Judicial Studies Institute Journal, 96 (2004).

problems prove the incompetence of the social court, which needs to be rectified by training and education.

2.2.3 Hearing Witness

Effective administration of justice is impossible without the existence of a fair trial for parties to the disputes.[56] A fair trial includes a fair hearing of witnesses. Despite this, there are many limitations concerning the hearing of witnesses by the social court. Where there are issues framed because of the existence of a point of dispute between parties, the court shall hear both witnesses to prove or disprove their allegation. In case the defendant admits the claim of the plaintiff, or the documentary evidence is sufficient to prove, a hearing of a witness may not be necessary. Where the defendant does not admit, the court shall hear the witness of the plaintiff and if the witness proves the claim, the court shall then hear the defendant's witness. In case the witness of the plaintiff fails to prove the claim, the court shall decide without hearing the defendant's side. However, the examination of cases decided by the social court in the selected study area reveals the existence of problems concerning the hearing of witnesses. The common problems include deciding without hearing witnesses or hearing the witness of only one party, and failure to hear expert evidence or reports. The study conducted on the social courts in Oromia revealed the same.[57]

2.2.4 Quality of Judgment

Quality of judgment is one core indicator on effectiveness of the administration of justice. Judgment is the principal document that proves the competencies of judges and the quality of justice rendered. Competent judges pass well-reasoned quality judgment. Judges of social court are not law graduates, and some of them are illiterate. Hence, a judgment well-reasoned and structured like the one decided by a regular court is not expected. The judgment reflects the legal knowledge and reasoning skills of the judge who passed the decision. Reasoned judgment not only ensures the quality of justice but also is an instrument to secure public confidence and ensure transparency. However, the content of judgments rendered by social courts reflects defects that prevail in this regard. The law requires a judgment of a social court to briefly specify the issues, the evidence, the core points of the

[56] Trechsel, Stefan, 'The General Right to a Fair Trial', Human Rights in Criminal Proceedings (Oxford, 2006)
[57] Indaalammaa and Tasfaa, *supera note 45*, 176

disputes, the reasoning of the court, and the legal provisions under which the case is disposed of.[58] However, the social court judges decide not based on law, but rather on their common sense, customary practices, and the principle of natural justice.[59] Most judgments were not well reasoned and supported by relevant law and evidence.[60] This is because of limited awareness of the law and reasoning aptitude. There are also non-legible judgments and judgments without a signature, stamp, summary of the claim and defence, clear issues, the relief requested, name of parties to the disputes, and several judges fulfilled.

2.3 Appointment and Removal of Judges

The manner of appointment and removal of judges as well as their salaries affect not only the independence but also the effectiveness of the administration of justice. The social court judges are appointed by the Kebele council upon the nomination of the Kebele administrator. Because of the close relationship, between lower administrative wings, the executive wing uses the social court judges as proxies to legitimize their actions.[61]

The level of protection for the term of social court judge has an impact on the administration of justice. Whether the term of office is fixed or unlimited, judges' terms of office must be protected by law. To this end, the ground of removal, the process of removal, and the remedy of judges must be regulated to avoid interference under the guise of removal. Generally, no social court judge shall be removed from his office except on the grounds of gross incompetence (because of illness) and misconduct (breach of ethics like corruption), change of residence, resignation, retirement, expiration of term office, appointment as

[58] Oromia Social Court Proclamation No.128, Art Art.33(2), Benishangul Social Court Proclamation No.126, Art.39; Amhara Social Court Proclamation No.246.
[59] Indaalammaa and Tasfaa, *supera note 45*, at 175.
[60] Interview with Fikadu Godesso, Benishangul Gumuz Region Metekel Zone Bullen Woreda Judge, January 16, 2023;Interview with Jebessa Woljira, Benishangul Gumuz Region Metekel Zone Manudra Woreda Judge, January 16, 2023; Interview with Amanuel Baye, Benishangul Gumuz Region Assosa Zone Ura Woreda Judge, January 16, 2023;Interview with Melkamu Aki, Benishangul Gumuz Region Metekel Zone Mandura Woreda Court Judge, January 16, 2023;Interview with Timket Kefyalew, Benishangul Gumuz Region Metekel Zone Ura Worda Court Judge, January 17, 2023;Interview with Limnew Worku, Benishangul Gumuz Region, Assosa Zone, Asssosa City Court Judge, January 17, 2023; Interview with Desalegn Gure, Benishangul Gumuz Region Assosa Zone Bambassi Worda Court Judge, January 17, 2023; Interview with Gabule Galo, Benishangul Gumuz Region Metekel Zone Dibate Woreda Court Judge, January 18, 2023; Interview with Amare Genet , Benishangul Gumuz Region Metekel Zone, Mandura Woreda Court Judge, January 18, 2023; Interview with Alemberhan Misikir, Benishangul Gumuz Region, Assosa Zone, Ura Woreda Court Judge, January 18, 2023.
[61] Interview with Bayualem Adimassu, Benishanul Gumuz, Assosa Zone, Ura Woreda Assosa City Kebele Social Court Judge, January 15, 2023.

member of Kebele council and administrators, and death.[62] there is a difference across regions on grounds of removal. Deciding without hearing the witness of both parties is a ground for removal in some regions, but not in others. [63]In the Oromia region, hearing cases in an area not determined by law, failure to notify the date and place of hearing, causing inconvenience because of failure to give a copy of the judgment, and attempting to perform or performing activities that limit the right to appeal are disciplinary fault that causes removal of judges. [64]In Amhara region, the conviction of a criminal offense is grounds for removal,.[65] But the law of other regions is not clear regarding grounds for removal.

In addition to defining the ground of removal, the law must set a clear procedure for removal. The procedure differs based on grounds of removal. The procedure is not the same for removal which involves or does not involve disciplinary fault. The different procedures must be set for different grounds as necessary. Where the ground of removal is the incompetence of the judge, the notice allows the judge to improve himself. In case of resignation, notice given by the judge allows the administrator to make a necessary appointment to fill the gap. Removal based on the grounds of disciplinary fault requires necessary investigation about the presence of an alleged fault. Compared to other regions, the laws of Oromia and BGR are better in providing necessary procedures like an investigation to be followed for removal in cases that involve disciplinary fault. However, they are silent about the notice requirement. The laws of the Amhara region lack procedures for the removal of social court judges, and this creates a loophole. The law of the Southern region requires one month's notice in case of resignation but is silent about the necessary procedure (except the approval by the Kebele council) in other cases.

No social court laws in Ethiopia provide judges with the right to appeals aganist removal. Though ground of removal are regulated, when the administrator remove the judge for illegtimate reason, the judge lacks remedy. As the same time, judges also lack interest in defending itself because of absence of financial incentives to stay on the post. To conclude, the protection for the term office of social court judges is weak relative to the regular one.

[62] Amhara Social Court Proclamation No.246, Art. 17; Southern Social Court Proclamation No.65, Art. 11(1); Benishangul Social Court Proclamation No.126, Art.18.
[63] Benishangul Social Court Proclamation No.126, Art. 18.
[64] Oromia Social Court Proclamation No.128, Art. 11.
[65] Amhara Social Court Proclamation No.246, Art. 17.

The term office of social court judge is five years subject to the probability of reappointment except in the Southern region where it is unlimited.[66]

Social court judges are not employees since they do not receive salaries from the government. Rather, they are volunteers who give free community services without or with less pocket money costing their time, energy, and resources. Social court judges are blamed for favouring the government and acting as agents of executives. Though it is difficult to prove or disprove this allegation by evidence, it is simple to understand the impact of financial independence on the autonomy of judges. The absence of salaries can subject judges to inference and pressures of those with deep pockets. It also discourages judges from devoting their time.

2.4 Independence, Accountability, and Transparency

Independence, accountability, and transparency are the bedrock of the judicial system.[67] They are essential in ensuring the effective administration of justice by the social court. Though, the social court is not mentioned as such the independence of the judiciary is recognized by the Constitution.[68] All social court proclamations declared the independence of the social court while carrying out its judicial function. Despite this, data collected to show the independence, accountability, and transparency of social court are subject to significant limitations.

2.4.1 Independence of Social Court

The independence of the judiciary is the bedrock of any judicial system in the world.[69]In its absence, it is impossible to expect an impartial and objective decision from the court. The

[66] Benishangul Social Court Proclamation No.126, Art.15; Southern Social Court Proclamation No.65, Art. 2(5) and 11(1).

[67] Shetreet S. Judicial independence and accountability: core values in liberal democracies. In: Lee HP, ed. Judiciaries in Comparative Perspective. Cambridge University Press; 2011:3-24; Udai Singh and Apoorva Tapas, Judicial Accountability: The Eternal Dilemma, Christ University Law Journal, 1, 1(2012), 69-89; Prem Chandra & Ashutosh Garg, Judicial Accountability and Transparency in India: Flaws and Road Ahead, GLS Law Journal; Vol. 03, Issue 02; July - December 2021.

[68] FDRE Constitution, Art.79 and ff; Oromia Cons, Art 61 and ff; Afar Const, Art 64 and ff; BGRS Cons, Art 65 and ff; Somali Cons, Art 65 and ff; Harari Cons, Art 67 and ff; Tigray Cons, Art 59 and ff; Amhara Cons, Art.64 and ff; Gambella Cons, Art.67 and ff; Dirdawa City Charter, Art 31 and ff; Addis Ababa City Charter, Art.39 and ff; Southern Region Cons, Art. 72 and ff.

[69] William H. Rehnquist, Judicial Independence, , 38 U. Rich. L. Rev. 579 (2004). Available at: https://scholarship.richmond.edu/lawreview/vol38/iss3/6; Barron, David J. (2020) "Judicial Independence: Origins and Contemporary Challenges," Roger Williams University Law Review: Vol. 25 : Iss. 1 , Article 2. Available at: https://docs.rwu.edu/rwu_LR/vol25/iss1/2; Boaz Oyoo Were, Judicial Independence as a contemporary challenge: Perspectives from Kenya, Comparative law working papers, volume 1, no. 1. 2017.

independence of the judiciary has a huge impact on the quality of the justice system. Countries with independent judiciary have better and stronger justice systems wherein human rights are respected, the rule of law is obeyed, transparency and accountability are ensured, development is ensured, and good governance is maintained. In Ethiopia, the independence court is the fundamental principle recognized under both the federal and regional constitutions and respective constitutive proclamations.[70] The independence of the social court is also guaranteed by the establishment proclamation.[71] In this sense, social court judges are free from any pressure or inference in their decision. They are led or ordered only by the law.

The independence of Judiciary refers to the institutional independence of the court as one branch of government, the personal independence of the judge, and decisional independence.[72] In other words, the independence of the judiciary may be institutional, personal, or decisional. Institutional independence refers to the independence of the social court as an institution whereas personal independence implies the freedom of social court judges as an individual to decide a case only based on fact, evidence, law, and reasoning. Decisional independence stands for the freedom of a judge to pass a decision without any interface or pressure from governmental and non-governmental actors including individuals and colleagues. The manner of appointment and removal, competencies, term offices, salaries, and available budget have an impact on the independence of the social court.

2.4.1.1 Institutional Independence

Institutionally, the independence of the social court is recognized by most regional constitutions and establishment proclamations. The social court is mandated to exercise its judicial function with full independence. This clause is wide enough to include all dimensions of independence of social court including institutional ones. As per the doctrine of institutional independence, the social court is free from the interference and pressure of

[70] FDRE Constitution, Art.79 and ff; Oromia Cons, Art 61 and ff; Afar Const, Art 64 and ff; BGRS Cons, Art 65 and ff; Somali Cons, Art 65 and ff; Harari Cons, Art 67 and ff; Tigray Cons, Art 59 and ff; Amhara Cons, Art.64 and ff; Gambella Cons, Art.67 and ff; Dirdawa City Charter, Art 31 and ff; Addis Ababa City Charter, Art.39 and ff; Southern Region Cons, Art. 72 and ff.

[71] Benishangul Social Court Proclamation No.126, Art.10; Oromia Social Court Proclamation No.128, Art. Art.7; The Amhara region social court establishment proclamation is silent about the independence of social court. This may be associated with the nature of social court in the region which similar with arbitrator.

[72] Lemlem Dejenu Mulugeta, Judicial Independence in Ethiopia and Its Challenge Vis-à-Vis the United Nations Basic Principle on Independence of Judiciary, Journal of Political Science and International Relations (Vol. 6, Issue 4, 2023).

another branch of government at any level in the exercise of its judicial functions.[73] To ensure their independence, the establishment laws make the social court accountable to the Kebele council which is the legislative wing at a lower level of administration.[74] The appointment and removal of judges shall be subjected to the approval of the Kebele council upon nomination or recommendation of the Kebele administrator.[75] In addition to this, members of the Kebele administrative committee/council and voting members of the Kebele council cannot act as judges. [76]The law also made clear that the term office of the social court is equal with Kebele council i.e., five years with the possibility of reappointment.[77] Despite the law on text, practically, the social courts lack the budget allocated to cover its administrative costs. They are financially dependent on the Kebele executives. They lack the necessary facilities like offices, tables, file cabinets, and others to carry out their mandate. Because of this, there is an area in which parties to the dispute are required to bring paper, a pen, and a file folder to get services. There are many social courts with no separate office to carry out their function. They are dependent on Kebele's administrator even for a minor essential facility. They lack an independent budget that is considered blood for their operation. How social court can be institutionally independent without having the financial independence to administer its budget? In some areas, they use the stamp of Keble administrator to authenticate their judgment. It is also not uncommon to see the circumstance in which the social court let us know the Kebele administrator about the judgment that they pronounced.

The Kebele administrator usually nominates a candidate for an appointment without receiving public comment against the law. The nomination is sometimes based on issues of political affiliation and submissiveness, instead of competencies. As the collected data show, usually, those who are appointed as social court judges are elders, religious fathers, and a person with good conduct within the community. Regarding the removal of judges, per the law without prejudice to the normal grounds of incapacity (like death and judicial interdiction), social court judges can be removed upon death, change of residence to another Kebele, expiration of term office, election as a member of Kebele council or administrative

[73] Oromia Social Court Proclamation No.128, Art. 7; Benishangul Social Court Proclamation No.126, Art., 9
[74] Benishangul Social Court Proclamation No.126, Art.4; Oromia Social Court Proclamation No.128, Art. 5.
[75] Amhara Social Court Proclamation No.246, Art. 9; Oromia Social Court Proclamation No.128, Art. 9; Benishangul Social Court Proclamation No.126, Art. 15.
[76] Oromia Social Court Proclamation No.128, Art. 9(7); Benishangul Social Court Proclamation No.126, Art. 13(3).
[77] Oromia Social Court Proclamation No.128, Art. 7(6); Benishangul Social Court Proclamation No.126, Art. 14.

committee, and commission of misconduct. Despite this, there are some limitations on the removal of judges. Especially when a new administrator is appointed it is common to see the removal of social court judges, especially the president.

2.4.1.2 Decisional Independence

Decisional independence is the cornerstone of judicial independence which requires the judge to decide based on law, evidence, reason and consciousness without interference from third parties.[78] In the process of passing a decision, the court shall be independent of the inference and pressure of the legislative and executive branches. Despite the constitutionality and relevancy of the independence of the social court, practically the decisional independence of the court is subject to significant limitations. Executive interference is higher in a case like land and criminal matters which involve government interest. In the case which involves no government interest, there is no inference. In such cases, the judges decide freely based on their understanding of justice and law. However, there are cases in which judges decide with the inference and pressure of youth, armed groups, local elders, or Kebele administrators.[79]

2.4.2 Accountability of Social Court

Accountability is a fundamental principle of constitutional governance in the 21st century.[80] In addition to independence, the 1995 FDRE constitution has recognized accountability as the basic principle of the judiciary.[81] Despite this, whether a social court judge is accountable or not is controversial. The controversy arises mainly from the position of social court judges within the employer-employee relationship. Social court judges are not salaried employees, rather they are free judicial services providers. So, how can the law make free service providers accountable for their faults related to the service they provide? On what grounds can the government take legal action and ensure accountability in case

[78] Barron, David J. (2020) "Judicial Independence: Origins and Contemporary Challenges," Roger Williams University Law Review: Vol. 25 : Iss. 1 , Article 2.
[79] Sufian Usman vs Kalisa Basha, Haramaya City Kebele 01, File No.2/01/0076/11, decided on 22/1/11 EC as referred on Indaalammaa and Tasfaa *supra note* 45; Tefera Tadesse vs Dereje Tefera, Ada Woreda Court, File No. 45224, Decision rendered on 28/01/07 as refered on Indaalammaa and Tasfaa (*supra note* 45); Interview with Birhanu Abebe, President of Haramaya City Kebele 01 Social Court on 06/06/11 Interview with Jemal Ahmed, Administrator Haramaya City Kebele 01 on 06/06/11; Zeituna Abrham vs Aweke Wondimu, Haramaya City Kebele 01 Social Court decided on 29/02/10 as refered on Indaalammaa and Tasfaa (*supra note* 45).
[80] McIntyre, J. (2019). Principles of Judicial Integrity and Accountability. In: The Judicial Function. Springer, Singapore. https://doi.org/10.1007/978-981-32-9115-7_13.
[81] FDRE Cons, Art. 12(2) and 79(4).

judges who provide free services become incompetent, non-performing, or involved in acts of misconduct like corruption which affects public confidence? As the prevailing practices reveal, the only action taken against a social judge in case of incompetence, non-performance, and misconduct is removal from office. However, the deterrence effect of removal is less in the situation where judges lack financial incentives like salaries to stay in office. Besides, despite the dearth of practices, the social court judges are subject to corruption crime law.[82]

Independence of the social court alone does not ensure access to quality justice unless it is supported and compromised by an accountability framework. The independence of social court should be balanced with accountability to avoid unnecessary consequences that happen because of imbalance. The law set different requirements to ensure the accountability of social court judges. Institutionally, the law made the social court accountable to the Keble council.[83] Concerning decisions, social court judges are accountable to the city or Woreda or district court which is responsible for reviewing the judgment of the social court upon appeal by the aggrieved party. Their judgment may also be reviewed by cassation if contains a fundamental error of law. The social court is technically accountable to the courts of the upper level. The law also requires social court judges to submit performance reports to the Kebele council and Woreda Court every quarter.

Though the term has not expired, and the residence has not changed, the judge can be removed from office for reasons of incompetence and disciplinary faults. There is a difference among regions regarding disciplinary grounds for the removal of a judge. In the Amhara region, the only disciplinary ground for the removal of social court judges that is expressly incorporated by law is a criminal conviction.[84] In the Oromia and BGRS regions, the law is more illustrative and clear in listing disciplinary grounds for the removal of social court judges.[85] In Oromia, the disciplinary faults that result in removal include a hearing case out of place determined by law, failure to notify the date and place of the hearing, deciding without hearing the witness of both sides, deciding a case by nepotism, favoritism,

[82] Corruption Crimes Proclamation No.881/2015, Art.2(2).
[83] Amhara Social Court Proclamation No.246, Art. 12; Oromia Social Court Proclamation No.128, Art. 7 and Benishangul Social Court Proclamation No.126, 18 and 19.
[84] Amhara Social Court Proclamation No.246, Art. 17(2).
[85] Oromia Social Court Proclamation No.128, Art. 11(5); Amhara Social Court Proclamation No.246, Art. 17; Benishangul Social Court Proclamation No.126, Art. 18 and 19.

or bribe, causing inconvenience by refusing to give a copy of the judgment for parties, performing or trying to perform activities which limit parties right to appeal,[86] Despite this legal clauses which try to ensure accountability of social court judges, hearing cases in deciding with hearing both parties and their witness, deciding based on nepotism or bribe, and refusing to give a copy of the judgment for parties are a common problem.[87] In this sense, the implementation of disciplinary action and accountability is poor. This is mainly attributed to the fact that the service offered by social court judges is free or with no payment. In addition, there is no efficient organ that supervises and audits the operation of the social court.

To conclude, the accountability framework is poor as judges are not salaried employees. The social court judges are free service providers, in this context, it is difficult to enforce legal liability against volunteers even in the case there is gross misconduct, incompetence, and non-performance. So far, as data collected through interviews reveals the only action taken against misbehaving, incompetent, and non-performing judges is removal from office followed by no legal action.[88]

2.4.3 Transparency of Social Court

Transparency is the core of constitutional governance in the 21st century.[89] The 1995 FDRE constitution also requires the conduct of government affairs including judicial activities to be transparent.[90] Despite this, whether a social court is transparent is controversial. Transparency of the activities of the social court is the fundamental element in the administration of justice. In regular court, transparency can be ensured through different means including public trial or hearing, written judgment, and supporting judgment with law evidence, reason, and fact. The law of all regions establishing the social court calls for public trial unless such trial involves an issue that affects individual privacy and public order. Matters that fall within the jurisdiction of the social court are a minor issue that does not raise privacy and public order concerns. In this sense, the public trial is a principle in a

[86] Oromia Social Court Proclamation No.128, Art.,11(5), Amhara Social Court Proclamation No.246, Art. 17; Benishangul Social Court Proclamation No.126, Art. 18 and 19.
[87] Indaalammaa and Tasfaa, *supra note 45*, 182.
[88] Interview with Bayualem Adimassu, Benishanul Gumuz, Assosa Zone, Ura Woreda Assosa City Kebele Social Court Judge, January 15, 2023; Abdi, 182.
[89] Wang, Y., Tian, H. (2023). The Rationale Behind Judicial Transparency. In: Judicial Transparency in China. Springer, Singapore. https://doi.org/10.1007/978-981-19-7822-7_3; Grimmelikhuijsen, S., & Klijn, A. (2015). The Effects of Judicial Transparency on Public Trust: Evidence From A Field Experiment. Public Administration, 93(4), 995-1011. https://doi.org/10.1111/padm.12149/.
[90] FDRE Cons, Art.12(1).

social court trial. Despite the legal clause that calls for a public hearing, the social court judges try all cases on camera because of practical factors like the absence of enough office to administer public trials and lack of awareness among judges about their obligation to entertain cases in public. In addition, judgment supported by relevant facts, law, and reason has a positive impact on ensuring transparency. However, almost all judges of the social court are not law graduates. Rather, most of them are respected elders or persons within the community who lack legal background. As a result, judges of the social court are not able to support their decisions with relevant provisions of law. To the maximum in the process of writing the judgment, the judges amass the claim and defence of parties with evidence and equity to pass a judgment. The response of one of the respondents clearly shows that they don't support their judgment due to lack knowledge of the applicable law.

The transparency of the administration of justice by the social court is subjected to too much limitation. Public hearings and written judgments supported by law, evidence, and relevant facts are essential in ensuring transparency. However, as the data collected show public trial is absent. As stated before, the social court lacks a fully furnished room to carry out its activities. Sometimes, they share the office with the speaker administrator or police of the Kebele. In this situation, a public trial is unexpected though the law calls for a public hearing. Concerning written judgment, social court judge passes their judgment in writing despite the defect in content. All social court judges interviewed have no degree or training in law. Some of them cannot even write or read. So, judges without knowledge and skills of law can pass support judgment supported by law. When judges are interviewed if can they support their judgment with the law, most of them respond "How we can support without knowing the applicable law? We work by customary norm and equity, not law" In this sense, the written judgment does not support transparency of social court operation.

2.5 Public Confidence in Social Court

Securing public confidence is essential for any institution including the social court to accomplish its purpose of establishment. Public confidence has paramount importance, especially for a judicial institution that strives to ensure access to justice. [91]The people do not go to social court unless they have confidence in the overall operation of the social court. Despite this, practically there are limitations on public confidence in a social court

[91] Pikramenos, M.N., Public Confidence and the Judiciary in a Democratic Society. In: Economou, E.M., Kyriazis, N.C., Platias, A. (eds) Democracy in Times of Crises. Springer, Cham (2022).

that can be attributed to different factors. First and foremost, the factor that reduced public confidence is attributed to the weakness of the social court to execute or enforce its judgments. Per the establishment law, social courts are empowered to order arrest to facilitate and ensure the execution of judgment. However, sometimes there is the unwillingness of the police to enforce an order of the social court. There is a circumstance in which the police centre or prison administration refuses to accept and administer a person's order to be arrested or imprisoned by the social court. The prison administration and police centre sometimes disregard the power of the social court to order arrest and imprisonment and release the arrested or imprisoned person upon bail. The social court lacks legitimacy not only to enforce its judgment but also its lack power to ensure respect for the bench. As a result, it is common to see parties disturbing the bench with insults and disobedience.

The second reason that negates public confidence is the manner of appointment and removal of social court judges. In the appointment and removal process of regular court judges, the Judicial Administration Commission plays a significant role. The Social Court Establishment Proclamation has also set requirements and procedures for the appointment and removal of judges. The person to be appointed should have to be a person with good conduct, competencies, diligence, reputation, and knowledge of customary and formal law. The public is also entitled to comment on the person appointed as such. However, in the case of social court judges, the appointment and removal are highly dependent on the need and interest of the Kebele administrator with no participation of the public. The administrator nominates the submissive person whom he can order as he likes and removes the judge when he is not obedient to the order. What matters is not public confidence in the person, but the administrator's confidence in the person. The same is true during removal. The politically-motivated appointment and removal of judges as well absence of transparency in the procedure thereof has negated public confidence. Usually, it is common to see a change of at least the president or chairperson of the social court when a new administrator is appointed. As the foreign experience of countries like Kenya and Zambia shows, the social court appointment and removal are made by constitutionally established Judicial Administration Commission.[92]

The absence of regular public hearings is the third factor that reduced public confidence in the social court. The social courts do not hear cases regularly. Even within a single region,

[92] The Republic of Kenya Small Claims Court Act Act No. 2 of 2016; Republic of Zambia The Small Claims Courts Act; Indaalammaa and Tasfaa, *supra note* 26, 151 and ff.

there is no regular working day and hour. Usually, the social courts set their working day based on their free will and internal bylaws. Some social courts work daily even at the weekend which is considered by Ethiopian society as a holiday or rest day. The reason for the lack of a regular working day is attributed to the law which set working days and the voluntary nature of judicial service rendered by social court judges. The judges serve without salaries even sometimes incurring the cost. They lack a suitable working environment like furnished and good size office with the necessary facility. The judges lack a financial incentive to be punctual and diligent. Because of this, usually, they fail to report for work on time. However, as the experience of Zambia shows judges of the social court are entitled to the allowance.

2.6 Conduct of Social Court Judges

The quality of justice rendered within the judicial system is highly dependent on the conduct of acting judges. The judge's conduct significantly impacts the quality and effectiveness of justice administered within the social court system. Because of the impact of the conduct of judges on the quality of justice, the law requires quality of good conduct for the person to be appointed as a judge. Expressing differently, the person accused of misconduct like laziness, dishonesty, corruption, and other matters of similar nature may not be appointed as a judge. The conduct of judges is one of the basic elements that determine the effectiveness of the administration of justice. Despite this, the misconduct of judges is one-factor reducing public confidence and limiting the effectiveness of social courts in ensuring access to justice. In the absence of a judge with good conduct, access to justice cannot be ensured. The data collected through interviews show the presence of social court judges who commit misconduct in one or another way. That misconduct includes corruption, refusal to give full file for parties who would like to appeal, and unnecessary and unreasonable adjournment. Per the relevant law, any parties aggrieved with the decision of the social court have the right to appeal. Despite this, there is a failure (unwillingness and refusal) to give a full file on a timely basis for parties who would like to appeal. There is also a failure to sign and stamp the copy of the judgment. As a result of refusal to give a copy of a file, there are circumstances in which the Kebele administrator or Woreda court orders the social court to give the file. Such refusal affects not only the rights of individuals but also ruins public confidence and opens room for different actors to interfere in judicial activities.[93] The social

[93] Indaalammaa and Tasfaa, *supra note* 45, 151 and ff.

court is required to give justice as speedily as possible. However, it is not uncommon to see multiple unnecessary and illegal adjournments. Before hearing, there are cases in which more than five adjournments. Such multiple adjournments ruin not only public confidence but also go against the very essence of a social court that is providing accessible justice concerning minor cases at a low cost within a short period.

2.7 Accessibility

Accessibility is another determining factor for the effectiveness of the administration of justice. The social court is established at the Kebele level which is the lowest structure in administration. As a result, geographically, they are nearly accessible to the community. However, the judges of social court don't report to work every working day. In a region like Oromia, the law states that the working hours of the social court are similar to the Kebele administration.[94] In this sense, they are expected to report to work every working day. The reality is different as the judges hear the case on two days per week. In a region like BGRS, the law is not clear regarding the issue of whether social court judges are duty-bound to report for work every working day. Despite the ambiguity of the law, in practices in the BGRS region, most social court judges report for work two days per week. The working days differ across and within the region. In some Kebele, the judge reports for work on the weekend.[95] In this sense, though usually, social courts are geographically nearest to the community, the absence of regular working hours has limited their accessibility.

2.8 Time and Cost-effectiveness

A speedy trial with lower transaction costs is the one indicator of the effectiveness of the administration of justice. Relative to regular courts, based on observation, the caseload is low in social courts. In addition to this, social courts do not follow the ordinary complex procedure in entertaining the cases. Rather, it follows a simplified version of the procedure constructed based on the principle of customary practice and/or establishment proclamation. For instance, in the Amhara region, the social court is not obliged to follow the ordinary civil and criminal procedure set by codes, instead, it undertakes its activities per the local

[94] Oromia Social Court Proclamation No.128, Art., 8(2(b))
[95] Interview with Gemechu, Benishanul Gumuz Metekel Zone Dibate Woreda Galessa Kebele Social Court Judge, January 10, 2023.

custom, tradition, and practices.[96] In the Benishangul Gumuz region, the law obliges the social court to follow the procedure set by the establishment proclamation.[97] The law of some regions fixed the maximum period within the court required to pass judgment. For instance, in Amhara, unless there obligatory condition, the social courts must render a decision within 30 days following the institution of the case.[98] In a region like Oromia and Benishangul Gumuz, the court shall pass judgment *immediately* or *within a short period* if the hearing is completed or matured.[99] Despite the difference in the wording of the proclamation, relative to a regular court, a social court is both time and cost-effective.

3. CHALLENGES FACING SOCIAL COURTS AND AREAS OF REFORM

The empirical inquiry reveals that the administration of justice by social court faces a multitude of challenges. Some of the challenges facing social court and areas that need reform are briefly examined as follows.

3.1 Legal Skills and Knowledge Gaps

The social court is subject to the problem of a lack of skilled manpower. Those serving as judges are not educated in the law. Most of them even lack formal education and language fluency to write and read. They are selected mainly based on the trust they secure within society or from administrators without the knowledge of the law. Because of this, they lack awareness about applicable laws and procedures. In rural areas, most of them are religious fathers whereas in urban areas some of them are young degree holders with no or limited knowledge of local customs. Also, there is no timely, adequate, and practical training and experience-sharing platform to improve the competence of judges. There are social courts which receive no training for more than decades.[100] Even in the area it rendered, the training is not adequate which can be either phone-based orientation[101] or a short hour like one-hour

[96] Amhara Social Court Proclamation No.246, Art. 7.
[97] Benishangul Social Court Proclamation No.126, Art.27(1)
[98] Amhara Social Court Proclamation No.246.
[99] Benishangul Social Court Proclamation No.126, Art. 39; Oromia Social Court Proclamation No.128, Art. 33.
[100] Interview with Fekede Belina, Benishanul Gumuz Kemash Zone, Kemash Woreda Kemash City Social Court Judge, January 10, 2023.
[101] Interview with Wajira Habte, Benishanul Gumuz, Metekel Zone Dibate Woreda Berber Kebele Social Court Judge, January 11, 2023;Interview with Lemesa Adimassu, Benishanul Gumuz Metekel Zone Dibate Woreda Bereber Kebele Social Court Judge, January 15, 2023; Interview with Yiber Tadesse, Benishanul Gumuz Metekel Zone Dibate Woreda Berber Kebele Social Court Judge, January 15, 2023.

training.[102] There is also untimely training for example giving training for a judge whose main occupation is farming during the farming season.[103] The absence of competent judges is not only a simple problem but is the root cause of many limitations in the administration of justice by the social court. To address these challenges well-structured short-term education and training must be adjusted for judges of social court on major substantive and procedural laws as well as file documentation and trial administration. The content, time, and place of education and training must be designed in a way that fits the needs of judges. Training given to the farmer during the farming season is not timely and effective.[104]

3.2 Lack of Access to Necessary Facility

The second challenge facing the social court is the lack of adequate and furnished offices with necessary facilities like chairs, tables, computers, printers, copy machines, shelves, laws, paper, pens, file cabinets, and other necessary facilities. None of the social courts observed by the researcher has furnished offices. The interview with the social court and Woreda court judges also confirm the same.[105] They are dependent on the Kebele Administrator for every facility including pen and paper. This has an impact on the independence and performance of the court. The facility support Kebele administrator is not formal, it is based on the begging and receiving principle. Because of the lack of a computer and printer, their judgments are handwritten which is non-legible in many cases. There is also an area in which the customer brings necessary facilities like paper and pen to get service.[106] Because of the lack of furnished office, the public trial is a myth in the social courts. The cause of the lack of facility lies in the financial dependence of the social court on the Kebele administration. Finance is blood for judicial performance. The social court cannot perform well without having its budget administered by itself. The social court even

[102] Interview with Gemechu, Benishanul Gumuz Metekel Zone Dibate Woreda Galessa Kebele Social Court Judge, January 10, 2023.
[103] Interview with Gemechu, Benishanul Gumuz Metekel Zone Dibate Woreda Galessa Kebele Social Court Judge, January 10, 2023.
[104] Interview with Gemechu, Benishangul Gumuz Metekel Zone Dibate Woreda Galessa Kebele Social Court Judge, January 10, 2023.
[105] Interview with Fekede Belina, Benishanul Gumuz Kemash Zone, Kemash Woreda Kemash City Social Court Judge, January 10, 2023; Interview with Gemechu, Benishangul Gumuz Metekel Zone Dibate Woreda Galessa Kebele Social Court Judge, January 10, 2023; Interview with Wajira Habte, Benishangul Gumuz, Metekel Zone Dibate Woreda Berber Kebele Social Court Judge, January 11, 2023; Interview with Bayualem Adimassu, Benishangul Gumuz, Assosa Zone, Ura Woreda Assosa City Kebele Social Court Judge, January 15, 2023.
[106] Interview with Gemechu, Benishangul Gumuz Metekel Zone Dibate Woreda Galessa Kebele Social Court Judge, January 10, 2023.

lacks access to a necessary law. In some courts, even they don't have social court proclamations.[107] This is like a soldier without a bullet.

3.3 Jurisdictional Ambiguity

The third major challenge facing the administration of justice by the social court is confusion relating to the jurisdiction of the social court. Jurisdictionally confusion is a common problem facing the administration of justice's social courts in Ethiopia. The federal Supreme Court cassation decision reveals the same. The material jurisdiction of the social court concerning civil matters is limited to matters that fall within a given pecuniary limit and subject matter. The jurisdictional limit of the social court is the point of controversy and ground for appeal unto cassation. As the lower court and federal cassation decision concerning the cases reveals there is no common stand between courts.[108] Concerning possessory action, in the cases G*/Meskel Demoze vs. Astede Mokenen* and *Mulatu Anberber vs. Tamneche Yosef* the Federal Supreme Court (FSC) cassation took a firm stand that the social court lacked the power to entertain the issue of possessory action.[109] Regarding the jurisdiction of social courts to entertain cases in which one of the parties to the dispute is an organization registered by the federal government, the FSC Cassation took a different stand at different times. In the case of *Farming Machineries S.C vs. Ethiopian Insurance Corporation* without taking into consideration the fact that the respondent is registered by the federal government, the FSC decided that the social court in Addis Ababa lacks jurisdiction to entertain *insurance matters* though the claim is within the limit to of pecuniary jurisdiction of social courts.[110] This is because under federal court proclamation (No.25) the issue of insurance is reserved for the federal court. Despite this, in the cases between *Ethiotelecom vs. Markos Abebe*, and *Ethiotelecom vs. Worknesh W/Mariam* without taking into consideration the registration of the Ethiotelecom by the federal government, the FSC decides that the social court has material jurisdiction over matters

[107] Interview with Fekede Belina, Benishangul Gumuz Kemash Zone, Kemash Woreda Kemash City Social Court Judge, January 10, 2023.
[108] *G/Meskel Demoze vs Astede Mokenen,* Cassation File No.36338 Tire 25, 2001 E.C; *Mulatu Anberber vs Tamneche Yosef,* Cassation File No.41608 Hamile 22, 2001 E.C, *Farming Machineries and Tech S.C vs Ethiopian Insurance Corporation,* Cassation File No.52041 Sene 29 2002 E.C; E*thiopia Telecommunication Corporation vs Markos Abebe,* Cassation File No.54990 Hidar 18, 2004 E.C; *Ethiopia Telecommunication Corporation vs Worknesh W/mariam,* Cassation File No.56118 Hidar 16, 2003 E.C; *TATN Constructions and Business Activities Organization vs Eyayu Dejene*, Cassation File No.89530, Tikemet 21 2006 E.C.
[109] *G/Meskel Demoze vs Astede Mokenen,* Cassation File No.36338 Tire 25, 2001 E.C; *Mulatu Anberber vs Tamneche Yosef,* Cassation File No.41608 Hamile 22, 2001 E.C.
[110] *Farming Machineries and Tech S.C vs Ethiopian Insurance Corporation,* Cassation File No.52041 Sene 29 2002 E.C.

which fall within pecuniary limit though one of the party is the federal body.[111] These two decisions may lie on the argument that the social court proclamation is a recent one that prevails over the court proclamation in case of contradiction. Labour Proclamation No. 377 empowered the first instance court to entertain individual labour disputes. Following this, in the case *Tatn Constructions vs. Eyayu Dejene,* the FSC Cassation decided that though the amount of claim is within the pecuniary jurisdiction of the social court, the social court lacks the power to handle labour dispute which is expressly given to the first instance court under proclamation which was enacted after the enactment of social court proclamation.[112] As the close inquiry of these cases reveals even there is no agreement among regular courts regarding the jurisdiction of the social court.

As data collected through the interviews with judges of different levels of court including social court and Woreda courts in Benishangul Gumuz prove, the jurisdiction of the social court lacks clarity and constitutes a ground for unnecessary litigation. The Woreda court repeals most decisions of the social court based on the grounds of lack of jurisdiction. The social court judges are also confused about their jurisdiction. The issue of whether the social court proclamation shall be read in line with the court proclamation or not is controversial. Reading social court proclamation independently and sideline with the court proclamation results in different conclusions concerning jurisdiction as they usually contradict each other. The power of the social court to handle the issue of possessory action, ownership, and land boundary issues is a confusing area.

3.4 Independence, Accountability and Transparency Defect

The independence, accountability, and transparency of the judiciary are subject to many fundamental defects because of executive hegemony. Relative to a regular court, the minor power of a social court does not attract the executive interest. As the data collected shows, executive interference in the decision of the social court is highly limited. None of the social court judges involved in the interview reported interference of the executive in their decision. Because of this, they decide freely per the law and custom by amassing claims

[111] E*thiopia Telecommunication Corporation vs Markos Abebe,* Cassation File No.54990 Hidar 18, 2004 E.C; *Ethiopia Telecommunication Corporation vs Worknesh W/mariam,* Cassation File No.56118 Hidar 16, 2003 E.C.

[112] *Tatn Constructions and Business Activities Organization vs Eyayu Dejene*, Cassation Fil No.89530, Tikemet 21 2006 E.C.

with evidence. However, this does not they are free and there is no attempt by the administrator to use the court to decide and legitimize the executive decision to impose a fine on a resident who fails to participate in a development project like terracing constructed by the public. Institutionally, the social court is not independent. The social court is much more dependent than the regular court. The social court is dependent on the Kebele administrator for everything including necessary facility, and judgment execution. The social court lacks the financial independence to administer its budget and property.

Organizationally, a social court is accountable to the Kebele council. Technically, it is accountable to the Woreda court under the appeal system. However, the accountability regime is almost none. The maximum action taken against a non-performing and misbehaving judge is removal from office. So far, no legal action against taken such a judge to ensure liability. There are some social courts, which impose fine on non-performing judges by their bylaws.[113] *Technically*, because of the long distance, parties usually lack the incentive to take their case to Woreda court through appeal. Hence, the appeal system is weak in ensuring the accountability of the social court. Even in case the case was taken to Woreda court through appeal, the Woreda court repealed the decision of the social court based on lack of jurisdiction without entertaining the subject matter. As a result, the substance of the decision of the social court is not subjected to review by the upper court.

The transparency in the social court is very limited. It lacks adequate office and legal awareness to carry out public trials. Their judgments cannot be published and are easily accessed by the public to comment. In addition, most of the time social court does not support their judgment. Moreover, the performance report submitted to the Justice Bureau and Woreda Court is not detailed enough to ensure transparency of the social court. There is no transparency about the income gained from court fees because of the absence of auditing. The social court lacks a registrar who can keep the file in order. Because of this, there is no formal documentation of the necessary file.

[113] Interview with Wajira Habte, Benishanul Gumuz, Metekel Zone Dibate Woreda Bereber Kebele Social Court Judge, January 11, 2023;Interview with Lemesa Adimassu, Benishanul Gumuz, Metekel Zone Dibate Woreda Bereber Kebele Social Court Judge, January 15, 2023; Interview with Yiber Tadesse, Benishanul Gumuz, Metekel Zone Dibate Woreda Berber Kebele Social Court Judge, January 15, 2023.

3.5 Absence of Salaries or Financial Incentives

Social court judges provide service without salary. They are public servants appointed by the Kebele council upon the nomination of the Kebele administrator. In a capitalist society where there is no free lunch, how does a judge sacrifice his time and energy for nothing? Justice is the most expensive item in this world. How does the judge who delivers this expensive item provide judicial service for free? The absence of salaries was a big challenge for social courts even during the imperial and Dergue regimes. The social court proclamations have not been learned from the previous regimes. This is a big failure. Reasonable salaries or financial incentives must be allocated for judges of the social court. Without it, improving the effectiveness of the administration of justice by the social court is impossible. The absence of salaries not only discourages judges but also forces them to be involved in illegal activities like receiving bribes. Because of the absence of salaries, judges consider their function as a luxury time work. They don't engage in rendering judicial services as their regular occupation. No judges interviewed so far see being a judge as a regular occupation but as part-time pro-bono service.

CONCLUSION

Despite the ambiguity and silence of the 1995 Constitution, social courts are recognized by all regional constitutions and city charters as the judicial branches of Kebele. This study has examined the effectiveness and challenges of the administration of justice by social courts. As the finding reveals, the effectiveness of social courts in the administration of justice is not easy to conclude as it is diverse and faces different challenges in different areas. Generally, in addition to their unique limitations, social courts have been facing similar challenges to regular courts. The unique challenges of social court emanate from the fact that the judges are not law graduates, provide free services without salaries, and perform adjudicative and conciliatory roles according to diverse local customs. The effectiveness of social courts is subject to various constraints because of the absence of adequate training and incentives for judges, insecurity especially in the rural areas, low legal awareness of judges, financial dependence of the court on the executive, executive interference, and weak accountability schemes. In extreme cases, the problems go to the extent of questioning the very existence of the social court. To improve the overall productivity of social court in the administration of justice, the study suggests the delivery of short-term training on basic substantive and procedural laws for social court judges, settlement of jurisdictional

ambiguity through training and revisions of law, payment of reasonable remuneration for judges, and increment of material jurisdiction accompanied by capacity building programs. Besides, the impact of social courts on gender equality, human rights, and customary law needs further study.

THE ROLE OF LEGISLATION ON URBAN LAND REGISTRATION ENFORCEMENT IN ETHIOPIA: THE CASE OF AMHARA NATIONAL REGIONAL STATE

Melkamu Belachew Moges*

Abstract

The Amhara National Regional State (ANRS) has undertaken urban land registration through the financial loan grant primarily from the World Bank since the early 2000s. However, the coverage of land registration practice remains low. This paper begins the journey of exploring the mechanisms in which legislative and other institutional processes could play a better role for the success of land registration systems. Such a study inquiring the casual relationship between legislation and land registration enforcement is unprecedented in Ethiopia. The paper utilizes project documents and mainstream secondary literature to construct conceptual framework. It applies qualitative research methods of data analysis with a case study approach. Descriptive, exploratory, and analytical research analysis were employed. The research explores processes, activities, and events in the form of narration. The paper concludes that gaps in the legislation development on land registration and land management have negatively contributed to the low performance of urban land registration in Ethiopia. The paper suggests that taking a few steps to fill the gaps in the current legislative framework could enhance the contribution of legislative development for improved land management in urban centers of Amhara region with implications for the whole country.

Keywords- Legislation, Land registration, Urban center, Amhara, Ethiopia

INTRODUCTION

Land administration systems play an unparalleled role for social, economic, and environmental development. Land resource is regulated and guided by land administration laws which, in Ethiopia, are separate for rural and urban areas. In general, the field of land administration has a well-developed conventional system that defines land in terms of the smallest unit, i.e. parcel, the users of the parcel, and the third parties who might have some stake on it.

Historically and in practice, land registration in Ethiopia dates to 1907, a period when Menelik II enacted a Decree for such purposes.[1] However, no standardized land registration system has been

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in place until at least the dawn of the 2nd Millennium. With respect to urban areas, the first attempt of systematic land registration was intended to be developed for major regional capitals, namely Mekelle (1998), Bahir Dar and Hawassa (1999), and Adama (2000).[2] In Bahir Dar ground survey and socio-economic data collection for the purpose of land registration was carried out for 8 Kebeles out of 17.[3] Although another attempt was made from 2006 to 2008, the Federal Government focused on developing the process of urban legal cadastre only since 2011. Development of legal cadastres for 23 major cities and towns (6 cities in ANRS including Bahir Dar) commenced in 2012.[4] The introduction of legal cadastre triggered the adoption of new laws and institutions both at Federal level and at the regions. Thus, the Integrated Land Management Information System Project Office and the Federal Urban Real Property Registration and Information Agency were established for the design of cadastral systems and for real property registration respectively. Since 1 March 2017, the Amhara region publicized the commencement of adjudication and registry in six cities, namely, Bahr Dar, Gonder, Debre Markos, Debre Birhan, Dese, and Kombolcha.[5] The momentum has continued, and the Land Bureau has adopted a 10-year strategic plan for the urban land sector in 2022.[6] This Plan aims to implement legal cadastre for 77 urban centers (733,000 land parcels) to improve land management. Generally, the pilot registration systems in the cities had been slow to progress, and, given the historic failure of urban cadastral pilots in Ethiopia, the ability to complete and scale-up the current pilots remained a concern.[7]

Sound land governance is best understood through analysis of a legal and regulatory framework, operational processes, and capacity to implement land policies and land management strategies consistently within a jurisdiction or country in sustainable ways.[8] The land management

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[1] Melkamu, B.Moges. & Alelegn W. Agegnehu, *Issues on the Role of Formal Requirements for Validity of Immovable Transactions in Ethiopia: The Case of Amhara Region*, 6 Bahir Dar U. J.L. 49 (2015-2016), at 78.

[2] Birhanu, K.A. et al. *Evolving urban cadastres in Ethiopia: The impacts on urban land governance*. 42 Land Use Policy, 695−705 (2015), at 699; Melkamu, B. Moges. The Need for Modern Real Estate Management in Urban Ethiopia: The Case of Bahir Dar City (Integrating Generations, FIG Working Week, 2008, Stockholm, Sweden 14-19 June 2008), at 6.

[3] Melkamu, *supra* note 2, at 7.

[4] Birhanu, K.A. et al, *supra* note 2.

[5] Interview with Mr. Zerihun Beniam (name changed for anonymity), ANRS Land Bureau, October 14, 2023.

[6] *Id*.

[7] Ministry of Urban Development and Housing. *Review of the Legal Cadastre of the Government of Ethiopia, Issues & Policy Recommendations*, Report (2016), at VII.

[8] Melkamu, B.Moges. *Critical Gaps in Land Governance with Respect to the Land Registration System in Ethiopia*, 15(2) Mizan Law Review, 419−454 (2021), at 427.

Paradigm developed by Enemark[9] helps us to best understand the interrelationship between these key concepts. The Paradigm illustrates that the land management activities may be described by three components, namely, land policies, land information infrastructures, and land administration infrastructures, which underpin sustainable development.[10] It further indicates that institutions and organizations run the land management activities whose arrangements and structures differ from one jurisdiction to the other and may change over time.[11] In short, this means land governance involves land management, land administration, land law and policy, land registration systems (commonly denoted by the words, "cadastre" and "land register") and land tenure.

True, Ethiopia's rural and urban land administration laws introduced the new concept of "land holding right" which embodies various rights including the right to transfer property produced on their land by their labour or capital by means of sale, exchange and bequeath.[12] Yet, Ethiopia's urban land registration system has been affected by severe problems. There is ample evidence in research that shows the gaps in land governance with respect to the land registration system in Ethiopia. These include incomplete land registration; outdated land records and cadastral information; weak land information management systems and public access; insufficient capacity and resources; overlapping jurisdictions and institutional fragmentation; and weak land dispute resolution mechanisms.[13] These challenges pose negative impact on land tenure security,

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[9] Enemark, S. "*Understanding the Land Management Paradigm"* (FIG Com 7 Symposium on Innovative Technologies for Land Administration 19 – 25 June, Madison, Wisconsin, USA, 2005), retrieved from https://www.researchgate.net/publication/228342504_Understanding_the_land_management_paradigm.

[10] *Id*. at 3.

[11] *Id*.

[12] While the idea of "land holding" was first introduced by earlier equivalent law (Proclamation No. 89/1997), the current law is Federal Democratic Republic of Ethiopia Rural Land Administration and Use Proclamation, 2024, Proc. No, 1324/2024, *Fed Neg. Gaz*, Year 30, No. 58, Art. 8. Also see Federal Urban Land Holding and Registration Proclamation, 2014, Proc. No, 818/2014, *Fed Neg. Gaz*, Year 20, No. 25, Art. 2 (3).

[13] See Mitiku, A. E. et al, *Exploring institutional capacity of urban land delivery and administration for housing development in Bahir Dar, Ethiopia: Institutional analysis,* 9(2) Cogent Social Sciences (2023); Mekonnen, T. M. et al, *The peri-urban cadastre of Addis Ababa: Status, challenges, and fit-for-purpose prospects, 125 land use policy (2023); Olira Kebede, Land Administration: Securing Limited Resource with Skyrocketed Demand in Shashemene City of Oromia Regional State, Ethiopia*, 3(1) Pan African Journal of Governance and Development (2022); Hafte, G. Gebrihet & Pregala Pillay, *Urban Land Governance in Ethiopia: Empirical Evidence from Mekelle City*, 56(3) Journal of Public Administration (2021); Amanuel, Weldegebriel et al, *Spatial Analysis of Intra-Urban Land Use Dynamics in Sub-Saharan Africa: The Case of Addis Ababa (Ethiopia)*, 5 Urban Sci. (2021); Worku, Nega et al, 2021, *Evaluating Institutional Dichotomy between Urban and Rural Land Administration in Amhara Region, Ethiopia*, *13*(16) Sustainability (2021); Nesru, H. K. et al, *Urbanization and*

efficiency and productivity and socioeconomic development in the country.[14] Although the importance of legislation is well noted in this body of literature, this body of research does not show how legislation contributes to the sound enforcement of land registration in Ethiopia. The objective of this paper is, therefore, to explore the relationship between these weaknesses of the land registration system, on the one hand, and the land administration law, on the other hand; and to shed light on the issue of whether gaps in the latter contributed to the challenges of land registration system, and to evaluate the extent of the contribution. In this regard, the paper's significance and originality is considerable as it newly attempts to addresses the question through the empirical/case study and doctrinal investigation of land registration in the case of ANRS. Further, it shall inspire further research on the role of robust legislative framework for land administration.

The Article proceeds in the following order. Part 1 deals with the research approach and methods applied. Part 2 presents a bird's eye view of the legislative framework for urban land management and registration. Part 3 attempts at framing tools to evaluate land registration legislation and its implementation in Ethiopia. Part 4 highlights the major gaps in the substantive part of land registration legislation and its enforcement. The study ends with a conclusion and the way forward.

1. RESEARCH DESIGN

This study applied a qualitative research approach.[15] "The idea behind qualitative research is to purposefully select participants or sites (or documents or visual material) that will best help the researcher to understand the problem and the research question" which "does not necessarily suggest random sampling or selection of a large number of participants and sites, as typically found in quantitative research".[16] The research applies qualitative research methods of data analysis. As part of this, a case study design has been employed where ANRS urban centers are used as as case studies with more focus on the city of Bahir Dar. A case study is more

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urban land use efficiency: Evidence from regional and Addis Ababa satellite cities, Ethiopia, 117 Habitat International (2021).

[14] See eg. Muradu Abdo, *Interrogating Land Policy Perspectives: Ethiopia in Focus*, 12(1) Oromia L.J. (2023).

[15] Creswell, J.W. Research design: qualitative, quantitative, and mixed methods approaches (California, SAGE Publications, Inc. 3rd ed, 2009).

[16] *Id*. at 166.

appropriate to study a well-defined aspect of an event that the researcher chooses for analysis especially where statistical methods and formal models are weak which is the case in this study. [17] It has relative advantages due to their potential for achieving high conceptual validity, their strong procedures for fostering new hypotheses, their value as a useful means to closely examine the hypothesized role of causal mechanisms in the context of individual cases, and their capacity for addressing causal complexity.[18] Descriptive, exploratory, and analytical research analysis were employed which helped the researcher to explore and narrate the processes, activities, and events in the case study. The nature of the study as a case study demanded the researcher to get a better picture of the land registration enforcement on real time. To achieve this, consultation and discussion with major government offices on the ways and means of land use and management was undertaken. This is through field observation that included undertaking informal interviews, and looking at training materials and implementation reports of most relevant stakeholders, namely, the ANRS Land Bureau, ANRS Urban and Infrastructure Bureau, and Bahir Dar City Administration. The paper employed these informal sources, not as a main source of data by themselves but to enable direct and primary access to the practice and process or implementation of the cadastre on the ground. As such, the researcher preferred rigorous qualitative analysis and argumentation as well as interpretation of existing reality as found in legislation and enforcement of the same. Literature review of relevant secondary sources and visual materials about the characteristics of relevant issues, the problems and major impacts was undertaken. Legal document analysis, which is a primary source that involved a simple review and analysis of selected relevant proclamations and other legislation, was the other method.

ANRS was purposefully selected for the study. First, because, the region is one of the largest regions in Ethiopia with many urban centers, and second, as was mentioned before, it is one of the regions where national attention has been given for implementing urban cadastre. As such, the case study of ANRS would be helpful in developing a theory for the legislation-cadastre nexus with implication for the country as a whole (Section 4.2).

[17] Alexander L. George & Andrew Bennett, Case Studies and Theory Development in the Social Sciences (MIT Press, 2005), at 24.
[18] *Id*.at 25.

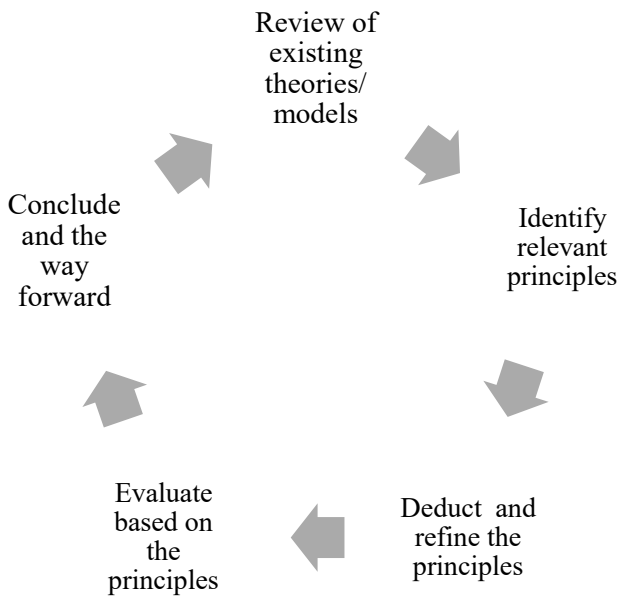

Figure 1: The conceptual framework to evaluate land registration legislation (**Source**: Author)

2. OVERVIEW OF URBAN LAND REGISTRATION LEGISLATION IN ETHIOPIA

2.1 National Level

Land institutions refer to policies and laws and organizations enforcing property rights.[19] In other words, urban land management is an outcome of the country's policies, programs/projects, legislations, and enforcement institutions. Ethiopia's urban land management legislation is diverse in its nature. It covers land holding and registration, land tenure, design planning and environment, and the expropriation and compensation procedure. The land tenure and ownership aspect is the basis for all other legislation. This basic component is found in the Constitution and the lease legislation. The former provides that urban and rural land and all other natural resources are owned by the state and the people, which is known as collective or public ownership of land.[20] The urban land tenure is leasehold (as opposed to land ownership concept) which is provided currently by the lease proclamation.[21] The lease law provides for the allocation of rights

[19] Feder, G. and Feeny, D. Land Tenure and Property Rights: Theory and Implications for Development Policy", 5(1) *The World Bank Economic Review,*135−153 (1991), at 137.
[20] Constitution of the Federal Democratic Republic of Ethiopia Proclamation,1995, Proc No 1/1995, *Fed Neg Gaz*, Year 1, No.1, Art. 40 (3).
[21] Urban Lands Lease Holding Proclamation, 2011, Proc No.721/2011, *Fed Neg Gaz*, Year 18, No.4.

to use land through urban leases, prohibits land possession and permission other than lease holding and provides for the administration of urban land lease holdings. It applies to all urban lands prospectively irrespective of how the lands were held previously.[22]

Urban land registration is governed by a handful of legislations in addition to many standards and manuals (Table I).

Table 1: Urban land registration legislations (Source: Author**)**

Legislation	**Description**
Urban Land Holding and Registration Proclamation No. 818/2014	It provides for the registration of rights, restrictions and responsibilities relating to urban land and the principles of a legal cadastre and landholding adjudication and registration system.
Urban Land Holding Adjudication and Registration Regulation No. 324/2014	It provides the objectives and principles of landholding registration and adjudication, and further detail on the implementation of Proclamation No.818/2014.
Cadastral Surveying Regulation No. 323/2014	It provides the principles of cadastral survey system implementation, specifies survey measurement and calculation activities and procedures.
Cadastral Surveying Directive No. 44/2015	It provides directions to surveyors on cadastral survey and preparation of the cadastral base maps.
Revised Urban Land Holding Adjudication and Registration Directive No. 61/2018	It provides guidelines and directions on the implementation of Proclamation No.818/2014, including details on the application for landholding adjudication and registration, the implementation of systematic and sporadic landholding adjudication and registration, responsibilities, and grievance handling.
Lease Proclamation 721/2011	It embodies the urban land tenure system, i.e. leasehold.

Urban land holding and registration law is the umbrella law for the urban land tenure registration. It provides for the different rights, restrictions, and responsibilities that need be

[22] *Id*. at Art.3.

registered.[23] It further stipulates "the registering institution shall be liable for damage caused to third parties who acted in good faith relying on the proof of registration of right, restriction or responsibility on a registered landholding".[24]

2.2 Regional Level

Basically, urban land legislation in Ethiopia is more centralized as it is national by its nature and scope. That means regions are governed by national legal framework. A good indication is that the urban land registration proclamation and regulations and directives issued under it are binding to all regions.[25] However, there seems to be no clear practical direction regarding the power of the Federal Government and the regions on law making on land issues.[26] That is why sometimes regional-level legislations have been enacted and this trend seems to grow in line with institutional growth and needs for improved land management.

In ANRS, the land registration function has become more formal after the enactment of the regional cities' powers and duties establishment legislation in 2004 (Proc No 91/2004) which is later replaced by legislation.[27] Specifically, this legislation provides that a city administration shall have the powers and duties to "administer and develop, in accordance with law, the lands and natural resources found within the boundary of the city in an efficient and effective manner; and to that end establish urban land title data system".[28] There are, however, more specific land tenure and registration legislations. They include the following:

- Leasehold Regulation No. 103/2011 and Directive No. 1/2012

The Regulation is enacted to implement the national lease Proclamation No.721/2011 and the Directive is enacted to implement the Regulation in full scale.

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[23] See Urban Land Holding and Registration Proclamation, *supra* note 12, Art. 30.
[24] *Id*. at Art. 40 (1).
[25] *Id*., at Arts.3, 50(1), 54.
[26] Thus, with regard to rural land, both the Federal Government and the regions adopt proclamations, regulations, etc. The regions' law making power derives from Art. 60 (2) Proc. 1324/24. In theory, however, the law making and administrative power of the Federal Government and the regions regarding land is set out under the FDRE Constitution. See at Arts. 52(2)(d) cum. 55(2).
[27] The Revised Amhara National Regional Cities' Establishment, Organization and Powers and Duties Determination Proclamation, 2017, Proc No.245/2017, *Zikre H*ig, Year 21, No.25.
[28] *Id*. at Art. 11(2).

- Directive to Provide for Provision of Land Holding Certificate for Land Holdings which do not have Complete Land Holding Certificate No. 4/2022 (replacing previous several directives on the matter)

  This legislation provides for the provision of land holding evidence for holdings, which, for various reasons, have not received current land holding certificate.
- Sporadic Adjudication, New Registration and Fees Determination Directive No.15/2022

  This Directive is enacted under national level legislation, namely, Proclamation No.818/2014, Regulation No. 324/2014 and Directive No. 61/2018. Its purpose is to address land adjudication requests submitted sporadically by landholders in urban areas where systematic land adjudication and registration has occurred. It also addresses service fee determination for these services.

3. EVALUATION TOOLS FOR LAND REGISTRATION LEGISLATION AND ENFORCEMENT

Land management legislation is one of the key tools for successful land policy system. "The foundation of any system of social order is the framework of laws, which reflect the Constitution of the country, governs the administrative processes, and expresses the rights and obligations to the citizen."[29] Legislation is one of the crucial components to establish a good and sustainable land registration governance system. To achieve its intended purpose, legislation should meet sound criteria and enhance the values of completeness, uniformity, consistency, coherence, equality, fairness and rationality.[30] For the purpose of this paper, we need criteria against which we can evaluate the land registration legislation in Ethiopia.

However, evaluative criteria for land registration legislation systems are rarely made and this part builds on these rare efforts to develop evaluative criteria.[31]From a broader and legal theory point of view, Fuller has coined eight excellences of the law, which according to him, a legal

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[29] Enemark, S. Building Land Information Policies, Denmark (UN, FIG, PC IDEA Inter-regional Special Forum on The Building of Land Information Policies in the Americas Aguascalientes, Mexico 26−27 October 2004). Retrieved from https://www.fig.net/resources/proceedings/2004/mexico/papers_eng/ts2_enemark_eng.pdf

[30] See Melkamu, *supra* note 8, at 428−429.

[31] See Id. at 433−436. This effort should continue until a more robust framework is developed for easy adaptation to future research.

system needs to possess or exhibit as a minimal amount of respect and dignity for those affected by it and which, together, give the law its existence. These are generality of law, promulgation, prospectivity, clarity, consistency or coherence, possibility, constancy, and congruence between official action and declared rule.[32] Interestingly, Fuller calls these rules "implicit laws of lawmaking".[33] The study takes these principles as relevant to assess Ethiopia's land law and policy because the principles are so universal in their nature which any legal system should adhere to.

Some specific indicators or measures of activities of good land governance including legislative principles are developed by the Land Governance Assessment Framework (LGAF) developed by Klaus Deininger et al.[34] The "Land Administration Tool Box" principles developed by Williamson also recognize sound legislative development as one of the tools for proper land management.[35] As such, they are quite relevant to measure Ethiopia's land registration legislation from a wider land governance and policy perspective.[36]

According to United Nations Economic Commission for Europe, the following indicates what land administration laws should include when drafted:

- Define and distinguish legal forms of land tenure (ownership, leasehold, use of land).
- Distinguish between real and movable property.
- Define who determines rights; and how land rights are transmitted.
- Establish an independent public land registration institution.

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[32] See generally Fuller, L. The Morality of Law, Rev. Ed. (New Haven: Yale University Press, 1969), at 46–91.

[33] Lon L Fuller, Anatomy of the Law (New York: Praeger, 1968) cited in Kenneth I Winston (ed), The Principles of Social Order: Selected Essays of Lon L Fuller (Hart Publishing, 2001), at 159.

[34] See generally Deininger, K. et al. The Land Governance Assessment Framework: Identifying and Monitoring Good Practice in the Land Sector (The World Bank, 2012). Retrieved from https://documents.worldbank.org/en/publication/documents-reports/documentdetail/862461468327558327/the-land-governance-assessment-framework-identifying-and-monitoring-good-practice-in-the-land-sector; Legislative component of LGAF is discussed in, Burns et al. Implementing the Land Governance Assessment Framework, (FIG Congress 2010 Facing the Challenges - Building the Capacity Sydney, Australia, 11-16 April 2010), at 5−6, retrieved from https://www.fig.net/resources/proceedings/fig_proceedings/fig2010/papers/ts03a/ts03a_burns_deininger_et_al_4640.pdf.

[35] Williamson, I.P. Land Administration "Best Practice" Providing the Infrastructure for Land Policy Implementation 18(4) *Land Use Policy*, 297−307 (2001), at 303.

[36] For possible use of other models or paradigms to evaluate land governance, See Solomon, D. Chekole et al. Performance Evaluation of the Urban Cadastral System in Addis Ababa, Ethiopia, 9,505*Land-MDPI*, 2020.

- Ensure that the State guarantees registered rights.
- Establish simple administrative systems for land transfer and property formation.
- Establish quick and simple procedures for mortgage and forced sales.
- Co-ordinate legislation related to planning, land-use, land value, land registration.
- Ensure clarity of responsibilities, roles and powers of the authorities involved, and
- Specify the administrative role of the agencies and actors involved.[37]

Nevertheless, we need to deduct the most important and relevant evaluative criteria from the discussion above for simplicity and clarity. These are presented textually as follows:

- Clarity, consistency or coherence, generality, constancy, reliability, and completeness
  The land registration rules are clear in their meaning and scope especially in defining all major functions of land administration namely land tenure, land use planning, value and development, there is no contradiction among different legislations, the legislations are made to address all individuals in similar manner, the rules do not change in application or in enactment without justifiable and rational cause, and are trustworthy, acceptable or legitimate in the eyes of citizens and all major stakeholders.
- Congruence between official action and declared legislation.
  This entails enforcement of land rights recognized by law or enforcement of legislation and prevention and resolution of violations of the rules in legislation.
- 'Continuum' of rights
  This refers to the existence of mechanisms for recognition, description and definition of land rights, restrictions and responsibilities including customary rights and the land rights of public offices, public lands, and lands held by religious and social institutions.
- Clarity of institutional mandates
  This entails coordination in institutional relations in central–local and local-local institutions.
- Accessibility, cost–effectiveness, responsiveness, and sustainability

[37] United Nations Economic Commission for Europe Working Party on Land Administration Social and Economic Benefits of Good Land Administration (HM Land Registry, London, Second Edition, 2005), at 14, retrieved from https://unece.org/sites/default/files/2022-01/benefits_landadmin_ed2.pdf.

This signifies the ease at which users and stakeholders access the information, the quantity and quality of land information, the cost of service, and the level in which fast responses are provided when so requested by urban dwellers.

- Transparency, participation, and good governance

  The working system, procedure and requirements, service delivery, decisions, and determinations, etc. are made in a manner all can understand and access to, mechanisms to detect and deal with illegal staff behaviour exist in all registry offices, and all cases are promptly dealt with.

The following Section shall evaluate the land registration legislation against these criteria (Table IV).

4. Synthesis of Key Findings: Practical Gaps and Their Implication

4.1 Analysis of Land Registration Problems and Gaps

Several studies investigated many land governance matters in relation to diverse issues of land management such as cadastre,[38] peri-urban land and informal settlement,[39] planning,[40] corruption,[41] land acquisition,[42] urban land development and renewal,[43] and institutional organization,[44] in Ethiopian urban centers especially Bahir Dar and Addis Ababa. Their insight was critical to better understand the gaps in the land registration and governance system. Consistent with the findings of other studies, documentary review of various reports and documents in the ANRS Land Bureau and Bahir Dar City Land Holding Registration and

[38] Birhanu, K.A. et al, *supra* note 2; Solomon, D. Chekole. et al, *supra* note 36.

[39] Abebe M.Wubie. et al. Synthesizing the dilemmas and prospects for a peri-urban land use management framework: Evidence from Ethiopia, 100 *Land Use Policy* 105122 (2021); Berhanu, K.A. et al. A socio-spatial methodology for evaluating urban land governance: the case of informal settlements, 60(2) *Journal of Spatial Science*, (2015), at 289–309.

[40] Genet, A. Urban Plans and Conflicting Interests in Sustainable Cross-Boundary Land Governance, the Case of National Urban and Regional Plans in Ethiopia, 13, 3081*Sustainability* (2021).

[41] Misganaw, G. B. Corruption in the post-1991 urban land governance of Ethiopia Tracing major drivers in the law, 4(1) *African Journal of Land Policy and Geospatial Sciences,* (2021), at 33−52.

[42] Dereje, T.A. & Birhanu, G.A., The Practice of Peri-Urban Land Acquisition by Expropriation for Housing Purposes and the Implications: The Case of Bahir Dar, Ethiopia, 7*Urban Science*, (2023), at 1−19.

[43] Meskerem, Z. Inner City Urban Renewal: Assessing the Sustainability and Implications for Urban Landscape Change of Addis Ababa, 36 *Journal of Housing and the Built Environment*, (2021), at1249–1275 .

[44] Solomon, D. Chekole. Analyzing the Effects of Institutional Merger: Case of Cadastral Information Registration and Landholding Right Providing Institutions in Ethiopia, 10, 404 *Land-MDPI* (2021).

Information Agency shows that the following are the major indicators of existing problems found in the legal cadastre system of ANRS urban centers. These include:

- The land creating institution does not provide complete land holding file and documentation and fails to give fast response when a file is returned to them for verification.
- Basic land right documents are not protected, there is intentional loss of them thereby illegally transferring the lands to non-owners and putting them in a state of difficulty in maintaining transparency and accountability.
- Survey control points are damaged by other infrastructure activities.
- Limited cooperation between the land creator and land registration office expecting that the jobs performed by the right creator will be taken over by the land registration office.
- Resources necessary for land adjudication are not supplied adequately.
- Burden on the human resources in land adjudication registration and service delivery due to inefficient organizational structure.
- Pre-adjudication activities such as block partition were not done in some adjudication Sections.
- Conflict between document adjudication and survey adjudication information makes it hard to provide services such as produce map/plan.
- Parcels not being made ready for adjudication and difficulty of giving land registration service for these parcels.
- Surveying equipment being damaged and shortage.
- Shortage of budget for activities such as land holding filing and map preparation; lack of complete documentation for Kebele and public rental houses, green area parcels, public and religious institutions, and informal parcels.[45]

As consequence of these problems, urban land registration coverage is too low generally in all urban centers in ANRS[46] as it is the case in the whole country.[47] Out of the 718,000 parcels

[45] See example. ANRS Urban Land Holding Registration and Information Agency, Training Material, 2017, at 14–16; Presentation by Bahir Dar City Urban Land Holding Registration and Information Agency, July 2017.
[46] See Annual Plan Implementation Report, ANRS Bureau of Land, 2022/2023, at 40.

estimated to be found in 14 urban centers of the region, only 4 % are registered. The difference between parcels adjudicated and registered/certified is huge, less than half of the adjudicated being certified. For example, in Bahir Dar alone, out of 95 000 parcels, only 14% are adjudicated and only about half of them are certified. This problem is hampering project intervention. What is more, each year the plan for land adjudication and registration is far less than the number of parcels existing in the urban centers (Table III).

Table II: Legal cadastre coverage in ANRS from 2018-2023 (Source: Land Bureau, 2023**)**

No.	City	Total parcel	No of parcel adjudicated by document	No of parcel registered	No of parcel certificate issued
1	Bahir Dar	95,000	13671	8953	7853
2	Gondar	95,000	9109	2523	2400
3	Dessie	95,000	14880	3776	3776
4	Debre Markos	40,000	2959	2474	2474
5	Debre Berhan	40,000	8720	4738	3700
6	Combolcha	35,000	3697	537	478
7	Woldia	30,000	2481	185	122
8	Debre Tabor	30,000	5060	1773	1773
9	Enjibara	18,000	4425	3497	2393
10	Fenoteselam	18,000	1369	758	719
11	Bure	180000	1314	746	746
12	Debark	12,000	2430	89	89
13	Kemissie	18,000	4050	285	285
14	Lalibela	12000	144	26	26
	Total	718,000	74309 (10%)	30360 (4%)	26834 (3.7%)

Even out of the plan (which is far less than actual parcels), only about half of the planned parcels are given land certificate (Table IV).

[47] Solomon, D. Chekole. et al. *supra* note 36, at 3.

Table III: Urban land registration plan and achievements in ANRS in the year 2022/23 (Source: Land Bureau, 2023**)**

No.	Activity	Planned	Achieved (%)
1	Transfer of land holding from right creator to right registration office	42,000	30,288 (72%)
2	Land adjudication by document	42,000	28,180 **(**67%**)**
3	Opening adjudicated parcel information to the public	42,000	26,702 (64%)
4	Give land holders evidence of adjudication	42,000	14,419 (34%)
5	Deliver adjudication evidence to land registration office	42,000	21,361 (51%0
6	Undertake land holding registration	29,400	17,413 (59%)
7	Issue land holding certificate	29,400	16,244 (55%)

The coverage of land registration in Bahir Dar, the capital of ANRS, is also too low (Fig. 1). Out of the total parcels in the city (95000), only 9414 are adjudicated (about 10%).

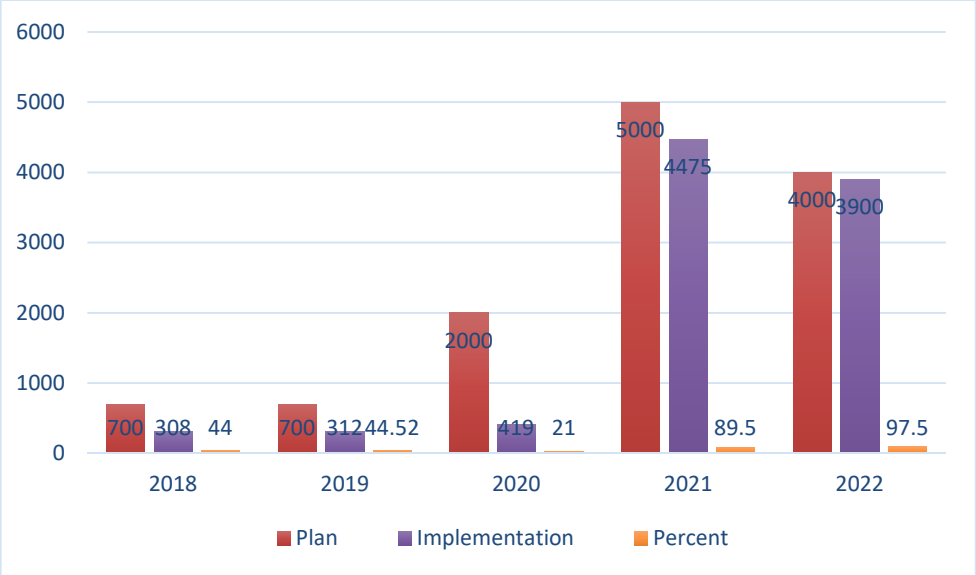

Figure 2: Annual performance of land registration in Bahir Dar for 5 Years (2018-2022) (**Source**: Land Bureau, 2022)

4.2 The Contribution of Legislative Gaps to Weak Land Registration System

Under this Section, we attempt to see how gaps in the legislative framework contributed to the existing problems in land registration, and, more broadly to land management. From the problem analysis outlined in the earlier Section, a few outstanding issues can be distilled which need to be discussed for better clarification and to cater for alternative mechanisms to mitigate the problems. These are the type of cadastre, the nature of land rights, relationship between right creator and right registration office, formal parcels and informal parcels, and unsupported practices.

- **The type of cadastre**

  The present land registration system is a legal cadastre.[48] This type of cadastre focuses on the registration or formalization of land parcels, the benefits or interests they provide and the beneficiary or owner. This may happen in a systematic manner, i.e. once for given number of parcels at a given time; or in a sporadic manner, i.e. whenever there is a specific request for land adjudication following a transaction.[49] This type of cadastre is limited in scope. That means it does not provide information on land developments such as infrastructure and parcels other than individually owned ones such as green areas and public holdings. Therefore, we need to cater for legislation that provides better cadastre so that project intervention brings better results for the stakeholders. The cadastre this study proposes is a multipurpose cadastre. This type of cadastre gives wider room for more diverse information on land and users, and it provides for a more holistic and integrated land management system. Moreover, it strengthens land development for various cases be it infrastructure or other.

- **Clarity of land rights and land development**

  Present land management legislation, especially lease legislation and land holding, and registration legislation lack clarity as, for instance, they do not define land rights in full.[50] As we know, land management and land administration cover four major functions, namely, land tenure, land use, land value, and land development. While the first three components are defined relatively clearly by mainstream legislation, namely, lease

[48] Urban Land Holding and Registration Proclamation, *supra* note 10, Art. 6.
[49] *Id*., at Art. 2 (6) & (7).
[50] See also Solomon, D. Chekole. et al, *supra* note 44; Abebe M.Wubie.et al, *supra* note 39.

legislation, land holding and registration law, and planning laws, the last or land development is not defined. The FDRE constitution provides that landholders have the right to undertake development on their parcel and make dealings with it.[51] But land development may be a wider concept which may indicate the production of property through the application of resources like labor and skills on different land parcels like road infrastructures, public domain property, religious holdings and common public facilities like green spaces and stadiums, intrastate and interstate boundary marks, and so on.This major tenet needs to be defined and addressed in adequate detail by legislation, especially the urban land holding and registration legislation. Not only should the whole meaning and process of land development be defined but also the legal relationship between a particular parcel of land and development made on that land should be clearly defined. Lack of clarity in this regard has made land development an alien concept to land registration practice in Ethiopia. For instance, how infrastructure development such as roads and utility infrastructure is to be related to the land registration system needs to be road-mapped.[52]

- **Relationship between right creator and right registration office**

  Land management power in ANRS is divided between the Bureau of Urban Development and Infrastructure and the Land Bureau. Some of the duties of the former, which seem to be most relevant for land management in the context of this study include:

  - Render the appropriate response and register for transfer of property requests presented by urban holdings, timely transfer changes taken place on land holding to concerned body.
  - Follow up urban centers found in the region to be led by plan and urban plan, and support hereof; and

[51] FDRE Constitution, *supra* note 20, Art. 40 (7).

[52] For a discussion of the relationship between water covered lands and wetlands and dry lands in land registration, see Melkamu, B. Moges *Towards a Land Administration Approach to Water Resource Management in Ethiopia with Particular Focus on Lake Tana Watershed*, 17(2) *Mizan Law Review* (2023).

- Receive any land found outside boundary of urban structural plan and prepared by concerned body, transfer it to third body, develop same economically, administer and control it.[53]

On the other hand, some of the specific powers and duties of the Land Bureau are:

- Study, register and maintain the type and amount of rural as well as urban land available in the region, follow up and supervise its administration and use thereof.
- Study and determine the land use found in the region; follow up that land users take care of their land holdings in various ways; devise various incentive methods for those who hold their land properly and take an appropriate measure on those who do not discharge their own duties.
- Identify land used for different services through study, enter same to land bank, cause same to be prepared in sufficient condition, devise procedures how they are transferred to the concerned body, follow up and control the implementation fairness thereof.[54]

In practice, the Bureau of Urban and Infrastructure Development is known as landholding right providing institution or simply "right creator" which is different from the registration institution. Accordingly, it undertakes what is referred to as right creation over a parcel of land for landholders. There is some back up of rules for this stipulation as evidenced by the urban land holding and registration regulation, which implies distinct institutions for "rights creation" and "rights registration".[55] This creates conflict with the emerging change in land management with land management functions required to be consolidated in one institution.[56] In practice too, this diversion is, as was mentioned in Section 5.1, creating many problems of urban land management. Therefore, legislation needs to be modified to bring better land management by clearly transferring land management and registration to the Land Bureau. Particularly land transfer needs to be done by the right registering institution and the idea of right-creation needs to be moved to the Land Bureau.

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[53] The Amhara National Regional State Revised Executive Organs Re-Establishment and Determination of its Powers and Duties Proclamation, 2021, Proc No 280/2021, *Zikre Hig*, Year 26, No 18, Art.18 (1), (5), (6).
[54] *Id*. at Art. 17.
[55] See Urban Landholding Adjudication and Registration Council of Ministers Regulation, 2014, Reg No.324/2014, *Negarit Gazetta*, Year 20, No 83, Arts. 2 (5) and (8).
[56] For example, ANRS and Oromia region have merged urban and rural land management under the same institution.

- **Formal parcels vs. informal parcels**

  Currently, legislation is focusing on formal land rights as it clearly provides for the adjudication and registration of formal rights, restrictions, and responsibilities. The law and the land management system in general does not provide for continuity with informal holdings.[57] But urban areas are dominantly held under informal settings.[58] Some land administration models approved both internationally and nationally provide that land rights exist in continuum and, as such, legal protection should be given to land rights that exist outside formal recognition. The field of land administration knows of various theories or models regarding this matter.[59] Thus, at international level we have the Social Tenure Model.[60] This model has been adapted to Ethiopia's context and referred to as Ethiopian Land Administration Model (ELADM).[61] According to ELADM, rights, restrictions and responsibilities have been developed to match with Ethiopian current and possibly future legislation by including customary rights and usufruct.[62]

[57] Berhanu, K.A. et al., *supra* note 39.

[58] See eg, Fentaw Baye et al, *Administrative failures contributing to the proliferation and growth of informal settlements in Ethiopia: The case of Woldia Township*, 9Heliyon (2023), at 2; Amanuel, Weldegebriel et al, supra note 13, at 3-4.

[59] See generally Melkamu, B.Moges. Modelling Legislation for a Sustainable Cadastral System (PhD thesis, University of Melbourne, Melbourne Law School, 2015), at 54−71.

[60] Augustinus, C. Social Tenure Domain Model: What It can Mean for the Land Industry and for the Poor (International Federation of Surveyors, 2010), at 7.

[61] Ministry of Urban Development, Housing and Construction, Ethiopian Land Administration Domain Model (ELADM) No.-02/2015, Jan.2015.

[62] *Id*. at 77.

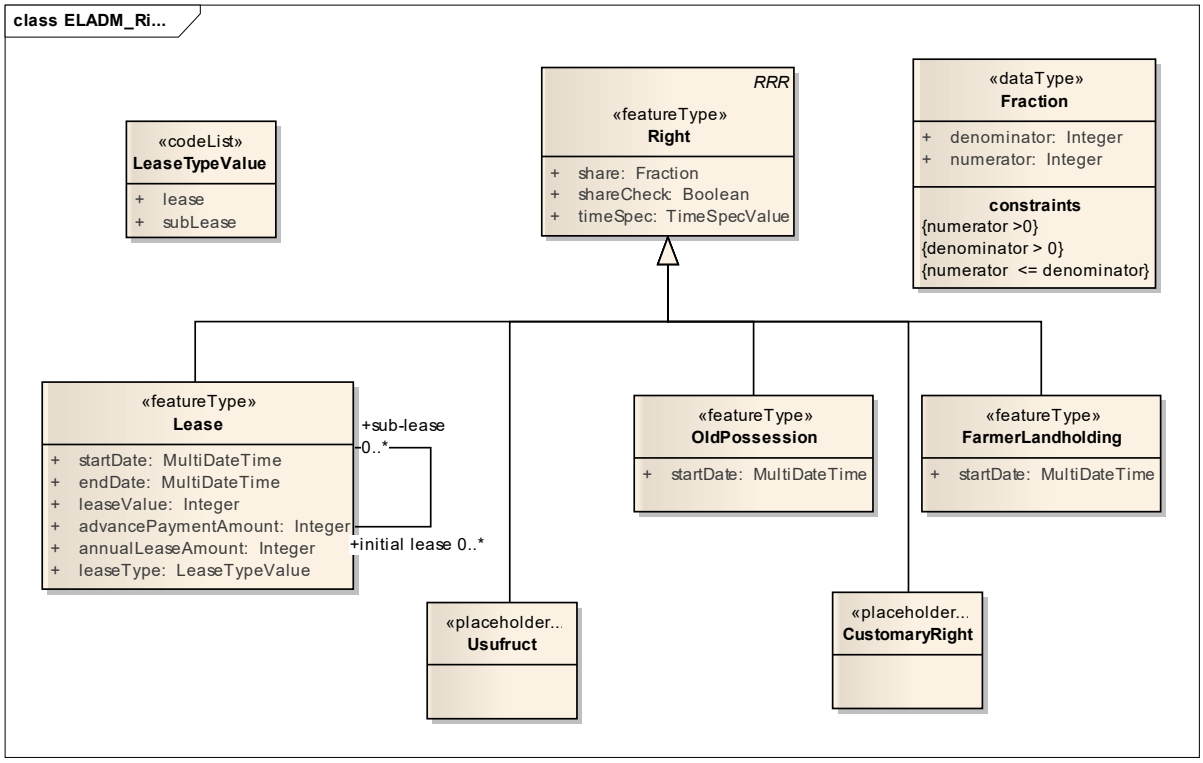

Figure 3: Right and sub-types (ELADM) (Source: Ministry of Urban Development and Housing, 2016**)**

It should be noted that the ANRS Bureau of Urban and Infrastructure has enacted directives for the recognition of some types of informal holdings. So, we have the Informal Holding Administration Directive No. 4/2022 which has replaced similar previous directives No.2/2012, 8/2014 and 2/2018. While the idea of regularising informal possessions is a great idea, it needs to be addressed at higher/Proclamation level to ensure transparency and enforce-ability. So, the law needs to have rules on how to enforce this.

- **Inappropriate practices**

  Considering that land is a scarce resource and the most basic resources for the citizens, land management in general and land adjudication and registration system in particular needs to be undertaken under existing strict, transparent, and disciplined working procedures laws and policies. However, the system is full of many drawbacks as discussed under Section 5.2. Further, unlawful, irregular and inappropriate practices could hamper the land registration development and sustainability in ANRS. One first issue is organizational because the Land Bureau has not yet handled all major urban land administration functions, i.e. it is merely symbolic. The Land Bureau must be strong and complete by itself and needs to handle all

basic land management functions. In this sense, the relatively good practice of land management already established in the case of rural land needs to be integrated into urban land management.[63] The establishment of a Land Bureau is only the first step; the institutional merger needs to be implemented at a lower level (city administration and lower levels) and a merger of legislation is pivotal. Further, the establishment of other support organizations must be done in a manner that does not frustrate regular enforcement in a predictable manner. In this regard, we can mention the decision of Ministry of Urban Development and Infrastructure decided that World Bank budget be used for urban land adjudication, registration and related services in 2019/2020 to be carried out by the support of professional entities (established as small micro enterprises) with the view to create job opportunities for the youth. [64]

A second issue relates to the checking of unsupported practices which we can observe from the operations of the land registration system in ANRS. In this sense, we can raise the practice of adjudication which is divided into adjudication by documentation and adjudication by survey measure. Further, we can recall the issuing of two certificates, namely, land adjudication certificate and land registration certificate. Land registration needs to be certain and uniform in its procedure and outcomes. So, there needs to be an improvement of legislation in this regard. Finally, we can raise the issue of financing urban land registration in ANRS. Land registration activity is a regular and most demanding and useful task for social, economic and governance development in line with the aspirations of existing laws and policies. If so, financial management for the task needs to be in line with these needs and goals as defined in legislation. In practice, however, land adjudication and registration are undertaken fundamentally by World Bank grant/loans. Unless this is smoothly unified with a robust land management system, it will contribute to the low performance and discontinuity of the system. Further, it will encourage the use of grant money for temporary and personal needs rather than contributing to sustainable urban land governance. Therefore, a regular financial supply needs to be in place if we need to have genuinely prosperous, smart, and enjoyable urban centers.

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[63] Suggestions for urban-rural land institution integration have been made by several researchers. See Melkamu, supra note 2, at 16-18; Abebe M. Wubie. et al, *supra* note 39, at 11 & Solomon, D. Chekole., *supra* note 44.

[64] ANRS Urban Land Holding Registration and Information Agency Term of Reference for Undertaking Land Adjudication by Associations in ANRS Urban Centers (Amharic), August 2020.

The following table summarizes the problems in the urban land registration system and evaluates them against the set criteria.

Table IV: Evaluative criteria and their implication to sustainable land registration in ANRS (Source: Author**)**

Problem/gap characteristics	**Implication to sound land registration legislation and its enforcement**
The land registration system is backward and un-supported by modern technology.	Reliability and completeness
Attempts for land registration are not supported by the proper institutional system and they are unsus-tainable (inconvenient or lack of offices, risks and damages, low salary, etc.)	Sustainability
The system favors corrupted and rent seeking prac-tices and it is contributing to bad land governance	Transparency and good governance
The system is inconsistent, un-integrated and as a result is threatening tenure security	Clarity, consistency or coherence, generality, con-stancy, ‘‘continuum’’ of rights
Land information is inaccessible to appropriate stakeholders and causes trouble and burden to land users, shifts the economic benefit which urban cen-ters should have driven from land sector to illegal brokers	Accessibility, cost–effectiveness, and sustainability
Lack of awareness or commitment on the part of leaders and stakeholders about land registration	Congruence between official action and legislation
Failure to cooperate and provide timely response when problems occur during implementation	Clarity of institutional mandates, responsiveness
Lack of commitment and understanding on the part of dwellers in doing what is expected of them dur-ing adjudication and registration	Participation and good governance

CONCLUSION AND RECOMMENDATIONS

Despite a century-old urban land registration attempts in Ethiopia, full-scale legal cadastre begun since 2011 through establishment of institutional, policy and legislative frameworks. Similarly, the ANRS urban centers (including its capital, Bahir Dar City) implemented cadastre since early 2000s. However, the land registration system in Bahir Dar and other urban centers of ANRS are fraught with many problems and it is not successful. The study has forwarded the argument that institutional and legislative gaps have contributed to this failure. These, among other things, relate to the limitation of the scope and nature of cadastre to legal cadastre, poor definition of

land rights mainly the right to land development, confusion rand overlapping regarding the powers of land management between the Bureau of Urban and Infrastructure Development and Land Bureau (and all bodies under each), the failure to accommodate informal rights and rural lands in urban centers, and practices contrasting with the law and formal system of land registration. As such, the legislative gap has affected the rreliability, sustainability, transparency, congruence, institutional mandate, responsiveness, and over all urban land governance.

The author recommends the following to amend these gaps. First, legislation needs to expand the type of cadastre from legal cadastre to fiscal and multipurpose cadastre. This helps to improve the potential of the land registration service by integrating with the management of different public functions such as government held property. This also leads to clear power division within implementing institutions.

Second, legislation needs to provide all land rights in detail along with the four main functions of land management, namely, land tenure, value, use and development. Especially, the right to land development needs to be elaborated in the land holding proclamation and should not be hidden under abstract ideas such as land rights, land tenure including lease rights. Land development must be at the center of the land management system because land development is the most powerful engine for economic development that the country needs most.

Third, powers and duties of executive bodies' legislation need to categorize the functions of land bureau and urban development bureaus clearly. Particularly, land management functions like land transfer and registration should be given to the Land Bureau.

Fourth, legislation needs to set mechanisms whereby informal rights would properly evolve into formal rights. Legislation needs to meet practical scenarios so that institutional role is high and in line with good governance principles enshrined in all relevant legislations and policy prescriptions in the country (e.g. principles of leasehold laid down in urban leasehold law). This is also helpful for a sustainable and predictable land management system in urban areas of ANRS.

Fifth, practices, which are not in line with legislation and formal institutional set up should be avoided. These include unnecessary dissecting of land administration functions like land

adjudication and registration, provision of different certificates like adjudication, registration, and lease certificates. A landholder needs to have a single powerful and accurate land holding certificate. Finally, future research should be increasingly carried out on land management legislation development, enforcement, and evaluation and monitoring.

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ታሕሣሥ 30 ቀን 2011 ዓ.ም

ዳኞች፡- ብርሃኑ አመነዉ

በዕዉቀት በላይ

እንዳሻዉ አዳነ

ሃይሉ ነጋሽ

እትመት አሠፋ

አመልካች፡- አቶ ቦጃ በየነ

ተጠሪ፡- የኦሮሚያ ጠቅላይ ዓቃቤ ሕግ

መዝገቡ ተመርምሮ ተከታዩ ፍርድ ተሰጥቷል፡፡

<u>ፍ ር ድ</u>

ለሰበር አቤቱታው መነሻ የሆነው ጉዳይ ወንጀልን የሚመለከት ነው፡፡ የአሁን ተጠሪ በአሁን አመልካች ላይ በስር ፍ/ቤት ያቀረበው ክስ ይዘት አመልካች የኦሮሚያ ክልል የቡና ጥራትና ንግድ ቁጥጥር ለመወሰን የወጣውን አዋጅ ቁጥር 160/2002 አንቀጽ 13/2፤19(1)(2)(5)(6) እና 23(6) ድንጋጌን በመተላለፍ ሆን ብሎ አስቦበት በቀን 26/05/2010 ዓ.ም ከምሽቱ በግምት 3፡00 ሰዓት በምዕራብ ጉጂ ዞን ገላና ወረዳ ፖሬ ከተማ ልዩ ቦታው ኬላ በተባለው ሕገ-ወጥ ቡና ንብረትነቱ የአመልካችበሆነ የሰሌዳ ቁጥሩ 3-38518 አ.አ በሆነ የጭነት መኪና ግምቱ ብር 6፣3520 የሆነ 14 ኩንታል ታጥቦ የተቀሸረ ቡና በመጫን ለጊዜው እጁ ካልተያዘ ሹፌር ጋር በመሆን ያለምንም ፈቃድ ከቡናው ላይ ሌላ ዕቃ በመጫን በማንገዝ ላይ እያለ ተይዟል የሚል ነው፡፡

አመልካች ቀርቦ ማንነቱ ከተረጋገጠ በኋላ ክሱ የደረሰው መሆኑን ለችሎቱ የገለጸ መሆኑን፤ ችሎቱም በሚገባው ቋንቋ የዓቃቤሕግን ክስ አንብቦለት ገብቶኛል በማለት ከገለጸ በኋላ መቃወሚያ የሌለው መሆኑን በመግለጽ የእምነት ክህደት ቃሉን ሲጠየቅ ድርጊቱን እንዳልፈጸመ እና ከመኪናው ረዳት እና ሹፌር ጋር ወደ ዲላ ከተማ በመንገዝ ላይ እንዳለ ህገወጥ ቡና ጭነሃል በማለት የተያዘ መሆኑን እና መኪናው ምን እንደጫነ የማያውቅ መሆኑን በመግለጽ ክሱን ክዶ የተከራከረ መሆኑን፤ ፍ/ቤቱም የዓቃቤሕግን ምስክሮች ሰምቶ አመልካች የቀረበበትን ክስ እንዲከላከል በማለት ብይን የሰጠ መሆኑን፤ አመልካች የመከላከያ ምስክር እንዲያቀርብ እድል ቢሰጠውም የመከላከያ ምስክር የለኝም በማለት ቅጽ ሞልቶ ያቀረበ መሆኑን እና ፍ/ቤቱም መከላከያ ምስክር ማቅረብ መብት እንጂ ግዴታ

አይደለም በማለት የአመልካችን ምስክር የማቅረብ መብት አልፎ አመልካችን ጥፋተኛ በማለት በሶስት ዓመት ጽኑ እሥራት እና በብር 25,000 መቀጮ እንዲቀጣ የወሰነ መሆኑን መዝገቡ ያሳያል፡፡ አመልካች ይህን ውሳኔ በመቃወም በየደረጃው ላሉ የክልሉ ፍ/ቤቶች አቤቱታ ያቀረበ ቢሆንም አቤቱታው ተቀባይነት አላገኘም፡፡ የሰበር አቤቱታው የቀረበው ይህን ውሳኔ በመቃወም ነው፡፡

የአመልካች የሰበር አቤቱታ መሠረታዊ ይዘትም፡- የስር ፍ/ቤት አመልካች በጠበቃ እንድከራከር በራሱ ተነሳሽነት ሊያመቻችልኝ ሲገባ በዝምታ አልፎታል፤ አመልካች መንግስት ጠበቃ እንዲያቆምልኝ ያቀረብኩትን ጥያቄ በማለፍ የግል ጠበቃ እንዳቆም ጊዜ ሳይሰጠኝ በማልሰማው እና መናገር በማልችለው ቋንቋ ያለአስተርጓሚ የተከሰስኩበትን ነገር ሳላውቅ የተሰጠው ውሳኔ አመልካች በሕገ-መንግስቱ የተሰጠኝን መብት የሚነፍግ ነው፤ አመልካች የተከሰስኩበት ሕግ ከተጠረጠርኩበት ወንጀል ጋር አግባብነት የለውም፤ አመልካች መኪናውን አላሽከረከርኩም የጫነውንም ነገር አላወቅኩም፤ ሹፌሩ መኪናውን ትቶ በመሸሹ በመኪናው አጠገብ ስለተገኘሁ ብቻ ጥፋተኛ ልባል የማይገባ በመሆኑ የስር ፍ/ቤቶች እነኚህን ሁኔታዎች ሳያገናዝቡ የሰጡት ውሳኔ መሠረታዊ የሆነ የሕግ ሥሕተት የተፈጸመበት በመሆኑ ሊታረም ይገባል የሚል ነው፡፡

የአመልካች የሰበር አቤቱታ ተመርምሮ አመልካች የመኪናው ባለቤት ቢሆንም ለሾፌር ሰጥቶ ሲያሽከረክር ከነበረበት ሾፌሩ ማምለጡ ተረጋግጦ ባለበት፤ አመልካች የቡና ነጋዴ ወይም አምራች መሆኑ ባልተረጋገጠበት፤ በሌላ በኩል አመልካች የቡናውን መጫን ያውቅ የነበረ መሆኑ ባልተረጋገጠበት እና በሚገባው ቋንቋ በአግባቡ ስለመተርጎሙ እና የመከላከል መብቱን ስለማወቁ ጥርጣሬ በፈጠረ ሁኔታ የመከላከል መብቱ ታልፎ የመኪናው ባለቤት በመሆኑ ብቻ ጥፋተኛ የመባሉን አግባብነት ከወንጀል ሕግ አንቀጽ 23 እና ከተጠቀሰው አዋጅ ጋር በማገናዘብ ለመመርመር ሲባል ጉዳዩ በዚህ ችሎት እንዲታይ ተደርጓል፡፡ ለተጠሪ ጥሪ ተደርጎም ግራቀኙ በጽሑፍ እንዲከራከሩ ተደርጓል፡፡

የተጠሪ መልስ ይዘት በአጭሩ፡- አመልካች የመኪናው ባለቤት ሆኖ ፈቃድ ሳይኖረው በክሱ የተጠቀሰውን ቡና በሌላ ዕቃ ስር ጭኖ ሲሄድ መያዙ ተረጋግጦበታል፤ ቡናው የተጫነው ከአመልካች ዕውቅና ውጪ ነው የሚለው ክርክር አሳማኝ አይደለም፤ ቡናው በሌሊት የተጫነ እና ከሌላ ዕቃ ስር የተጫነ በመሆኑ አመልካች የወንጀል ሀሳብ እንዳለው የሚያሳይ ነው፤ አመልካች በአዋጁ መሠረት ሀላፊነት ስላለበት የመኪናው ባለቤት ስለሆንኩ ተጠያቂ ልሆን አይገባም በማለት የሚያቀርበው ክርክር አግባብነት የለውም፤ ፍ/ቤቱ ለአመልካች ክሱን ካነበበለት በኋላ በሚገባው መልኩ በድጋሚ የተነበበለት መሆኑ ተገልጿል፤ የክልሉን ፍ/ቤቶች እንደገና ለማቋቋም በወጣው አዋጅ ቁጥር 141/200 አንቀጽ 17/2 ፍ/ቤቱ ተከላካይ ጠበቃ ለማቆም የሚገደደው የተከሰሰበት ወንጀል ከአምስት ዓመት ጽኑ እሥራት በማያንስ የሚያስቀጣ ከሆነ እና በራሱ ጠበቃ ለማቆም የማይችል ከሆነ ነው፤የተሰጠው የቅጣት ውሳኔ አመልካችን የሚጠቅም በመሆኑ የስር ፍ/ቤቶች የሰጡት ውሳኔ ሊጸና ይገባል የሚል ነው፡፡

የጉዳዩ አመጣጥ በአጭሩ ከላይ የተገለጸው ነው። እኛም በስር ፍ/ቤት የተሰጠው ውሳኔ የአመልካች የመሰማት መብት ተጠብቆ የተሰጠ ውሳኔ ነው ወይስ አይደለም የሚለውን ጭብጥ በመያዝ ለጉዳዩ አግባብነት ካላቸው ሕጎች ጋር በማገናዘብ እንደሚከተለው መርምረነዋል።

በመሠረቱ የተከሰሱ ሰዎች በሕግ የመሰማት መብት / the right to fair trial / ያላቸው ሲሆን ክስ ከቀረበባቸው በኋላ ተገቢ በሆነ አጭር ጊዜ ውስጥ በመደበኛ ፍ/ቤት በመቅረብ ጉዳዩ በዝግ ችሎት እንዲታይ የሚያስችል ሕጋዊ ምክንያት ከሌለ በቀር ለሕዝብ ግልጽ በሆነ ችሎት የመሰማት መብት ያላቸው መሆኑን የሕገመንግሥቱ አንቀጽ 20/1 ድንጋጌ ያስገነዝበናል። ኢትዮጲያ የተቀበለችው የሲቪል እና የፖለቲካ መብቶች ዓለምዓቀፍ የቃልኪዳን ሰነድ አንቀጽ 14 ድንጋጌም .....everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..... በማለት ይደነግጋል። ይህ መብት በሕገ-መንግስቱም ሆነ ኢትዮጲያ በተቀበለችው ዓለምዓቀፍ ስምምነት እውቅና የተሰጠው መሠረታዊ መብት እንደሆነ እና በየደረጃው ያሉ ፍ/ቤቶችም ይህን መሠረታዊ የሆነ መብት የማክበር እና የማስከበር ሀላፊነት እንዳለባቸው ከሕገመንግስቱ አንቀጽ 9/4 እና 13(1)(2) ድንጋጌዎች መገንዘብ ይቻላል።

የተከሰሱ ሰዎች ክሱ በቂ በሆነ ዝርዝር እንዲነገራቸው እና በጽሑፍ የማግኘት መብት ያላቸው መሆኑን፤ በፍርድ ሂደት ባሉበት ወቅት በተከሰሱበት ወንጀል እንደ ጥፋተኛ ያለመቆጠር እና በምስክርነት እንዲቀርቡ ያለመገደድ፤ የቀረበባቸውን ማንኛውንም ማስረጃ የመመልከት፤ምስክሮችን የመጠየቅ፤ ለመከላከል የሚያስችላቸውን ማስረጃ የማቅረብ፤ ምስክሮቻቸው ቀርበው እንዲሰሙላቸው የመጠየቅ፤በመረጡት የሕግ ጠበቃ የመወከል፤ ጠበቃ ለማቆም አቅም በማጣታቸው ፍትሕ ሊጓደል የሚችልበት ሁኔታ ሲያጋጥም ከመንግስት ጠበቃ የማግኘት መብት፤ ይግባኝ የመጠየቅ እና የፍርዱ ሒደት በማይገባቸው ቋንቋ በሚካሄድበት ሁኔታ በመንግስት ወጪ ክርክሩ እንዲካሄድላቸው የመጠየቅ መብት ያላቸው ስለመሆኑ የሕገ-መንግሥቱ አንቀጽ 20 በዝርዝር የተደነገገ ሲሆን የሀገራቱ ሕግ አካል በሆነው የሲቪል እና የፖለቲካ መብት አንቀጽ 14 ድንጋጌም ላይ በዝርዝር ተመልክቷል።

የተከሰሱ ሰዎች የቀረበባቸውን ክስ በአግባቡ ተረድተው ክሱን መከላከል የሚችሉትም ክሱ በሚገባቸው ቋንቋ በዝርዝር ሲነገራቸው እና በጠበቃ ሲታገዙ እንደሆነ ግልጽ ነው። በመሆኑም ፍ/ቤቶች የፍ/ቤቱን የስራ ቋንቋ የማይችሉ ተከሳሾች በቀረቡላቸው ጊዜ አስተርጓሚ በመመደብ ክሱ በሚገባቸው ቋንቋ በዝርዝር የመንገር እና በጠበቃ ታግዘው የመከራከር መብት እንዳላቸው፤ ጠበቃ ለማቆም የሚያስችል ዓቅም ከሌላቸው በመንግሥት ወጪ ጠበቃ የማግኘት መበት እንዳላቸው የመንገር ሀላፊነት አለባቸው።

የአመልካች ዋነኛ ክርክር የስር ፍ/ቤት አመልካች በጠበቃ በመታገዝ እንድከራከር አላደረገም፤ አመልካች የፍ/ቤቱን የስራ ቋንቋ የማልችል ሲሆን ያለአስተርጓሚ የተከሰስኩበትን ነገር ሳላውቅ

የተሰጠው ውሳኔ ሕገ-መንግስታዊ መብቱን የሚጻረር ነው የሚል ሲሆን ተጠሪ በዚህ ፍ/ቤት ባደረገው ክርክር ፍ/ቤቱ ለአመልካች ክሱን ካነበበለት በኋላ በሚገባው መልኩ በድጋሚ የተነበበለት መሆኑ ተገልጿል፤ የክልሉን ፍ/ቤቶች እንደገና ለማቋቋም በወጣው አዋጅ ቁጥር 141/200 አንቀጽ 17/2 ፍ/ቤቱ ተከላካይ ጠበቃ ለማቆም የሚገደደው የተከሰሰበት ወንጀል ከአምስት ዓመት ጽኑ እሥራት በማያንስ የሚያስቀጣ ከሆነ እና በራሱ ጠበቃ ለማቆም የማይችል ከሆነ ነው በማለት ከሚከራከር እና በስር ፍ/ቤት ውሳኔም ላይ አመልካች በሚገባው ቋንቋ ክሱ በድጋሚ ተነቦለታል በሚል ከመገለጹ በቀር አመልካች የፍ/ቤቱን የስራ ቋንቋ የማይችል ከመሆኑ አኳያ የተከሰሱ ሰዎች በሕገመንግሥቱ በተጠበቀላቸው መብት መሠረት አስተርጓሚ ተመድቦለት ክሱ የተነበበለት እና እንዲረዳው የተደረገ መሆኑን፤በጠበቃ የመወከል መብት እንዳለው እና በግሉ ጠበቃ ማቆም የማይችል ከሆነ በመንግስት ወጪ ጠበቃ የማግኘት መብት እንዳለው የተነገረው መሆኑን የስር ፍ/ቤት ውሳኔ ይዘት አያመላክትም፡፡ አመልካች አስተርጓሚ ተመድቦለት ክሱን እንዲረዳው እስካልተደረገ እና በጠበቃ እስካልታገዘ ድረስ የቀረበበትን ክስ በአግባቡ ተረድቶ ክሱን ለመከላከል ይችላል ተብሎ አይገመትም፡፡ በመሆኑም ጉዳዩ የቀረበለት ፍ/ቤት አመልካች የቀረበበትን ክስ በአግባቡ ተረድቶ መከላከል ይችል ዘንድ ለአመልካች አስተርጓሚ እንዲመደብ በማድረግ፤ አመልካች ጠበቃ የማቆም መብት እንዳለው እና ጠበቃ ለማቆም የሚያስችል አቅም ከሌለው በመንግስት ወጪ ጠበቃ የማግኘት መብት እንዳለው በመንገር ጉዳዩ እንዲታይ ማድረግ ሲገባው ይህን ሳያደርግ የሰጠው ውሳኔ በኢ.ፌ.ዲሪ ሕገመግስቱ እና ኢትዮጲያ በተቀበለቻቸው ዓለምዓቀፍ ስምምነቶች ለከተሰሱ ሰዎች የተጠበቁትን መሠረታዊ መብቶች ያላገናዘበ እና መሠረታዊ የሆነ የሕግ ሥሕተት የተፈጸመበት ሆኖ አግኝተነዋል፡፡ በዚህም ምክንያት ተከታዩን ውሳኔ ሰጥተናል፡፡

ው ሳ ኔ

1. በኦሮሚያ ብሔራው ክልላዊ መንግሥት የገላና ወረዳ ፍ/ቤት በመ.ቁ 03750 በቀን 13/06/2010 ዓ.ም የሰጠው የጥፋተኝነት እና የቅጣት ውሳኔ የምዕራብ ጉጂ ዞን ከፍተኛ ፍ/ቤት ይግባኝ ሰሚ ችሎት በመ.ቁ 00832 በቀን 30/06/2010 ዓ.ም የሰጠው ትእዛዝ፤ የክልሉ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት በመ.ቁ 260947 መጋቢት 13 ቀን 2010 ዓ.ም የሰጠው ትዕዛዝ፤የክልሉ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ.ቁ 284002 ግንቦት 21 ቀን 2010 ዓ.ም የሰጠው ትዕዛዝ በወ/መ/ሥ/ሥ/ሕ/ቁ 195/2/ለ/2 መሠረት ተሽሯል ።
2. በኢ.ፌ.ዲ.ሪ ሕገመንግሥት አንቀጽ 20 ላይ ለተከሰሱ ሰዎች የተጠበቁላቸው መሠረታዊ መብቶች ሳይከበሩ የሚሰጥ ውሳኔ መሠረታዊ የሆነ የሕግ ሥሕተት የተፈጸመበት ነው ብለናል፡፡
3. የገላና ወረዳ ፍ/ቤት በአመልካች ላይ ያስተላለፈው የጥፋተኝነት እና የቅጣት ውሳኔ የተሻረ መሆኑን አውቆ ለአመልካች አስተርጓሚ እንዲመደብለት በማድረግ፤ አመልካች በግሉ ጠበቃ

ማቆም የሚችል ከሆነ በግሉ ጠበቃ እንዲያቆም በማድረግ፤ አመልካች በግሉ ጠበቃ ማቆም የማይችል ከሆነ በመንግሥት ወጪ ጠበቃ እንዲመደብለት በማድረግ አመልካች የቀረበበትን ክስ እዲረዳው ካደረገ በኋላ ጉዳዩን አይቶ ተገቢውን እንዲወስን በወ/መ/ሥ/ሥ/ሕ/ቁ 195/2/ለ/2 መሠረት ጉዳዩ ተመልሶለታል፡፡

<u>ት ዕ ዛ ዝ</u>

-በአመልካች ላይ የተላለፈው የጥፋተኛነት እና የቅጣት ውሳኔ የተሻረ እና ጉዳዩ በድጋሚ እንዲታይ የተወሰነ በመሆኑ ተጠሪ ይህ ውሳኔ ከደረሰው ቀን ጀምሮ በአሥራ አምሥት ቀን ጊዜ ውስጥ መዝገቡን እንዲያንቀሳቅስ ታዟል፡፡

-የገላና ወረዳ ፍ/ቤት የአመልካችን አቆያየት በተመለከተ አግባብነት ያላቸውን ሕጎች መሠረት በማድረግ ተገቢውን ትዕዛዝ እንዲሰጥበት ታዟል፡፡

መዝገቡ ውሳኔ ስላገኘ ተዘግቷል፡፡ ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

ፅ/ወ

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UNIVERSITY OF GONDAR

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