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HUMAN RIGHTS LAW STREAM

Exhaustion of Local Remedies under ACHPR: Shall the Remedies under the House of the Federation be Exhausted?

By: HACHALU ADABA GALETA
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Finfinnee, Oromiyaa

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Declaration

I, Hachalu Adaba Galeta, declare that this thesis is original and has never been presented in any institution or university. In addition, I also declare that all information used in this study has been duly acknowledged.

Declared by:

Signed……

Date……

Confirmed by:

Supervisor: Assoc. Prof. Dr. Takele Soboka Bulto

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Acknowledgment

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List of Abbreviations

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
AJC	Anuak Justice Council
ANDM	Amhara Nation Democratic Movement
CCI	Council of Constitutional Inquiry
CUD	Coalition for Unity and Democracy
ECHR	European Convention of Human Rights
ECrtHR	European Court of Human Rights
EHRC	Ethiopian Human Rights Council
EPRDF	Ethiopian peoples' Revolutionary Democratic Party
FDRE	Federal Democratic Republic of Ethiopia
HoF	The House of the Federation
IACHR	Inter-American Court of Human Rights
NEB	National Electoral Board
OPDO	Oromo Peoples' Democratic Organization
SPEDM	Southern Ethiopian Peoples' Democratic movement
TPLF	Tigray Peoples' Liberation Front
UNHRC	United Nations Human Rights Council

Abstract

There is an internationally recognized principle of law known as rule of the exhaustion of local remedies which requires states to provide effective and sufficient remedies. Equivalently, there is also a globally recognized right to seek effective remedy from an independent, impartial, and competent tribunal. In the context of Africa, Art. 56 (5) of the African Charter on Human and Peoples' Rights (ACHPR) provides that communications are admissible only if they are submitted after exhausting local remedies unless those remedies are unavailable, ineffective or inadequate. In the same vein, the African Commission established three requirements- availability, sufficiency and effectiveness of remedy - to evaluate the nature of the local remedies for the purpose Art. 56 (5) of the ACHPR.

In one of the cases brought against Ethiopia, EHRC v. Ethiopia, complainants contended that the two bodies that are mandated to interpret the constitution, HoF and CCI, are not independent, impartial, competent, and do not decide cases according to fundamental principles of law while Ethiopia argued strenuously to the opposite. The Commission ruled that HoF and CCI are independent, impartial, competent, and decide cases according to fundamental principles of law.

The questions are: did complainants present sufficient information to the Commission that enables it to fully appreciate the nature of remedies under HoF and CCI, if any? Are there impediments to the remedy under HoF and CCI and, if so, what are they?

The above listed questions demand scientific answers, which will be uncovered via mixed legal research. It is mixed because the scientific legal research in this inquiry involves both doctrinal and empirical elements of research approaches. As to the empirical approach, interview and case laws of HoF, ACHPR, ECrtHR, and IACHR are employed alongside with other doctrinal approach to get the actual practice of the HoF. Finally, the research's finding is that exhaustion of local remedies from HoF is not mandatory for the purpose of Art.56 (5) of ACHPR.

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CHAPTER ONE

1. Introduction

1.1. Background

The grand pillar of this thesis is, everyone has the right to seek effective remedy from a competent, independent and impartial tribunal and these rights are recognized by various instruments across the globe.[1] However, if the source of the domestic remedy cannot operate impartially, independently and competently, then any one may seek remedy from international human rights tribunals such as the African Commission on Human and People's Rights (the Commission) before resorting to the domestic remedy. This can be justified by the fact that lack of impartiality and independence of the source of the local remedy renders that remedy unavailable, ineffective, and insufficient which has the effect of absolving complaints from exhausting local remedy.[2]

In Ethiopia, the power to interpret the Constitution is constitutionally given to the House of the Federation (HoF).[3] Additionally, Council of Constitutional Inquiry (CCI) is also constitutionally created to support HoF by identifying cases that need constitutional interpretation or not.

The point is that HoF must be independent, impartial and competent to compel complainants to exhaust local remedy from it. The issue is then: does HoF operate independently, impartially and

[1] Article 2(3)(b) International Covenant on Civil and Political Rights; Article 7(1) Organization of African Unity, African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982); entered into force 21 October 1986.; Article 25 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary session of the Assembly of the Union, Maputo, July 11-August 13, 2003; Articles 25 and 63(1) American Convention on Human Rights, Adopted at the Inter-American Specialized Conference on Human Rights San Jose, Costa Rica, 22 November 1969; Articles 13 and; 41 European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 10 Universal Declaration on Human Rights; and Articles 24 and 26 American Declaration of the Rights and Duties of Man. These all are relevant to the study through article 60 and 61 of African Charter of Human and Peoples' Rights and article 13 of the Federal Democratic Republic of Ethiopia's constitution.; ICCPR General Comment No. 13: Article 14 (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law *Adopted at the Twenty-first Session of the Human Rights Committee, on 13 April 1984,* Par. 1

[2] *Communications147/95 and 149/96 - Sir Dawda K Jawara v. The Gambia, Done in Algiers, Algeria on 11 May 2000,par. 31,* par. 32

[3] Constitution of Federal Democratic Republic of Ethiopia, *Federal Negariat Gazeta,* 1st year, no. 1 (August 1995), Art. 62 (2)

competently? This basic question of the thesis is analyzed based on the jurisprudences of the Commission, European Court of Human Rights, and other pertinent human rights principles.

The Commission was established to promote human and peoples' rights and ensure their protection in Africa.[4] Communications received by the Commission, shall be considered if they are sent after exhausting local remedies, if any.[5] The phrase 'if any' indicates that the local remedy shall be available. Regarding exhaustion of local remedy, the Commission has a view that the exhaustion of local remedy must be interpreted in light of the right to fair trial.[6]

In addition to ACHPR, African Commission has developed jurisprudence in its various decisions regarding exhaustion of local remedies in which some Communications were admitted[7] while others were declared inadmissible[8] for failure on the part of the complainant to exhaust local remedies. The Commission identified three exceptions in which complainants are not obliged to exhaust local remedies which are availability, effectiveness and adequacy (sufficiency) of the remedies.[9] The Commission rules the Communications admissible when "[…] the remedy available is not of a nature that requires exhaustion according to Article 56 paragraph 5 of the

[4] ACHPR, above n.1, Art. 30
[5] Ibid, Art. 56 (5)
[6] Communications No. 48/90-50/91-52/91-89/93: *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan,* par. 31, Communication -87/93 *Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria*, par.11, Communication -60/91 *Constitutional Rights Project (in respect of Wahab Akamu, G. Adega and others) v. Nigeria*,par.13, Communication -129/94 *Civil Liberties Organisation v. Nigeria*, par. 14, Communication 334/06 - *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Par. 92, *Anuak Justice Council v. Ethiopia*, par.49
[7] Communication *301/O5 – Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials v.Ethiopia)* par.121*;* Communications No. 87/93 *Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria, par.9;* Communications147/95 and 149/96 - *Sir Dawda K Jawara v. The Gambia,* Done in Algiers, Algeria on 11 May 2000,par. 32; Communication *-48/90, 50/91, 52/91, 89/93,* par.*39;* Communication *102/93: Constitutional Rights Project v. Nigeria,* par.44; Communication 157/96 : *Association pour la sauvegarde de la paix au Burundi v. Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia*, par. 65
[8] Communication 340/07 *Nixon Nyikadzino (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe, Done in Banjul, The Gambia, at the 11th Extraordinary Session of the African Commission held from 21 February to 1 March 2012;* Communication No. 435/12 *Eyob B. Asemie v the Kingdom of Lesotho, Done in Kigali, Rwanda at the 16th Extraordinary Session of the African Commission on Human and Peoples' Rights held from 20 – 29 July 2014;* Communication No. 338/07 *Socio-Economic Rights and Accountability Project(SERAP) v the Federal Republic of Nigeria,* par.68; Communications No. 221/98 *Alfred B. Cudjoe v Ghana, Bujumbura, 5 May, 1999.; Communication 300/05 : Socio Economic Rights and Accountability Project v. Nigeria, Adopted at the 5th Extraordinary Session of the African Commission on Human and Peoples' Rights, 21st to 29th July 2008, Banjul, The Gambia; Communication 467/14 – Ahmed Ismael and 528 Others v. the Arab Republic of Egypt, par. 174*
[9] *Haregewoin Gabre-Selassie and IHRDA v. Ethiopia,* above n.7*; Sir Dawda K Jawara v. The Gambia,* above n.2, par. 32

African Charter."[10] The nature of exhaustion of local remedies that does not require exhaustion is determined case by case.

In addition to provision of ACHPR and the jurisprudence of African Commission as discussed above, different literatures such as books,[11] articles[12] journal, guidelines,[13] reports[14] and others also suggest that the local remedies shall be available, effective and adequate for the complainants to be compelled to exhaust them. Several of such literatures deal with the independency, impartiality and competency of judiciary. But there are non-judicial tribunals with a mandate of some of judicial functions such as HoF in the case of Ethiopia.[15] Everyone has the right to seek effective remedy[16] from a competent, independent and impartial tribunal established by law.[17] The existence of independent and impartial tribunals is at the heart of a judicial system

[10]Communication -87/93, above no.6, par.9; , Communication -60/91 , above no.6, par.11

[11] Malcolm N. Shaw, *International Law* (Cambridge University Press, Fifth ed, 2003); Frans Viljoen, 'Communications under the African Charter:Procedure and Admissibility' in Malcolm Evans and Rachel Murray (ed), *The African Charter on Human and Peoples' Rights:The System in Practice 1986–2006* (Cambridge University Press, 2nd ed, 2008) ; Annemarieke Vermeer-Künzli, 'Diplomatic Protection as a Source of Human Rights Law' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 1st ed, 2013) ; Sarah Joseph and Adam McBeth (ed), *Research Handbook on International Human Rights Law*, Research Hand Books in International Law (Edward Elgar Publishing Limited, 2010); Theo van Banning Magdalena Seplveda, Gudrn D. Gudmundsdttir, Christine Chamoun and Willem J.M. van Genugten, *Human Rights Reference Handbook* (University for Peace, 2004); Nihal Jayawickrama, *The Judicial Application of Human Rights Law National, Regional and International Jurisprudence* (Cambridge University Press, 2002); Catarina Krause and Allan Rosas Asbjern Eide (ed), *Economic, Social and Cultural Rights*
(Martinus Nijhoff Publishers, second Revised ed, 2001); *Handbook on European law Relating to Access to Justice, European Union Agency for Fundamental Rights and Council of Europe* (2016);

[12] Takele Soboka Bulto, 'Exception as norm: the local remedies rule in the context of socio-economic rights in the African human rights system' (2011) 16(4) *The International Journal of Human Rights* 555; Sarah Braasch Chi Mgbako, Aron Degol, Melisa Morgan, Felice Segura and Teramed Tezera 'Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights' (2008) 32(1) *Fordham International Law Journal* ; Nsongurua Udombana, 'So far so Fair: The Local Remedies Rule in the Jurisprudence of African Commission on Human and People's Rights' (2003) 97(1) *The American Journal of International Law* ; Henry Onoria, 'The African Commission on Human and Peoples' Rights and the Exhaustion of Local Remedies under the African Charter' (2003) 3(1) *AHRLJ* ; Solomon T Ebobrah, 'The Admissibility of Cases Before the African Court on Human and Peoples' Rights: Who should do what? ' (2009) 3 (1) *MLJ* ; Nelson Ononchong, 'The African Charter on Human and Peoples' Rights:Effective Remedies in Domestic Law?' (2002) 46(2) *Journal of African Law* ;Godfrey M Musila, 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *AHRLJ* 442 ;

[13] Council of Europe, 'Guide to Good Practice in Respect of Domestic Remedies' (2013) ;

[14] 'The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on ' (European Court of Human Rights, 2012); 'REPORTS OF JUDGMENTS AND DECISIONS' (EUROPEAN COURT OF HUMAN RIGHTS, 2006)

[15] FDRE Constitution, above n.3, Arts. 62 (1) and Art.83

[16] UDHR, above n.1, Art.10; ICCPR, above n.1, Article 2(3)(b); ACHPR, above n.1, Article 7(1); Protocol to ACHPR on the Rights of Women in Africa above n.1, Article 25; ACHR, above n.1, Arts.25 and 63(1); ECHR, above n.1, Articles 13 and 41

[17] ICCPR, above n.1, Art. 14 (1); ICCPR General Comment No. 13, above n. 1, Par.1; ACHPR, above n.1, Art. 7

that guarantees human rights in full conformity with international human rights law.[18] Establishing special court is not prohibited but it is a must to maintain competence, independence and impartiality with regard to such courts.[19] The most important component of the principle of the independence of the judiciary is, *inter alia*, independence from the executive and the legislature.[20] In Ethiopia however, it seems that HoF and CCI are part and parcel of the executive and the legislature.[21] Is it theoretically and practically possible to be independent from them given their purpose of establishment and how they are operating? In this regard, the finding of this research concludes that the political contexts compel them to be partial and dependent.

The FDRE Constitution also provides that everyone has a right to obtain a decision or judgment by a court of law or any competent body with judicial power.[22] In Ethiopia, the power to interpret the supreme law of the land which contains the most important human rights provisions is out of the reach of courts though it ought to have been given to it. However, some argue that state may choose mode of implementing human rights but does it have an option to apply independence, impartiality and competence of the tribunals? The states may choose the mode of applying human rights laws domestically but according to African Commission independence, impartiality and competence of the tribunals shall not be compromised.[23]

In *HRC v. Ethiopia*, complainants argued that both HoF and CCI are neither courts nor judicial organs for purposes of exhaustion of local remedies[24] relying on the Communication *Alfred B. Cudjoe v Ghana*.[25] But the African Commission ruled that even if HoF and CCI are not courts, it

[18] International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – A Practitioners Guide, Second edition, (Geneva, 2017)
[19] OHCHR, Human Rights Cases and materials: Comparative Analysis of Selected Case-Law ACHPR, IACHR, ECHR, and HRC: The Rights to Due Process: An Independent, Impartial and Competent Tribunal p.
[20] Icelandic Human Rights Center, Human Rights Education Project, and Comparative Analysis of Selected Case-Law: ACHPR, IACHR, ECHR, ECHR, HRC: The Right to Due Process of Law. http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-rights-to-due-process
[21] Members of HoF are elected by State Councils or legislative body and some of them are working in various executive organs of regional and/or Federal governments. For example, regional head of states
[22] FDRE Constitution, above n.3, Art. 37 (1)
[23] Communication -87/93, above n.6, par. 8; Communication 147/83 *Lucía Arzuaga Gilboa v. Uruguay* (1985) HRC par. 7.2
[24] Communication No.445/13 Human Rights Council and Others v. Ethiopia, (2015), Par. 42
[25] *Alfred B. Cudjoe v Ghana*, above n.8

is more of legal nature than purely political[26] hence complainants ought to have exhausted the remedies under them.[27] For the Commission, "[…] the essential characteristic of the remedy that ought to be exhausted for purposes of Article 56(5) of the Charter is its demonstrable effectiveness in redressing a particular violation."[28] Citing its own former decisions,[29] African commission asserted that "[…] the remedy must primarily conform to and operate in accordance with certain fundamental legal principles. It must operate in strict observance of the procedural guarantees of a fair hearing by a competent, independent and impartial organ."[30]

The Conclusion of the Commission is that HoF and CCI are independent, impartial, competent, and decides cases according to the fundamental principles of the law based on the arguments of the State (Ethiopia). But did the complainants provide the African Commission with better evidence than the State (Ethiopia) did[31] to substantiate their arguments?

It seems that, practically, HoF and CCI are in situations in which they cannot be independent and impartial due to one of the purpose that necessitated their establishment and the fact that they are political bodies. One of the reasons of giving the power to interpret the Constitution to the HoF is to escape from "[…] 'judicial adventurism' or what some prefer to call 'judicial activism' […]"[32] Only few of members of HoF are trained in law based on representatives of Oromia to HoF.[33] But they are in charge of deciding some of the most controversial legal issues. This situation begs a question; can they really competently, independently and impartially handle constitutional disputes? These requirements of independence, impartiality and competence can be analyzed from different grounds. However, in this thesis only the existence of justified doubts in other words the appearance of independence and impartiality of HoF was analyzed. Thus, questioning

[26] HRC *v. Ethiopia*, above n.24, Par.69
[27] Ibid, Pars.69 and 74
[28] Ibid, Par.59
[29] Communication -87/93, above n.6, par. 8; Communication 147/83 above n.23, par. 7.2
[30] HRC *v. Ethiopia*, above n.24, Par.59
[31] To prove that the remedy under HoF and CCI are available, effective and sufficient, Ethiopia cited the case of *Melaku Fanta* in which the HoF found one provision of proclamation no. 25/96 unconstitutional. But the complainants failed to refute this single evidence with more convincing one.
[32] Dr. Assefa Fiseha, 'Constitutional Adjudication in Ethiopia: Exploring the Experiance of House of Federation (HOF)' (2007) 1(1) *Mizan Law review* 1, p.11
[33] Caffee Oromiyaa, Qaboo Yaa'ii, Yaa'ii Duraa Caffee, waggaa Hojii 1ffaa, bara Hojii 3ffaa, Fulbaana 1998, Finfinnee (Afan oromo), Oromia State Council, Minute, 1st meeting, 1st year, 3rd term of the Council, Addis Ababa, September, 2005; Caffee Oromiyaa, Qaboo Yaa'ii, Walgahii Ariifachiisaa Waggaa hojii 1ffaa, bara Hojii 4ffaa, Amajjii 23-24, 2003, Adama (Afan oromo), Oromia State Council, Minute, 1st Extra ordinary Meeting, 1st year, 4th term , January 31-February 1st, 2011, Adama

the independence and impartiality of HoF, the research argues that there is no effective and sufficient remedy available under HoF. Additionally, the research also argues that the members of HoF do not have the required legal knowledge and sufficient experience to interpret the Constitution. Above all, based on the cases analyzed in chapter three, HoF decides cases based on political consideration and policy than purely interpreting the constitution. Finally, the research concludes that exhaustion of local remedies from HoF should not be mandatory for the purpose of Art.56 (5) of ACHPR.

1.2. Research Problem

As already stated complainants lodged communications against Ethiopia in the African Commission and prayed the African Commission to exempt them from the obligation of exhausting local remedies required under Art. 56 (5) of the ACHPR.[34] The complainants argued that the remedies under HoF and CCI are not available, effective and sufficient as required by the African Commission and the ACHPR.[35]

Ethiopia, on the other hand, argued that the remedies under both HoF and CCI are effective and efficient.[36] Inverting all the arguments of the complainants, in various Communications, Ethiopia argued that the remedies under both HoF and CCI are available both theoretically and practically. Above all Ethiopia argued that both HoF and CCI are deciding cases according to the fundamental principles of laws, independently, impartially and in conformity with international human rights laws.[37]

In the Case of *EHRC v. Ethiopia*, accepting the arguments of Ethiopia, the African Commission ruled that the HoF and CCI are not completely political but legal in nature i.e. they decide cases independently, impartially and competently.[38]

But the arguments of the parties and the position of the African Commission beg questions that need research investigation. What facts led the African Commission for its conclusion? Is it the

[34] *EHRC v. Ethiopia;* Communication 299/05, *Anuak Justice Council v. Ethiopia*, (2006), pars. 33-39 (hereafter, *AJC v. Ethiopia*)
[35] ACHPR, above n.1, Art 56 (5)
[36] Ibid*; AJC v. Ethiopia*, above n.34
[37] *EHRC v. Ethiopia*, above n.24, pars.35-38
[38] Ibid, pars. 68-69

strength of the argument of Ethiopia or the weakness of the argument of the complainants? Are there facts that can be revealed through research that might have changed the position of African Commission had it been revealed by that time to the Commission? Frans Viljoen stated that African Commission often rules cases inadmissible due to lack of exhaustion of local remedy "…because the communications does not reveal a sufficient factual basis to indicate otherwise."[39]

From the above discussion, some of the contested facts about the HoF and CCI relate to the non-judicial nature, lack of independence, partiality, and competency. This research will investigate whether or not effective and sufficient remedies are available under HoF by identifying the determining contested factors using theoretical and empirical evidences such as cases and records of HoF. Therefore, the research problem can be broadly summarized as: is there an effective and sufficient remedy under HoF for the purpose of article 56 (5) of ACHPR?

1.3. Objectives

The general objective of this research is to identify whether exhausting local remedy from HoF should be mandatory or not for the purpose of Art.56 (5) of ACHPR.

The specific objectives

1. Identifying whether there are factors that can create justified doubts as to the independence and impartiality of HoF (institutional and personal independence) ;
2. Identifying whether or not members of HoF have necessary knowledge and experience in interpreting the Constitution (competence)
3. Identifying whether decisions of HoF indicate that HoF and its members are competent and impartial;
4. Finally, identifying whether remedies available from HoF fulfill the requirements of Art. 56 (5) of the ACHPR.
5. Whether or not CCI can fill the gaps of HoF

1.4. Research Questions

1.4.1. Is the HoF an independent, competent and impartial body for the purposes of Art. 56 (5) of the AHPR?

1.4.2. Are effective and sufficient remedies available under HoF?

[39] Viljoen, above n 11

1.4.3. Do members of HoF have necessary competence, impartiality, and independence and experience in interpreting Constitution?

1.4.4. Finally, should it be mandatory to exhaust local remedies from HoF for the purpose of Art.56 (5) of ACHPR?

1.4.5. Can CCI fill the gaps of HoF?

1.5. Significance of the Research

The finding of this research will help the academic communities such as law student, teachers and researchers to understand and get some insight about the nature of local remedies from HoF. African Commission, legal practitioners, NGOs, and (potential) parties to the case at the Commission level will get some understanding about some of the essential character of remedies under HoF. Above all, this research shows that not only actual lack of independence and impartiality are mandatorily required by the Commission to institute complaint against the state but appearance of lack of impartiality and independency. In other words the existence of justified doubt as to the independency and impartiality is sufficient to complain human rights violations to the Commission directly without seeking remedy from HoF.

1.6. Scope of the Research

This research investigates some major impediments to the right to remedies under HoF procedures. These are impediments regarding independence, impartiality, and competence of members of HoF which may render the remedy unavailable, insufficient and ineffective. Among several factors that render certain institution as dependent and partial; only the existence of justified doubt as to the impartiality and independence of HoF will be covered in this research. Under this part the general political and socio-legal context of the country and the implications of actual political membership of members of HoF to Ethiopian peoples' Revolutionary Democratic Party (EPRDF) are analyzed. Regarding competence of HoF, legal training of members of HoF based representatives of National Regional State of Oromia to HoF for three terms. The experience of the members is also analyzed based on representatives of National Regional State of Oromia to HoF. Finally, the quality of the decision of the HoF is analyzed based on some indicative decisions of HoF.

1.7. Limitation of the Study

The major research limitations are difficulty of accessing members of the HoF, necessary documents and profile of the members of HoF which are vital for the research. Such limitations forced the scope of the research to be limited only to those stipulated in the scope. To overcome the problem, the research focused on representatives of the National Regional State of Oromia, and to focus on doctrinal aspect of the research though, originally it was intended to investigate several cases of both HoF and CCI.

1.8. Research Methods and Methodology

1.8.1. Data Collection Methods

This research is mixed legal research in approach. It utilizes both literature and interview. Laws, treaties, general comments, guidelines, reports, books, and journals of articles, decision of Human Rights tribunals such as African Commission, decisions of CCI and HOF, and also other secondary materials are used to conduct the research.

1.8.2. Research Methodology

This thesis conducts systematic analysis, exposition and evaluation of legal rules, principles, and concepts in relation to exhaustion of local remedies in general, and some major impediments to remedy under HoF in selected areas which makes it doctrinal legal research. The research further goes to identify the actual applicability of such normative framework in case of HoF by analyzing decisions of HoF which makes it socio-legal research. Therefore, this research follows a mixed legal research approach.

As to the sample size and sampling techniques the cases used in the research are purposely selected. As to its representativeness, only illustrative cases are analyzed based on its relevance to the study. Therefore, the representativeness of the case is not measured in terms of number (size) but in terms of its significance to show the controversy being researched.

Regarding interview semi-structured interview was used in this research. The interviewees are members of HoF from National Regional State of Oromia Council. The interviewees are only selected from Oromia because it is difficult for the researcher to Travel to regional states to ask the information required. Phone interviewee was attempted but no one was answering the

phone.The interviewees are purposely selected since it is mandatory to solicit information from a proper person. This method was also used to get information that could not obtain from documents.

1.9. Structure of the Paper

The thesis has four chapters. Chapter one covers the background. This background comprises background of the study, statement of the problem, literature review, objectives of the study, research questions, significance and scope of the study, limitation of the study, methodology of the study and organization of the paper. Chapter two covers the discussion of the jurisprudence of the African Commission regarding exhaustion of local remedies. The core points under chapter two are the definition, rules and exceptions of local remedies both under the Commission as interpreted in different communications and ACHPR. Most importantly how unavailability, ineffectiveness and inadequacy/insufficiency are interpreted by the Commissions are discussed. Chapter three is where the major characteristics of remedy from HoF is discussed and analyzed from the perspective of the Commission's jurisprudences, the jurisprudences of European Court of Human Rights and other pertinent laws and principles. The last chapter, chapter four is conclusion and recommendation followed by bibliography and appendix

CHAPTER TWO

The Jurisprudence of African Commission on Exhaustion of Local Remedies

2.1 Introduction

In this chapter, the jurisprudence of African Commission regarding the exhaustion of local remedies will be discussed. The jurisprudence of the Commission will be discussed by identifying how the concepts such as, availability, effectiveness, and sufficiency is interpreted by the Commission in different communications. This chapter serves as a foundation for the subsequent chapter. The next chapter investigates whether or not the law and practice of HoF confirm to the Commission's law and jurisprudence. To avoid repetition of ideas, literatures and case laws of other regions will be discussed in the next chapter in support or against the possible arguments to be raised.

2.2 Rules and Exceptions of Exhaustion of Local Remedies under The Commission

The Commission defined local remedy as "any domestic legal action that may lead to the resolution of the complaint at the local or national level."[40] The phrase 'any domestic legal action' in this definition suggests that all domestic remedies shall be exhausted, but must lead to the resolutions of the case. However, neither the phrase 'any domestic legal action' nor 'all local remedies' connotes that all domestic remedies shall be exhausted irrespective of their individual character.[41]

This definition confirms the exceptions to exhaustion of local remedies provided by ACHPR which are unavailability and undue delay.[42] It also conforms to the jurisprudence of the

[40] *Communication 299/05, Anuak Justice Council v. Ethiopia, (2006), pars. 33-39 (hereafter, AJC v. Ethiopia)*, par.50

[41] Communications No. 48/90-50/91-52/91-89/93: Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan, par.28, Communication 334/06 - Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt , Par. 92, *AJC v Ethiopia*, above n.1, par.49

[42] Organization of African Unity, African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982); entered into force 21 October 1986 (ACHPR), art. 56 (5)

Commission which are unavailability, ineffectiveness, and insufficiency of the local remedy.[43] It further conforms to both of them because, the definition requires that 'any domestic legal action' must be exhausted only as long as that remedy 'leads to the resolution of the complaint.' In other word, no remedy may lead to the resolution of the complaint if it is unavailable, ineffective, and insufficient.[44]

This definition also encompasses unjustified impediments as grounds for an exception to the rule of exhaustion of local remedies. The Commission highlighted on the concepts of impediments or as to what constitutes impediments in the case of *Eyob B. Asemie v. the Kingdom of Lesotho*. The Commission implied that fleeing the country,[45] prevention from availing oneself of local remedies, denial of fair hearing, unimpeded access to respondent state's courts,[46] denial of due process of law[47] and existence of impediment in initiating proceedings from abroad constitutes unjustified impediments.[48]

The Commission recognizes that "[…] though the requirement of exhaustion of local remedies is a conventional provision, it should not constitute an unjustifiable impediment to access to international remedies."[49] If there are situations which make "[…] an affront to common sense and logic to require the complainant to [….] exhaust local remedies"[50], then there is no need of exhausting the remedy. The other standard used by the commission in assessing the availability of the local remedy is, "[…] the minds of right thinking people […]"[51] This implies that, if there

[43]Communications 147/95 and 149/96 - Sir Dawda K Jawara v. The Gambia, Done in Algiers, Algeria on 11 May 2000, par. 31
[44] *Ibid*, Communications No. 221/98 *Alfred B. Cudjoe v Ghana*, Bujumbura, 5 May, 1999, par.12, Communications No. 48/90-50/91-52/91-89/93, above n. 2, par. 29 & 31, Communication 102/93: Constitutional Rights Project v. Nigeria,par. 39, Communication 334/06, above n.2, pars.86 & 87, *AJC v. Ethiopia*, above n.1, pars.46, 49 & 51, Communication No. 435/12 *Eyob B. Asemie v the Kingdom of Lesotho*, Done in Kigali, Rwanda at the 16th Extraordinary Session of the African Commission on Human and Peoples' Rights held from 20 – 29 July 2014, par. 63, Communication 300/05 : *Socio Economic Rights and Accountability Project v. Nigeria*, Adopted at the 5th Extraordinary Session of the African Commission on Human and Peoples' Rights, 21st to 29th July 2008, Banjul, The Gambia , *par.45; Communication No. 338/07 Socio-Economic Rights and Accountability Project(SERAP) v the Federal Republic of Nigeria*, par.59
[45] *Eyob v. Lesotho*, above n.5, par. 66
[46] *Ibid*, par. 67
[47] *Ibid*, par. 68
[48] *Ibid*, par. 73
[49] *AJC v. Ethiopia*, above n.1. par.49, Communication 334/06, above n.2, Par. 92
[50] *Jawara v. The Gambia*, above n.4, par. 36
[51] *Ibid*

is some remedy, but exhausting that remedy is difficult due to some reasons attributable to state in the eyes of reasonable man, then it can be said that there is no remedy for the purpose of exhaustion.

The conclusion of this definition is, therefore, if there is any remedy with reasonable likelihood of effectiveness, then it must be exhausted or at least attempted by complainants.[52] However, this attempt or actual exhaustion of local remedy must be only as long as there is no unjustifiable impediment in attempting or exhausting the remedy.[53]

The other condition that compels the complainants to exhaust the local remedy is pendency and undue delay. If the subject matter before the Commission is pending before the national courts, then the Commission will reject the communications due to lack of exhaustion of local remedies.[54] The existence of 'undue delay' is also one of the grounds that liberate complainants from the duty of exhausting local remedies.[55] But since both pendency and undue delay is not within the scope of this thesis, they are not discussed in detail.

2.3 Rationale behind the Exhaustion of Local Remedies

There are principles behind the rule of exhaustion of local remedies that justifies the importance of exhaustion of local remedies as required under art.56 (5) of the ACHPR. The first principle is the respondent state must get an opportunity to redress the wrong done by its own legal system[56] "[…] in order to protect its reputation from being tarnished [….]"[57]

The second principle is the principle of subsidiarity of international human rights system to the domestic one,[58] which makes the commission a body of last resort.[59] The third principle is, domestic remedies are preferably convenient when compared to international human rights

[52] *AJC v. Ethiopia*, above n.1, par.58
[53] *Ibid*, par.49, Communication 334/06, above n.2, Par. 92
[54] *AJC v.Ethiopia*, above n.1, par.62,
[55] ACHPR, above n.3, art. 56 (5)
[56] Communication 338/07, above n.5, par.58, *Jawara v. The Gambia*, above n.4, par. 31, Communication -25/89-47/90-56/91-100/93 *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. DRC*, (Communication -25/89-47/90-56/91-100/93), par. 36, Communication 334/06 ,above n.2, par.87
[57] Communication *-48/90, 50/91, 52/91, 89/93*, above n.2, par. 32
[58] *AJC v. Ethiopia*, above n.1, par.48
[59] Ibid, par.48; Communication *-48/90, 50/91, 52/91, 89/93*, above n.2, par. 32, Communication 338/07, above n.5, par.58, Communication 334/06, *above n.2*, par.87

tribunals or systems.[60] This is so because, "[t]he rule is founded on the premise that the full and effective implementation of international obligations in the field of human rights is designed to enhance the enjoyment of human rights and fundamental freedoms at the national level."[61]

Above all, "[…] local remedies are normally quicker, cheaper, and more effective than international ones. They can be more effective in the sense that an appellate court can reverse the decision of a lower court, whereas the decision of an international organ does not have that effect, although it will engage the international responsibility of the state concerned."[62]

The above discussed points are the reasons for the Commission to strictly applying the exhaustion of local remedies rule and only in few defensible situations has it put aside such conditions.[63] However, the Commission in several Communications held that the condition of exhaustion of local remedies "should not constitute an unjustifiable impediment to access international remedies."[64]

2.4 Availability of Local Remedies

The term "[…] 'available' means 'readily obtainable; accessible'; or 'attainable, reachable; on call, on hand, ready, present; . . . convenient, at one's service, at one's command, at one's disposal, at one's beck and call'. In other words, remedies, the availability of which is not evident, cannot be invoked by the State to the detriment of the Complainant."[65] The Commission considers a remedy as available if the petitioner can pursue it without impediments or if he can make use of it in the circumstances of his case.[66] Particularly, the remedy shall be sufficiently certain both in theory and practice, there shall be no generalized fear for life, there shall be a prospect of success, arguably the remedy shall be of judicial in nature, and there shall be a guarantee of fair trial. Each of these will be discussed below

[60] *AJC v. Ethiopia*, above n.1, par.47
[61] *Ibid*
[62] *Ibid*, par.48
[63] Communication 340/07 Nixon Nyikadzino (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe, Done in Banjul, The Gambia, at the 11th Extraordinary Session of the African Commission held from 21 February to 1 March 2012,par. 84
[64] Communication 334/06, above n.2, Par. 92, *AJC v. Ethiopia*, above n.1, par.49
[65] Ibid, par.51, Citations omitted
[66] Ibid

2.4.1 Availability of Sufficiently Certain Remedy both in Theory and Practice

The Commission decided that it is mandatory for the local remedy to be available and that available remedy must be "[…] sufficiently certain both in theory and practice, failing which, it will lack the requisite accessibility and effectiveness."[67]

The Commission ruled that a remedy will be available if it offers a prospect of success and that success is sufficiently certain[68] that can be pursued without impediment.[69] The Commission strongly emphasized that, "[…] remedies, the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant."[70]

2.4.2 Obligation to Decide According to Legal Principles

The remedy is neither adequate nor effective if the source of the remedy has no obligation to decide cases according to legal principles.[71] Bodies that are established by ousting the jurisdiction of courts have no obligation to decide according to legal principles.[72] Therefore, for the purpose of art. 56 (5) of the ACHPR, the complainant shall not be compelled to exhaust local remedies from "[…] sources [….] which have no obligation to decide according to legal principles."[73] In the case of *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt*, the Commission decided that "[…] the remedy was neither adequate nor effective because the Governor was under no obligation to decide according to legal principles."[74]

[67] Communication 334/06 above n.2, Par.93, *Jawara v. The Gambia*, above n.4, par. 35
[68] *AJC v. Ethiopia*, above n.1, par.52
[69] Ibid, par.51; *Jawara v. The Gambia*, above n.4, par. 32, Communication 334/06, above n.2, Par.93
[70] *Jawara v. The Gambia*, above n.4, par. 34
[71] Communication -87/93 Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria , par. 8, Communication -60/91 Constitutional Rights Project (in respect of Wahab Akamu, G. Adega and others) v. Nigeria , par.10, Communication 334/06, above n.2, Par.96
[72] Ibid: *Zamani Lakwot v. Nigeria*
[73] Ibid; Communication -60/91, above n.32, par.10
[74] Communication 334/06, above n.2, par.96, Quotation mark omitted.

2.4.3 Generalized Fear for One's Life or Relatives'

The nature of the victim is one of the determining factors to decide on the contest of admissibility based on art. 56 (5) of ACHPR. If someone cannot turn to the domestic judiciary because of generalized fear for one's life or those of relatives, then the local remedies would be deemed to be not available to such person.[75] However, the "[…] Commission is of the view that fear of persecution is not a tenable ground to waive the requirement of exhaustion of local remedies when the Victim could have been represented by the Complainant or anyone else."[76]

2.4.4 Remedies of Judicial Nature

The Commission's stand on the nature of the remedy is not clear because in some cases it decided that the remedy shall be of judicial nature while in some cases it decided that all local remedies shall be exhausted if it can resolve the case. The Commission defined local remedy as "any domestic legal action that may lead to the resolution of the complaint at the local or national level."[77] The phrase 'any domestic legal action' in this definition suggests that all domestic remedies shall be exhausted, but must lead to the resolutions of the case. In *Eyob B. Asemie v. the Kingdom of Lesotho,* "[…t]he Commission recalls that Article 56 (5) of the Charter requires Complainants to exhaust all local remedies unless it is obvious that the procedure is unduly delayed."[78] Similarly, if the local remedies have some likelihood to be effective, it must be pursued.[79]

Only "[…] casting aspersion on the ability of the domestic remedies due to isolated or past incidences […]" will not entitle complainants to be exempted from the requirements of exhaustion local remedies.[80] In some cases,[81] the Commission re-confirmed this stand. Example, In *Article 19 v. Eritrea,* "[…] the Commission referred to the Human Rights Committee's […] decision in *A v Australia*, in which the Committee held that: "mere doubts about the

[75] *Jawara v. The Gambia,* above n.4, par. 35, *AJC v.Ethiopia*, above n.1, par.52
[76] *Nixon Nyikadzino* v. *Zimbabwe,* above n.24, Par. 82, Communication 361/08 - *J.E. Zitha & P.f.L Zitha (represented by Prof Dr. Liesbeth Zegveld) v. Mozambique,*(Communication 361/08*),* (2011) ACHPR, Communication 275/03 -*Article 19 v. Eritrea* (*Article 19 v Eritrea*), (2007) ACHPR
[77] *AJC v.Ethiopia*, above n.1, par.50
[78] *Eyob v. Lesotho,* above n.5, par. 63
[79] *Nixon Nyikadzino* v. *Zimbabwe*, above n.24, par.89
[80]*Ibid,* par.91, Communication 372GTK/2009-*Interights (on behalf of Gizaw Kebede and Kebede Tadesse) v. Ethiopia,(Gizaw Kebede and Kebede Tadesse v. Ethiopia), par.70*
[81] Communication 300/05, above n.5, par.59, Communication 308/07 - *Michael Majuru v. Zimbabwe* , (*Majuru v. Zimbabwe*) (2008) ACHPR

effectiveness of local remedies or prospect of financial costs involved did not absolve the author from pursuing such remedies."[82]

However, in other cases, the Commission made clear that, "[…] the remedies required to be exhausted must be sought from instances of a judicial nature and must not be discretionary."[83] In declaring the case of *Alferd cudjoe v.Ghana* inadmissible, the Commission ruled that "…the internal remedy to which article 56, 5 refers entails remedy sought from courts of a judicial nature, which the Ghanaian Human Rights Commission is clearly not."[84]

Similarly, In the case of *Zamani Lakwot and six others v. Nigeria,* and *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt,* the Commission decided that if the source of the domestic remedy is not judicial in nature, then the domestic remedy is said to be neither effective nor sufficient,[85] which does not require exhaustion.

The other factor to determine the availability of the remedy is ouster of the jurisdiction of courts. Ouster can be made by passing decree whose validity cannot be challenged or questioned[86] or by establishing special tribunals[87] or by making certain subject matter non-justiciable. Examples of special decrees used to oust the jurisdiction of courts are: the civil disturbances special tribunal Act[88], the robbery and firearms special provisions Act, decree No. 5 of 1984 in communication No. 60/91,[89] the political parties dissolution decree 12993,[90] in Communication No.*-48/90, 50/91, 52/91, 89/93,* the 1994 law,[91] and Constitution modification and suspension law[92], in

[82] Ibid, Communication -300/05, above n. 5, par.60
[83] *Eyob v. Lesotho,* above n.5, par. 64, Communication *-48/90, 50/91, 52/91, 89/93,*above n.2, par. 31
[84] *Cudjoe v Ghana*, above n.5, par.13
[85] *Zamani Lakwot v. Nigeria,* above n.32, par. 8, Communication -60/91, above n.32, par.10
[86] *Jawara v. The Gambia,* above n.4, par. 34
[87] Ibid, par. 33
[88] "Part IV, Section 8 (1) provides: The validity of any decision, sentence, judgment, ... or order given or made, … or any other thing whatsoever done under this Act shall not be inquired into in any court of law."
[89] "Chapter 398, in which Section 11, paragraph 4 provides: No appeal shall lie from a decision of a tribunal constituted under this Act or from any confirmation or dismissal of such decision by the Governor."
[90] "13 (1) reads: Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979, as amended, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act or any other enactment, no proceeding shall lie or be instituted in any court for or on account of any act, matter or thing done or purported to be done in respect of this Decree."
[91] "no legal action, no appeal is provided for against any decision issued under this law"
[92] "specifies that even decrees that may lack an internal ouster clause cannot be challenged."

Communication *102/9.* The similarity between these decrees is, all of them are devised to oust the jurisdiction of courts.

"The ouster clauses create a legal situation in which the judiciary can provide no check on the executive branch of government."[93] Such ouster will not only result in undue delay but also it is certain to yield no results.[94] In Communication *48/90, 50/91, 52/91, 89/93,* the jurisdiction of appellate court is ousted by the law which stipulates that, "[…] no legal action, no appeal is provided for against any decision issued under this law"[95] except for "[…] a death penalty or prison terms over thirty years."[96] This stipulation unequivocally prevented the right to appeal to court.[97]

The remedy that must be exhausted shall be ordinary remedy of common law that is "[…] normally accessible to people seeking justice."[98] This means, it shall not be special tribunal. However, if the special tribunal is established and it is chiefly composed of persons belonging to the executive branch of government, "[r]egardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality. It thus violates Article 7.1.d."[99] of ACHPR.

The other mode of ousting jurisdiction of courts is, making some subject matter non-justiciable. However, "[…] Fundamental Objectives and Directive Principles of State Policy"[100] are justiciable under ACHPR, "[e]ven though it can be argued that these are not rights, but mere political, economic, social, educational, environmental, cultural and foreign policy directives and that these provisions are non-justiciable […]"[101] In the case of *SERAP v. Nigeria,* the Commission ruled that complainants must have exhausted the local remedies despite the

[93] Communication *102/93,* above n.5,Par.41
[94] *Zamani Lakwot v. Nigeria,* above n.32, par.9
[95] Communication -*48/90, 50/91, 52/91, 89/93,* above n.2, par. 35
[96] Ibid, par. 36
[97] Ibid, par. 35 & 36
[98] *Gizaw Kebede and Kebede Tadesse v. Ethiopia,* above n.41,par.71
[99] Communication -60/91, above n.32, par.14
[100] Communication-300/05, above n.5, *par.62*
[101] Ibid, par.63

constitution of Nigeria stipulates that the socio-economic and cultural rights are non-justiciable.[102]

2.4.5 Victims Identified or Named vs. Serious and Massive Violation

Unlike in the case of identified victims, in the case of serious and massive violations in which it may be impossible or undesirable for the complainants to identify all the victims, the exhaustion is not required.[103] This is so because the larger number of the people involved will make the remedy unavailable or unduly prolong it.[104] Since one of the purposes of exhaustion of local remedies is to notify the respondent state about the violation,[105] the state will be presumed to have notice of the violations especially where the state took no steps to prevent or stop them[106] or not diligent.[107] However, "[…] one single incident that took place for a short period of time […]" does not constitute the serious and massive criteria.[108]

2.4.6 The Right to Fair Trial

The Commission has a view that the exhaustion of local remedy must be interpreted in light of the right to fair trial.[109] In Communication *48/90, 50/91, 52/91, 89/93,* the Commission found that denying the right to appeal violates the right to fair trial, in which lack of it results in exempting complainant from the duty of exhausting local remedies.[110] In the case of *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt,* "In the instant case and consistent with the jurisprudence of the Commission, there are no remedies remaining for the Complainants to pursue as they have no judicial right to appeal the decision of the State Security Emergency Court. What remains was for the President of the Republic to ratify the judgment to give force to it."[111]

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[102] Ibid, *par.63 & 69*
[103] *AJC v.Ethiopia*, above n.1, par.60
[104] Communication *48/90, 50/91, 52/91, 89/93,* above n.2, par. 37
[105] Communication 338/07, above n.5, par.58, *Jawara v. The Gambia*, above n.4, par.31, Communication-25/89-47/90-56/91-100/93, above n.17, par.36, Communication 334/06, above n.2, par.87
[106] *AJC v.Ethiopia*, above n.1, par.60
[107] *Ibid*, par.61
[108] *Ibid*
[109] Communication -*48/90, 50/91, 52/91, 89/93,* above n.2, par. 31, *Zamani Lakwot v. Nigeria*, above n.32, par.11, Communication 60/91, above n.32, par.13, Communication -129/94 *Civil Liberties Organisation v. Nigeria*, above n.5, par. 14, Communication 334/06, above n.2, Par. 92, *AJC v. Ethiopia*, above n. 1, par.49
[110] Communication -*48/90, 50/91, 52/91, 89/93,* above n.2, par. 34
[111] Communication 334/06, above n.2,Par.93

2.5 Sufficiency of Local Remedies

The term "[…] 'sufficient' literally means "adequate for the purpose; enough"; or "ample, abundant; [. . .] satisfactory."[112] There are some factors used to determine the sufficiency of local remedies including obligation to decide impartially, competently, and according to legal principles.

The remedy is adequate or sufficient if it can compensate or redress the victim.[113] Additionally, the Commission decided that a "[…] purely discretionary remedies of non judicial [*sic*] nature […]" are not intended by art. 56 (5) of ACHPR.[114] If the source of the remedy is discretionary, extraordinary remedy of a non-judicial nature, then the remedy is neither adequate nor effective.[115] In *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt,* the president has the power[116] to "[…] decide to commute the sentence, revoke the judgment, or order a retrial by another circuit of the State Security Emergency Court."[117] The Commission found that such decision of the President is discretionary.[118] In *Zamani Lakwot and six others v. Nigeria* also, the Armed Forces Ruling Council is empowered to confirm the penalties of the tribunal by Civil Disturbance Act.[119] However, this power is a discretionary, extraordinary, and non-judicial nature which makes the remedy ineffective.[120]

The Commission also decided that, there is no obligation to exhaust local remedies from a source which does not operate impartially because such remedy is not effective.[121] Bodies that are established by ousting the jurisdiction of courts do not operate impartially.[122] In Communication 60/91, the Commission decided that the special tribunal established is not impartial because its "[…] members do not necessarily possess any legal expertise."[123] Therefore, "It would be improper to insist on the complainants seeking remedies from sources which do not operate

[112] *AJC v.Ethiopia*, above n.1, par.52, citation omitted
[113] Ibid, Par.52; *Jawara v. The Gambia*, above n.4, par. 32, *;* Communication 334/06, above n.2, Par.93
[114] *Ibid*:Communication 334/06, Par.96
[115] *Ibid*
[116] Under Article 14 of the Emergency Law (Law No. 162 of 1958 as amended)
[117] Communication 334/06, above n.2, Par.95
[118] *Ibid*
[119] *Zamani Lakwot v. Nigeria*,above n.32, par.8
[120] *Ibid*
[121] *Ibid*; Communication 60/91, above n.32, par.10
[122] *Ibid*:*Zamani Lakwot v. Nigeria* above n.6
[123] Communication 60/91, above n.32, par.14

impartially […]"[124]bodies that are established by ousting Jurisdiction of courts have no obligation to decide according to legal principles.[125] This ouster results in relieving a party from exhausting local remedies, because such remedy is not effective.[126] The existence of generalized fear for one's life or relatives' to resort to judiciary of one's own country, and then the remedy is not sufficient.[127] However, if someone flees his country for fear of life but still could exhaust the local remedy by any means possible, then that person cannot raise the benefit of exception to rule of local remedies.[128]

Ousting the jurisdiction of courts also makes the remedy insufficient.[129] In the case of *Zamani Lakwot v. Nigeria,* the remedy is not adequate because the body established under the Act[130] complained of ousts the jurisdiction of courts by providing that "[…t]he validity of any decision, sentence, judgment, ... or order given or made, ... or any other thing whatsoever done under this Act shall not be inquired into in any court of law."[131]

2.6 **Effectiveness of Local Remedies**

The term "[…] 'effective' has been defined to mean "adequate to accomplish a purpose; producing the intended or expected result," or "functioning, useful, serviceable, operative, in order; practical, current, actual, real, valid".[132] Some factors that can be used to determine the effectiveness of the local remedy are offering a prospect of success, sufficient certainty of the remedy, guarantees of good administration of justice.

The jurisprudence of the commission indicates that, "[…] a remedy that has no prospect of success does not constitute an effective remedy."[133] "The prospect of seizing the national courts, whose jurisdiction had been ousted by decrees, in order to seek redress, is nil."[134] The

[124] *Ibid*, par.10, *Zamani Lakwot v.Nigeria,* above n.32, par. 8
[125] *Ibid*: *Zamani Lakwot v. Nigeria*
[126] *Ibid*
[127] *AJC v.Ethiopia*, above n.1, par.52
[128] *Zamani Lakwot v. Nigeria*, above n.32, par.8
[129] *Ibid*
[130] The Civil Disturbances Special Tribunal Act, Part IV, Section 8 (1)
[131] *Zamani Lakwot v. Nigeria*, above n.32, par.8
[132] *AJC v. Ethiopia*, above n.1, par.52, citation omitted
[133] *Jawara v. The Gambia*, above n.4, par. 38 & 32, Communication 334/06, above n.2, Par.93
[134] Ibid: *Jawara v. The Gambia,* above n.4, par. 38

Commission also decided that, a remedy will be effective if it offers a prospect of success and that success is sufficiently certain.[135]

For the purpose of article 56 (5) of the ACHPR, domestic remedy shall guarantee a good administration of justice. In relation to appeal for example, the Commission decided that, "[…] the right to appeal, being a general and non-derogable principle of international law must, where it exists, satisfy the conditions of effectiveness."[136] To be effective for the remedy, the appellate body shall "[…] provide all necessary guarantees of good administration of justice."[137]

In Communication *48/90, 50/91, 52/91, 89/93,* the Commission decided that the appeal against verdicts passed by the revolutionary security courts does not satisfy the requirement of effectiveness as stipulated in ACHPR because appeal is allowed in case of death penalty or prison terms over thirty years by excluding other issues.[138] Similarly, in the case *Zamani Lakwot v. Nigeria,* the remedy is not effective due to the fact that the Act complained of ousts the jurisdiction of courts.[139]

2.7 Conclusion

As a rule, any local remedy shall be exhausted but exceptionally there are situations in which exhausting local remedies is not required. These exceptional situations include unavailability, insufficiency, and ineffectiveness of the local remedies. The legal base for such exceptions are Art. 56 (5) and various decisions of the Commission. There are further considerations that can also help to decide whether a given remedy is unavailable, insufficient, and ineffective. These include the existence of a remedy not only in theory but also in practice, the existence of an obligation to decide cases according to legal principles, adhering to the principles of the right to fair trial, good administration of justice, operate impartially, competently and independently. In determining the impartiality and independency of the source of local remedies the Commission also considers issues such as common sense and logic and more importantly the standard of reasonable man.

[135] *AJC v. Ethiopia*, above n.1, par.52
[136] Communication -*48/90, 50/91, 52/91, 89/93,* above n.2, par. 37
[137] *Ibid*
[138] *Ibid*, par. 36
[139] *Zamani Lakwot v. Nigeria*, above n. 32, par.8

What can be concluded from the above chapter is that it is not always necessary to prove the existence of actual lack of impartiality, and independency to be exempted from the duty of exhausting local remedy. Appearance of lack of impartiality, and independency might suffice depending on the case at hand. If the source of the remedies lacks impartiality, and independency in the eyes of reasonable man; then there is no need of exhausting local remedy for the purpose of Art. 56(5) of ACHPR and for the purpose of the Commission. In the next chapter, the research questions will get the answers analyzed from the discussions of the above chapter.

CHAPTER THREE
SHALL THE REMEDIES UNDER ETHIOPIAN HoF BE EXHAUSTED?

3.1. Introduction

This chapter aims at answering the core research question: of whether the remedies available under HoF procedures should be exhausted? As already discussed, exhaustion of local remedy is mandatory unless that remedy is unavailable, insufficient and ineffective. But what are the factors that render the local remedy unavailable, insufficient and ineffective?

There are several factors that render the local remedy unavailable, insufficient and ineffective including lack of independent, impartial and competent source of the remedy.[1] This research argues that it is sufficient to determine certain remedy as unavailable, insufficient and ineffective if the source of the remedy is found to be not independent, impartial and competent.[2] Therefore, this research analyzes a remedy under HoF from some aspects of these three grounds.

However, independence, impartiality and competence have several aspects by themselves. This research however does not investigate all such aspects but only few of them that can suffice to answer the research questions. The existence of justified doubt as to lack of the independence and impartiality of the source of the remedy is sufficient to render that remedy unavailable, insufficient, and ineffective.[3] "Article 7.1.d of the African Charters requires the court or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality. It thus violates Article 7.1.d."[4]

[1]Communication -87/93 Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria, pars. 8 & 9
[2]Organization of African Unity, African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982); entered into force 21 October 1986, Art. 7 (1)(d)
[3] Communication 87/93, above n.1, par. 14
[4] Ibid

Accordingly, independence and impartiality have two components known as objective and subjective components.[5] Objective standard is a situation in which standard of reasonable man is used while subject is a situation in which each case shall be investigated to find actual existence or otherwise of independence and impartiality. The level of importance of these components has differences in case of independence and impartiality. For independence, the decisive component is the objective component while for impartiality the subjective component is a decisive component.[6]

From the objective component of independence, the possibility of political intervention, lack of sufficient knowledge and experience will be analyzed. Competence of HoF is evaluated only from three grounds which are educational back ground of members of HoF, quality of their decisions by analyzing some cases, and their experiences in constitutional interpretation.

The above selected grounds will enable us to determine the independence, impartiality and competence of the HoF that in turn enable us to determine whether exhaustion of remedy under HoF is mandatory or not for the purpose of Art.56 (5) of ACHPR. As to materials: human rights laws, case laws of human rights tribunals, soft laws pertinent to human rights, and scholarly works will be used to analyze the issue in addition to interview result. What are the facts that can create justified doubts as to the independence and impartiality of HoF?

3.2 Competence of HoF: Are Members of HoF Competent?

Competence of HoF will be analyzed from three grounds: necessary legal training, sufficient experience, and quality of their decision. The argument that CCI fill the gap of lack of legal knowledge and experience of members of HoF will also be analyzed. This research argues that CCI cannot mitigate the problems of members of HoF regarding competence effectively both theoretically and practically.

[5] Diego M. Papayannis, 'Independence, impartiality and neutrality in legal adjudication' (2016) 28 *journal for constitutional theory and philosophy of law* 33, p.37
[6] Ibid

3.2.1 Legal knowledge of Members of HoF and its Implication

3.2.1.1 Representative of Oromia for the fifth term of HoF

Out of the total 31 current members of HoF representing Oromia in the 5th term of HoF (2015-20120) only three persons have law and law related field of study. One person have LLB degree[7] one has Diploma in law[8] and the third one has MA in human rights[9] not LLM in human rights, 1 MA in Political science, 4 MA and 1 BA in leadership, 5 MA and 5 BA management, 1BA in Human Resource management, 1MA in Business Administration, 1PhD in Range Economics, 1 MA in Public Administration, 3 BA in sociology, 1 BA in rural development, 1 BA in Business Management, 1 BA in social Science, 1BA in General Education, and 1 MSC in Agriculture.[10]

3.2.1.2 Representative of Oromia for the fourth term of HoF

Oromia had 25 representatives in the 4th term of HoF (2010-2015).[11] Out of these 25 representatives 5 not available (NA), 4 MA in leadership, 4 MA and 2 BA in Management, 1 MA in Political Science, 1 MA in Economics, 2 BA in Organizational management, 1 BA in Business Administration, 2 BA [sic] in Law, 1BA in Business Management, 1BA, and ONE 12+4.[12]

3.2.1.3 Representative of Oromia for the third term of HoF

In the third term of HoF (2005-2010) Oromia had 19 representatives.[13] From these 19 representatives, 1 MA in *Afaan Oromoo*, 1 PhD, 4BA, 1MA, 2BA in management, one 12+2, one 12+4, 1diploma, 1 MA in leadership, and 1 MA in political science, 1 BA in Business Administration, and 4Not available.[14]

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[7] *Obbo Beenyaa Tarrafaa Fufaa*
[8] *Obbo Ahimad mahaamad Jundaa*
[9] *Obbo Shimallis Abdiisaa Ulfaataa*
[10] Caffee Oromiyaa, Qaboo Yaa'ii, Yaa'ii Duraa Caffee, waggaa Hojii 1ffaa, bara Hojii 3ffaa, Fulbaana 1998, Finfinnee (Afan oromo), Oromia State Council, Minute, 1st meeting, 1st year, 3rd term of the Council, Addis Ababa, September, 2005; Caffee Oromiyaa, Qaboo Yaa'ii, Walgahii Ariifachiisaa Waggaa hojii 1ffaa, bara Hojii 4ffaa, Amajjii 23-24, 2003, Adama (Afan oromo), Oromia State Council, Minute, 1st Extra ordinary Meeting, 1st year, 4th term , January 31-February 1st, 2011, Adama
[11] Ibid
[12] Ibid
[13] Ibid
[14] Ibid

3.2.1.4 Analysis of Facts

In the 5th, 4th, and 3rd terms of HoF; Oromia's representative in HoF are 31, 25, and 19 respectively. Out of these 75, [for 9 of them data is NA], total representatives for the three terms of HoF which covers a period from 2005-2020 G.C; only five of them are trained in law and law related field. In the fifth term of the HoF; only three persons have law and law related field of study. One person has LLB degree,[15] one has Diploma in law,[16] and the third one has MA in human rights[17] not LLM in human rights. In the fourth term; only 2 persons have BA [sic] in Law. In the third term; no one had law degree.

African Commission, European Human rights Court and Inter American Court of Human Rights have developed jurisprudences which obliges members of a body engaged in determining rights and obligation, be it civil or criminal matter, to have a necessary academic qualification. This necessary qualification is 'training in law'. Most importantly, training in law is not sufficient; they must be 'well trained in law and its application'.

One of the constitutional mandates of HoF is constitutional review which involves the determination of rights and duties. Therefore, HoF is supposed to be composed of members who are well trained in law and its application. However, from the data discussed above in the case of representative of Oromia region to HoF for a period of 15 years (2005-2020), only five out of 66 for which their profile is obtained, [for 9 of them data is NA], were trained in law. Based on this sample, can a reasonable person conclude that HoF is composed of members with sufficient training in law?

This research concludes that HoF is not composed of members who are trained in law let alone who are sufficiently trained in law and its application. This makes HoF incompetent body despite Ethiopia's claim that HoF decides cases competently.[18] If the source of remedy is incompetent,

[15] *Obbo Beenyaa Tarrafaa Fufaa*
[16] *Obbo Ahimad mahaamad Jundaa*
[17] *Obbo Shimallis Abdiisaa Ulfaataa*
[18] See Communication 301/O5 – Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials v. Ethiopia), Par. 165 for Ethiopia's argument that states "[…] every person in Ethiopia has the right to access impartial and independent courts and judges having jurisdiction over any alleged infringements including violations of human rights." This argument is simply made to deceive the Commission because Ethiopian courts are not

then the remedy is considered as unavailable, ineffective and insufficient. If the remedy is as unavailable, ineffective and insufficient. Then exhaustion of local remedy is not mandatory for the purpose of Art.56 (5) of ACHPR. In Ethiopia, HoF is not competent, due to the incompetence of its members, as a result the remedy from HoF shall be considered as unavailable, ineffective and insufficient. Therefore, there is no obligation to exhaust remedy from HoF for the purpose of Art.56 (5) of ACHPR.

3.2.2 Experience of Members of HoF

Expert wise, members of the HoF shall use their experiences exhaustively in discharging their duties.[19] However, the HoF is suffering from lack of experienced and knowledgeable experts at the required level.[20] "[…] if the constitutionality of the law is found to be controversial, a government body which has the duty to consult the Federal or State government depending on conditions, shall have the obligation to explain."[21] Do the members of HoF have sufficient experience to understand the explanation of legal expert from governmental agency with the quality of impartial umpire?

To see the experience of all members of HoF there must be available data that shows this. But since there is no relevant data which shows about the profile of the members of HoF, from HoF, it is mandatory again to be based, partially, on the representative of Oromia region to HoF for a period of 15 years (2005-2020) and partially on the position of such members in various offices. According to the sample from Oromia; those representatives are members of *Caffee oromiyaa, Oromia State Council.* This implies that their work experience must be in relation with some political affair as opposed to constitutional interpretation. Even if they work in some legal related offices their number cannot be sufficient.

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entertaining cases which include "[…] any alleged infringements including violations of human rights." That is why HoF and CCI are there.

[19] The Amended FDRE HoF Procedural and Members' Discipline Directive No.1, (Amaharic, translation mine), May 2007, Addis Ababa, Art.59(1)

[20] Federal Democratic Republic of Ethiopia House of Federation's, 2006-2010 Budget Years Strategic Plan Evaluation Report and 2011-2015 Budget years Strategic Plan, (Amaharic, translation mine), May 2010, Addis Ababa, p.77, see risk no.2

[21] Art. 9 (2) of Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation No. 251/2001, Federal Negarit Gazette 7th Year No. 41 Addis Ababa 6th July 2001(Proclamation no. 251/2001)

The second way of looking at their experience is by investigating their official positions in various offices. Accordingly, all of them are members of political parties to their respective ethnic groups.[22] Based on their contribution some of them are members of different committees including central committee of their political parties, and some of them are members of central committee of EPRDF, and some are members of council of EPRDF.[23] Others are members of different committees in regional legislative bodies.[24] Some are even high ranking government officials such as Ambassadors,[25] ministers, and different offices.[26] Therefore, their experiences must have related to such activities not legal and its application especially, not constitutional interpretation.

Based on the above facts, two important points can be observed. Members of HoF do not have a necessary experience in law and its application generally. Above all, they do not have experience in constitutional interpretation, let alone having 'sufficient experience' in constitutional interpretation. Moreover, such lack of experience is a constitutionally acknowledged problem and therefore it is uncontestable. It is constitutionally acknowledged problem because that is why the backup organ of HoF, CCI, was constitutionally established. In other words, if it was true that members of HoF possess sufficiently required experience; then there will not be CCI at least for such purpose. What does this mean for the purpose of exhaustion of local remedy?

If it is guaranteed that any one has the right to seek effective remedy, then the requirement of sufficient experience in constitutional interpretation must be uphold. HoF is not composed of individuals with 'necessary and sufficient experience' in constitutional interpretation. Since it will be illogical to expect members of HoF without sufficient experiences of constitutional

[22] Adem Kassie Abebe, *The Potential Role of Constitutional Review in the Realization of Human Rights in Ethiopia* (Doctor Legum (LLD) Thesis, University of Pretoria, 2012), p. 81; *See* also the case of Oromia State Council in which all of representative of Oromia to HoF are members of OPDO/EPRDF

[23] Daniel Berhane, [Full list] EPRDF's Council - Who's in, who's out | Metekakat review, April 8, 2013, http://hornaffairs.com/2013/04/08/eprdf-council-old-new-members-list/ accessed on September 23, 2017

[24] Since there are various standing and *adhoc* committees at State Council, their members are also the members of the Council itself.

[25] Awramba Times, Ethiopian President Dr. Mulatu Teshome Appoints 12 New Ambassadors to Different Countries by admin • July 26, 2017, http://www.awrambatimes.com/?p=16484, accessed on September 24, 2017; http://hornaffairs.com/2016/11/01/ethiopia-hailemariam-desalegn-new-cabinet-ministers/ accessed on September 23, 2017

[26] See Daniel Berhane, Meles Zenawi Appoints New Cabinet [full list] October 5, 2010, http://hornaffairs.com/2010/10/05/meles-zenawi-appoints-new-cabinet-full-list/ accessed on September 23, 2017

interpretation then it will be undesirable to force complainants to seek remedy from HoF for the purpose of Art.56 (5) of ACHPR. Therefore, Complainants from Ethiopia shall have no obligation to exhaust local remedy from HoF. But "CCI is designed to fill the gap in legal competence of the members of HoF."[27] However, is CCI practically filling such gap?

There is an argument which says; since CCI is devised to fill such gap of legal training, and gap of experience in constitutional interpretation by HoF shall not affect the quality of constitutional interpretation.[28] Does this argument hold water for the purpose of exhaustion of local remedy? This research argues that no; CCI cannot fill such gaps of members of HoF effectively.
Of course CCI was devised to inspect complaints, and to give their recommendation as to what they think shall be the correct interpretation of the constitutional provision. However, CCI is not mandated to provide legal training for HoF which will help them to understand the facts of the case, issue, legal ground and various possible interpretations of the constitutional provision and other laws such as international human rights laws. Even if CCI present them with the best possible constitutional interpretation (recommendation); HoF must be competent to understand that recommendation, the possible alternatives to the recommendation of CCI; if there is any other alternative that were not foreseen by CCI. It is mandatory that the members of HoF do perform such investigation by themselves not with the help of CCI. Can they competently do this by themselves? HoF and CCI are two different organs, CCI being an auxiliary organ of HoF not with identical power and function.

CCI cannot order or tell to the members of HoF as to whether or not its recommendation is correct or wrong. What the CCI can legally do is to explain its recommendation and its reasoning to HoF. Then it is up to the members of HoF to competently evaluate the validity of the recommendation of CCI. To do this they must understand the facts, identify legally relevant facts, issues, laws, treaties, jurisprudences of human rights bodies, decisions of other country on the same subject matter etc… But, members of HoF cannot do this because they do not have both necessary knowledge and experience to do so as discussed above. However, the HoF may seek explanation regarding the constitutionality of the law in question from Court handling the case,

[27] Abebe, above n 22, p.90
[28] *See* arguments of Ethiopia on admissibility in the case of Communication No.445/13 Human Rights Council and Others v. Ethiopia, (2015) (*EHRC v. Ethiopia),*

parties involved in the case,[29] or "…[a] pertinent Federal or State government institution…"[30] and "…pertinent institutions, professionals, and contending parties to give their opinions."[31] This implies that the HoF and its members lack sufficient knowledge and experience required for constitutional interpretation independently and impartially.

The obligation of HoF to investigate the recommendation of CCI thoroughly, implies that HoF must be composed of members who are not only competent but also who are, at least, equal to members of CCI both in legal knowledge and experience in constitutional interpretation to understand what CCI recommends. If not, then it is practically compulsory for HoF to be limited to confirming the recommendation of CCI; because they cannot identify the other side of the recommendation of CCI by themselves. If the role of the HoF is limited only to confirming the recommendation of CCI; then that decision will be the decision of CCI, indirectly, not that of HoF; because, decision making is not merely about confirmation. If that is the case then that will amounts to undue influence and interference even if it is willingly done between HoF and CCI. Obviously, for CCI its recommendation is correct for itself. If CCI forces the members of HoF to accept its recommendation; then that action amounts to undue influence and interference in the exclusive business of HoF. If CCI does not order or compel or unduly influence the members of HoF to accept its recommendation, they cannot competently identify by themselves whether or not the recommendation of CCI is correct or not because they do not have a necessary legal knowledge and experience in constitutional interpretation. There is also another problem.

The other problem is; lack of sufficient time to consider the case presented to them. Even if they are competent to interpret the constitution, they do not have a time to sufficiently consider the case as they are extremely busy individuals with various official duties. HoF in general and the members, committees etc… in particular do not have sufficient time to investigate the cases submitted to them.[32] When he discharges all these responsibilities of which all are sensitive position? Is it reasonable to expect such individual to give time to study the recommendation of CCI, to study the law related to the case, to search for other alternatives to the recommendation

[29] Proclamation no. 251/2001, above n. 21. Art. 9 (4)
[30] Ibid, Art. 7 (3)
[31] Ibid, Art. 10
[32] Strategic Plan of 2011-15, above n.20, p.77

of CCI, to study and analyze the facts of the case, to evaluate the evidence of the case, to read the jurisprudence of other countries on the same topic, does he have time to hear expert opinion, critically understand, analyze it and give a reasoned decision? Or is it sufficient if they confirm or reject the recommendation of CCI based on whatever they are told by CCI or by other experts?

The research concludes that it will not be logical to expect them to perform such necessary activities as required. On the other hand; people have the right to reasoned decision and such reasoned decision is the result of deep understanding of the case, strong analyses of the case and having the required time, knowledge, and experience. However, from the above discussion, HoF is filled with individuals who do not have sufficient time for the reasoned constitutional interpretation.[33] This time related problem creates a paramount negative effect on the right to fair trial when coupled with the problem of lack of necessary legal knowledge and experience in constitutional interpretation.[34] What does this mean for the purpose of exhaustion of local remedy? If members of HoF do not have sufficient time to consider the case, then it will be undesirable to seek remedy from HoF.

3.2.3 Quality of Decisions of HoF

There are cases which show the incompetence of both HoF and CCI in which HoF must have corrected the fatal error committed by CCI. In a case between *Tesfaye Ababu v. Meta Abo Beer*[35], the complainant was asking that there are two opposing decision on the same case between the same parties by the same court. The issue in that case was which decision shall be enforced? Both CCI and HoF failed to identify the issue. They were analyzing if the termination of the complainant's employment contract was lawful or not.[36] But interpreting contract was completely out of the jurisdiction of both of them. So this case illustrates that even CCI is not competent, or not serious in its mandate, or bribed by the company or some other cause. But what is clearly certain is that, CCI made a grave fault even that HoF did not commit.

[33] *See* also Strategic Plan 2011-15, above n.20, p.77, see risk no.2
[34] Ibid
[35] *Tesfaye Ababu v. Meta Abo Beer,HoF,2009 E.C*
[36] *Ibid*

CCI made a grave fault even that HoF did not commit because the complainant took the matter for the second time to CCI as a new complaint. They admitted it but decided identically the same way as the former decision. The Amharic proverb best describes this situation is *"huletagna tifat qomo manqalafat".* Had the case was rejected or the first time by negligence; it must have been corrected when it was applied for the second time to the same body. This implies that either they do not have sufficient time or they are incompetent or bribed or some other reasons. But this proves that CCI is not a body that mitigates the defects of HoF. At least there are times in which HoF deciding cases without knowing what it is doing. This can be indicated by analyzing different cases that as discussed below.

The weakness of HoF also extends to the so called legal experts of HoF who are investigating the cases referred to HoF by CCI or cases come to HoF by way of appeal from CCI and give their recommendation to Constitutional Interpretation and Identity Affairs Committee. Members of HoF, given the time they have, legal training and experiences, cannot significantly change the recommendation of such experts even if it is a clear case in which constitutional rights are violated. In the case between *Ato Isu Indale Ababe V. W/ro Yisalaf Mamo* HoF's legal experts, and HoF rejected a case which violated Art.40 (3 and 4) of the FDRE constitution and also other several legal provisions. The fact of the case is as follows:-

> The major issue of the case is whether or not someone can possess rural land to set off a debt. Dara Woreda court decided that the defendant possessed the land by buying in auction. However, the zonal court rejected the case reasoning that land cannot be subjected to sell (translation mine).[37]

Oromia, Federal Cassation Benches and CCI confirmed woreda court's decision in which the purchaser of the land is legalized. The HoF also confirmed the same but with slightly different reasoning as cited below.

The reasoning of HoF is that the possessor of the land sold all of his property including house on the land in setting off his debt to the respondent but not sold the bare land. Therefore, HoF reasoned, there is no any violated constitutional provision by the decisions of courts.[38]

[37] *Ato Isu Indale Ababe V. W/roYisalef Mamo*, Internal Memo, to: Constitutional Interpretation and Identity Affairs Permanent Committee, from Constitutional Interpretation and Identity Affairs Directorate Ginbot 01, 2009 E.C.
[38] *Ibid*

The gist of the reasoning of HoF is that you cannot sell bare land but you can sell your property such as houses and other fixed assets even if it has the effect of eviction of the peasant from his land. See the effect of rejecting the core reasoning of high court in its decision which is "[…] **የሰሜን ሸዋ ዞን ከ/ፍ/ቤት መሬት የማይሸጥ በመሆኑ መልስ ሰጭ ከመሬቱ ላይ ያለውን ንብረት አንስታ መነሳት አለባት** […]"[39] meaning since the land is not subject to sell; respondent shall take off her property and transfer the land to the applicant.

Is there any legal provision which support the reasoning of HoF i.e. it is possible to be the lawful possessor of rural land by buying fixed assets and houses built on the land? Pertinent laws that govern rural land does not support the decision of HoF. The Constitution provides that "Land […] shall not be subject to sale or to other means of exchange."[40] And "Ethiopian peasants have right to […] protection against eviction from their possession. The implementation of this provision shall be specified by law."[41] There are laws made in this regard such as Federal rural land administration proclamation No. 456/2005 which states that "Each regional council shall enact rural land administration and Land use law, which consists of detailed provisions necessary to implement this Proclamation,"[42] Accordingly Oromia enacted laws such as Oromia rural land proclamation No. 130/99 and Oromia rural land administration and use regulation No.151/2012. Accordingly they provide as the following.

"Any peasant […] shall not be evicted from his holding and his holding shall not be transferred to anybody […] due to any liability or execution of judgment."[43] It also provides that "The right to sell property […] in any condition does not include land."[44] "The use right of any peasant […] shall not be transferred because of selling fixed assets […]"[45] above all it provides that "Any individual or organ who bought houses and other buildings built on rural land shall be obliged to

[39] *Ibid*
[40] Constitution of Federal Democratic Republic of Ethiopia, *Federal Negariat Gazeta*, 1st year, no. 1 (August 1995), Art. 40 (3)
[41] Ibid
[42] Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation No. 456/2005, Federal Negarit Gazeta,11th Year No. 44 Addis Ababa-15th July, 2005 Art. 17 (1)
[43] Proclamation to amend the proclamation No.56/2002, 70/2003, 103/2005 of Oromia Rural land Administration and Use Proclamation No.130/2007, Oromia National Regional State Council, *Finfinnee*, July 29, 2007, Art. 6(5)
[44] Ibid, Art. 6(6)
[45] Ibid, Art. 6(7)

take off his property […]"[46] However, the federal rural land proclamation stipulates that ""holding right" […] includes the right to acquire "property produced on his 'Land thereon by his labour or capital and' to sale, exchange and bequeath same"[47] does this mean to sale property with your rural land?

Not only laws but also some of the other decisions of HoF indicates that peasant shall not be evicted from their holdings. In the case between *Mrs. Alemitu Gabre v. Mr. Channe Dasaleng* in which the HoF decided that renting rural land for unpermitted time, 50 years, amounts to evicting peasants from their land and results in the violation of Art. 40 (3 and 4) of the FDRE Constitution.[48] If this is the case, then how selling the fixed property on the rural land cannot result in eviction of peasants from their land in the case between *Mrs. Alemitu Gabre v. Mr. Channe Dasaleng*?

The other case which shows the trend of the HoF is a case between *Ato Lema Getachew V. Hayilagiorgis Mune (2 others)*.[49] In this case the HoF decided that land cannot be subjected sale since sale results in eviction of peasants from their land.[50] If HoF decided in this way in the case between *Ato Lema's* case, then why and how HoF failed to give the same decision in the case between *Ato Isu Indale Ababe V. W/ro Yisalaf Mamo*[51]which has similar facts and issues as discussed above? There are some other decisions which can indicate that the trend of constitutional interpretation in Ethiopia does not worth exhausting local remedies for the purpose of Art. 56 (5) of ACHPR. The following cases are discussing the right to fair trial particularly the right to accused person to"[…] full access to any evidence […]"[52] "Accused persons have the right to full access to any evidence presented against them […]"[53]

[46] Ibid, Art. 6(8)
[47] Proc. No. 456/2005, Art. 4, above n.42
[48] *Mrs. Alemitu Gabre v. Mr. Channe Dasaleng*, 5th terms of parliamentary office, 1st year, 2nd ordinary meeting, FDRE HoF, Megabit 3, 2008 E.C
[49] *Ato Lema Getachew V. Hayilagiorgis Mune (2 others)*, Internal Memo, to: Constitutional Interpretation and Identity Affairs Permanent Committee, from Constitutional Interpretation and Identity Affairs Directorate, Ginbot 01, 2009 E.C.
[50] *Ibid*
[51] *Ato Isu Indale Ababe V. W/roYisalef Mamo*, above n.37
[52] FDRE Constitution, Art.20 (4), above n.40
[53] Ibid

CCI gave a wrong interpretation regarding the right to accused person specifically "[…] the right to full access to any evidence presented against them […]"[54] in different cases. In the case between *Ato Mahadi Aliye and (2 others) V. Federal Public Prosecutor*[55] The CCI decided that the right to accused person does not include the right to know the list of the witnesses to be presented against them even if the referral Court believe that there is a contradiction between Art. 32(1) of Anti-Terrorism proclamation No. 652/09 and Art. 20 (4) of the FDRE Constitution.[56]

Similarly, in the case between *Husen Ali Husen (and 23 others) V. Amara National Regional State Public Prosecutor,* the CCI decided that the right to accused person does not include the right to know the list/identity of the witnesses.[57] It reasoned that "**ከ ህገ መንግስታዊ ድንጋጌ መገንዘብ እንደሚቻለዉ ምስክሮች የመጠየቅ መብት ያላቸዉ መሆኑን የሚያረጋግጥ እንጂ የምስክሮች ስም ዝርዝር እና አድረሻ ለተከሰሱ ሰዎች እንዲደርሳቸዉ መብት የሚሰጣቸዉ ወይም በክሳሹ ወገን ላይ የምስክሮችን ስምና አድራሻ ለተከሰሱ ሰዎች እንዲያሳዉቅ ግዴታን የሚጥል አይደለም**::"[58] It means that the Constitution does not give the accused the right to know the list of witnesses and does not impose the duty on the public prosecutor let the accused know the list and addresses of witnesses.

Above all in the case between *Ato Mahadi Aliye and (2 others) V. Federal Public Prosecutor*[59] the Federal High Court which referred the case to CCI framed the problem to be solved clearly as cited below.

> Art. 20 (4) does not have exceptional circumstances in which the rights of defendants stated under the article can be limited. Then does the right to full access to any evidence include the right to know the list of

[54] Ibid
[55] *Ato Mahadi Aliye and (2 others) V. Federal Public Prosecutor,* referred to CCI by Federal High Court 19th Criminal Bench, CCI, Hamle 29, 2009 E.C
[56] *Ibid*
[57] *Husen Ali Husen (and 23 others) V. Amara National Regional State Public Prosecutor,* referred to CCI by Amahara National Regional State Supreme Court Dasse and its Surrounding Permanent Bench, CCI, Ginbot 06, 2007 E.C
[58] *Ibid*
[59] *Ato Mahadi Aliye and (2 others) V. Federal Public Prosecutor,* above n.55

witnesses? Is there any contradiction between Art. 20 (4) of FDRE constitution and 32 (1) (c) Anti-Terrorist proclamation No. 652/09 and Proclamation No. 699/11 Art. 4 (e) and (j)?[60]

Despite of the clearly formulated problem by the referral court, the body designed to mitigate the problem of legal knowledge and experiences in constitutional interpretation of HoF decided that "[…] **የተከሰሱ ሰዎች የቀረቡባቸዉን ምስክሮች የመጠየቅ መብት ያላቸዉ መሆኑን የሚያረጋግጥ እንጂ የምስክሮች ስም ዝርዝር እና አድራሻ ለተከሰሱ ሰዎች እንዲደርሳቸዉ መብት የሚሰጣቸዉ ወይም በከሳሹ ወጋን የምስክሮችን ስምና አድራሻ ለተከሰሱ ሰዎች እንዲያሳዉቅ ግዴታን የሚጥል አይደለም፡ ይህም በህገ መንግስቱ ላይ በግልጽና በማያሻማ ሁኔታ የተቀመጠ ነዉ።**"[61] The core message of this decision is that the accused person does not have the right to know the list/identity and addresses of witnesses presented against them and this is clearly and unequivocally provided in the Constitution. However, different mistakes can be inferred from such decisions as discussed below.

The first mistake of the decision of CCI is that the failure to understand the meaning, scope and status of the rights of accused person. FDRE Constitution stipulates that "[a]ccused persons have the right to full access to any evidence presented against them […]"[62] on the other hand the Anti-terrorism Proclamation No. 652/09 provides that "[w]here the court, […] is satisfied that the life of such witness is in danger, it may take the necessary measure to enable the withholding of the name and identity of the witness. The measures it takes may in particular include:"[63] "issuing of any directions for securing that the identities and addresses of the witnesses are not disclosed […]"[64] Does these two provisions, Art. 20(4) of the Constitution and Art. 32 (1) (c) of Proc. No. 652/09, convey the same message or does the proclamation deviates from the constitutional provision? More specifically does the constitutional phrase "[…] full access to any evidence […]"[65] also include "[…] the identities and addresses of the witnesses […]"?[66]

[60] *Ibid*
[61] *Ibid*
[62] FDRE Constitution, Art.20 (4), above n.40
[63] Anti-Terrorism Proclamation No. 652/2009, Federal Negarit Gazeta, 15th Year No. 57. Addis Ababa 28th, August, 2009, Art. 32 (1)
[64] Ibid, Art. 32 (1)(c)
[65] FDRE Constitution, Art.20 (4), above n.40
[66] Procl. No. 652/09, Art. 32 (1)(c), above n.63

The constitutional phrase "[…] full access to any evidence […]"[67]shall include "[…] the identities and addresses of the witnesses […]"[68] because the constitutional provision does not have any exceptional circumstances under which such constitutional rights can be limited by law or other means. If this is the case; then CCI could not understand the meaning of the rights stipulated under Art. 20 (4) of the Constitution and wrongly decided that the right to "[…] full access to any evidence […]"[69]does not include "[…] the identities and addresses of the witnesses […]."[70]

The second mistake of CCI is the conclusion which states that "[…] **በከሳሹ ወጋን የምስክሮችን ስምና አድራሻ ለተከሰሱ ሰዎች እንዲያሳዉቅ ግዴታን የሚጥል አይደለም፡ ይህም በህገ መንግስቱ ላይ በግልጽና በማያሻማ ሁኔታ የተቀመጠ ነዉ፡፡** "[71] This means that the Constitution clearly and unequivocally provided that the Constitution does not impose the obligation on the prosecution to disclose the identity and addresses of the witnesses to the accused. However, the Constitution nowhere provided that the accused does not have the right to know the identity and addresses of the witnesses. On contrary, the Constitution clearly and unequivocally provided that "[a]ccused persons have the right to full access to any evidence presented against them […]."[72] As understood from this constitutional provision, what is clear and unequivocal is the fact that the accused person has the right to know the identities and addresses of the witnesses as opposed to the decision of CCI and the provision of Anti-Terrorism proclamation. More importantly CCI argued that denying the accused persons the right to know the identities and addresses of the witnesses is constitutional and conforms to the rule of fair trial. Does it really conform to it? How the right to fair trial including the rights of accused person to know the list and identities of the witnesses is interpreted by different body under various jurisprudences?

Since the jurisprudences of other jurisdictions are relevant as per Art. 61 and 62 of ACHPR; it will be helpful to see different experiences regarding the right to fair trial particularly the right to disclose the list of witnesses. Various principles provide that "[…] the accused and their counsel

[67] FDRE Constitution, Art.20 (4), above n.40
[68] Procl. No. 652/09, Art. 32 (1)(c), above n.63
[69] FDRE Constitution, Art.20 (4), above n.40
[70] Procl. No. 652/09, Art. 32 (1)(c), above n.63
[71] *Ato Mahadi Aliye and (2 others) V. Federal Public Prosecutor,* above n.55
[72] FDRE Constitution, Art.20 (4), above n.40

should be granted timely access to relevant information [including] witness lists and information, […] on which the prosecution intends to rely [...].”[73] Such information also includes information that might […] affect the credibility of evidence presented by the prosecution, support a line of argument of the defense or otherwise help the accused prepare their case or mitigate a penalty.”[74] As decided by European Court; the value of the information about the witnesses of the prosecution is high because “[d]isclosure provides the defen[s]e with an opportunity to learn about and prepare comments on the observations filed or evidence to be adduced by the prosecution.”[75]

The Inter-American Court[76] and International Criminal Court (ICC) established that “The prosecution must […] disclose information relevant to the credibility of witnesses.”[77]

Regarding the status of the right to know the list of the witnesses of prosecution, “The right to disclosure of relevant information is not absolute; however, restrictions on disclosure and any failure to disclose must not lead to an unfair trial. To avoid unfairness as a result of lack of disclosure, charges may ultimately have to be dropped or criminal proceedings terminated.”[78] “[…] any such restrictions on disclosure must be strictly necessary and proportionate to the aim of protecting the rights of another individual (including those who may be at risk of reprisal) […].”[79] “Court orders permitting non-disclosure must be the exception, not the rule, and must not have an adverse impact on the overall fairness of the proceedings. […]”[80] “The authorities

[73] “Principle 21 of the Basic Principles on the Role of Lawyers, Principle 12 §36 of the Principles on Legal Aid, Section N(3)(d) and (e)(iii)‑(vii) of the Principles on Fair Trial in Africa, Article 67(2) of the ICC Statute, Rules 66‑68 of the Rwanda Rules, Rules 66, 67(b)(ii) and 68 of the Yugoslavia Rules; HRC General Comment 32, §33” as cited in Amnesty International, *Fair Trial Manual* (2nd ed, 2014), p. 78

[74] Ibid,

[75] “See *Foucher v France* (22209/93), European Court (1997) §§36-38.” Cited in ibid

[76] “*Leiva v Venezuela*, Inter-American Court (2009) §54.” As cited in ibid

[77] “*Prosecutor v Blaškić*, (IT-95-14-A), ICTY Appeals Chamber (29 July 2004) §§263-267; See *Prosecutor v Lubanga Dyilo* (ICC-01/04-01/06), ICC, Decision on the scope of the prosecution’s disclosure obligations as regards defence witnesses (12 November 2010) §§12-16.” As cited in ibid

[78] Ibid, p. 78

[79] “See Rules 81‑84 of the ICC Rules of Procedure and Evidence; Rowe and Davis v United Kingdom (28901/95), European Court Grand Chamber (2000) §§60-67; See Prosecutor v Katanga and Ngudjolo (ICC-01/04-01/07-475), ICC Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” (13 May 2008) §§60-73.” As cited in ibid, p. 78 and 79

[80] “Ibid

and courts must also keep under review, throughout the proceedings, the appropriateness of the non-disclosure in the light of the significance of the information, the adequacy of the safeguards and the impact on the fairness of the proceedings as a whole."[81] But who shall permit the withholding of the disclosure of the list of the witnesses?

The European Court decided that "[t]he necessity of non-disclosure should be decided by a court rather than the prosecution. An adversarial hearing respecting the principle of equality of arms should generally be held by the trial court."[82] "According to the Johannesburg Principles, any restriction on the disclosure of information is […] allowed only if its demonstrable effect is […] to respond to the use or threat of force."[83]

When reviewing anti-terrorism legislation in Canada which permitted non-disclosure of information which could cause injury to international relations, national defen[s]e or national security, the Human Rights Committee reminded the authorities that in no case could exceptional circumstances be invoked as a justification for deviating from fundamental principles of fair trial.[84]

"[…] The Human Rights Committee has clarified that the right to adequate facilities to prepare a defen[s]e must be understood as a guarantee that individuals cannot be convicted on the basis of evidence to which the accused or their counsel do not have full access."[85]We can summarize the following from the above discussion.

[81]International, above n , 73

[82] "European Court: Rowe and Davis v United Kingdom (28901/95), Grand Chamber (2000) §§53-67, McKeown v United Kingdom (6684/05), (2011) §§45-55; Myrna Mack Chang v Guatemala, Inter-American Court (2003)§179; but see European Court: Jasper v United Kingdom (27052/95), Grand Chamber (2000) §§42-58, Botmeh and Alami v United Kingdom (15187/03), (2007) §§41-45.", Cited in, ibid p. 78 and 79

[83] Principles 1, 2 and 15 of the Johannesburg Principles.

[84] "HRC Concluding Observations: Canada, UN Doc. CCPR/C/CAN/CO/5 (2006) §13; See Onoufriou v Cyprus, HRC,UNDoc. CCPR/C/100/D/1636/2007 (2010) §6.11; HRC Concluding Observations: United Kingdom, UN Doc.CCPR/C/GBR/CO/6 (2008) §17; UN Mechanisms Joint Report on detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120 (2006) §36; Special Rapporteur on the independence of judges and lawyers, UN Doc. A/64/181 (2009) §§41-43; See Myrna Mack Chang v Guatemala, Inter-American Court (2003) §§179-182; See also Prosecutor v Katanga and Ngudjolo (ICC-01/04-01/06-2681-Red2), ICC Trial Chamber, Decision on the Prosecution's Request for the Non-Disclosure of Information, a Request to Lift a Rule 81(4) Redaction and the Application of Protective Measures pursuant to Regulation 42 (14 March 2011) §27."

[85] "Onoufriou v Cyprus, HRC, UN Doc. CCPR/C/100/D/1636/2007 (2010) §6.11, HRC Concluding Observations: Canada, UN Doc. CCPR/C/CAN/CO/5 (2006) §13; See Prosecutor v Katanga and Ngudjolo (ICC-01/04-01/06-2681-Red2) ICC Pre-Trial Chamber, Decision on the Prosecution's Request for the Non-Disclosure of Information,

The right to "[…] full access to any evidence […]"[86] includes information that might […] affect the credibility of evidence presented by the prosecution, […]"[87]; specifically, […] information relevant to the credibility of witnesses.[88] Any "[…] restrictions on disclosure must be strictly necessary and proportionate to the aim of protecting the rights of another individual […]"[89]; "The necessity of non-disclosure should be decided by a court rather than the prosecution."[90] Regarding "[…] non-disclosure of information […] in no case could exceptional circumstances be invoked as a justification for deviating from fundamental principles of fair trial.[91] Since this thesis is mainly concerned with the rules and practice of African Commission; it is helpful to see the status of the right to fair trial under African Commission's rules? Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa strongly recognized the right to fair trial and made it non-derogable right.[92] It provides that "[n]o circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial."[93] Therefore, the right to fair trial has the status of non-derogable rights. When such non-derogable status of the right to fair trial is seen from FDRE Constitution which provides that

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a Request to lift a Rule 81(4) Redaction and the Application of Protective Measures pursuant to Regulation 42 (14 March 2011) §27; Principle 20(i) of the Johannesburg Principles." Cited in International, above n 212, p. 79

[86] Art.20 (4) of FDRE Constitution, above n.3

[87] "Principle 21 of the Basic Principles on the Role of Lawyers, Principle 12 §36 of the Principles on Legal Aid, Section N(3)(d) and (e)(iii)‑(vii) of the Principles on Fair Trial in Africa, Article 67(2) of the ICC Statute, Rules 66‑68 of the Rwanda Rules, Rules 66, 67(b)(ii) and 68 of the Yugoslavia Rules" Cited in International, above n 212; p. 78 "HRC General Comment 32, §33."

[88] "Prosecutor v Blaškić, (IT-95-14-A), ICTY Appeals Chamber (29 July 2004) §§263-267; See Prosecutor v Lubanga Dyilo (ICC-01/04-01/06), ICC, Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses (12 November 2010) §§12-16."

[89] "See Rules 81‑84 of the ICC Rules of Procedure and Evidence; Rowe and Davis v United Kingdom (28901/95), European Court Grand Chamber (2000) §§60-67; See Prosecutor v Katanga and Ngudjolo (ICC-01/04-01/07-475), ICC Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" (13 May 2008) §§60-73.; Cited in International, above n 212, p. 78 and 79

[90] "Principles 1, 2 and 15 of the Johannesburg Principles."

[91] "HRC Concluding Observations: Canada, UN Doc. CCPR/C/CAN/CO/5 (2006) §13; See Onoufriou v Cyprus, HRC,UNDoc. CCPR/C/100/D/1636/2007 (2010) §6.11; HRC Concluding Observations: United Kingdom, UN Doc.CCPR/C/GBR/CO/6 (2008) §17; UN Mechanisms Joint Report on detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120 (2006) §36; Special Rapporteur on the independence of judges and lawyers, UN Doc. A/64/181 (2009) §§41-43; See Myrna Mack Chang v Guatemala, Inter-American Court (2003) §§179-182; See also Prosecutor v Katanga and Ngudjolo (ICC-01/04-01/06-2681-Red2), ICC Trial Chamber, Decision on the Prosecution's Request for the Non-Disclosure of Information, a Request to Lift a Rule 81(4) Redaction and the Application of Protective Measures pursuant to Regulation 42 (14 March 2011) §27."

[92] African Union, African Commission on Human & Peoples' Rights, *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247,* (R), p.22

[93] Ibid

accused persons have the right to "[…] full access to any evidence […]";[94] the decision of CCI will be wrong decision. Such wrong decisions might happen due to various reasons but never due to the existence of the required legal knowledge and experiences in constitutional interpretation. Then what are the implications of such wrong decision by the body, CCI, hoped to mitigate the weakness of the HoF but failed to do so, at least as indicated in above indicative decisions? Is there a need for exhausting local remedies from such institution? No, exhausting local remedies from such institution is not desirable for the purpose of Art. 56 (5) of ACHPR.

3.3 Membership to EPRDF and its Implications

3.3.1 Members of HoF are Actually Members of EPRDF

Members of HoF are elected by state councils.[95] Despite the absence of constitutional provision which prohibits electing non-EPRDF to HoF, the members of HoF are dominated by members of EPRDF. In the case of National Regional State of Oromia; all of the members of HoF delegated from the region are members of Oromia State Council, *Caffee Oromiyaa,* for all the five terms.[96] The members of *Caffee Oromia* are currently wholly members of OPDO[97] which is an EPRDF member party. There are also documentary evidences which show that the elected members of HoF from Oromia are exclusively members of OPDO/EPRDF.[98] They are appointed by the speaker of the *Caffee since 1994 EC and by the regional president before the 1994 EC.*[99] Therefore, based on the representative of National Regional State of Oromia, HoF is a composition of members of a political party, OPDO/EPRDF, members.

In addition to being member of *Caffee Oromia* or OPDO/EPRDF; the members of HoF elected from Oromia are also key officials who are also members of Central Committee of EPRDF, and members of Council of EPRDF.[100] The Central Committee of EPRDF is one of the most important decision making body.[101] This means at least some members of HoF are also members

[94] FDRE Constitution, Art.20 (4), above n. 40
[95] Ibid, Art.62
[96] Mr. *Sammaa A/Goojjam A/Garoo*, Head of oromia State Council and Member of HoF for the 5th term of Office. Interview, June 2017, Finfinne
[97] Ibid
[98] Oromia State Council's Minutes, above n.10
[99] Mr.*Addisu malaku*, High legal advisor of Oromia State Council, Interview, June 2017, Finfinne
[100] Daniel Berhane, EPRDF's New Leadership (Executive & Council members lists), October 3, 2010, http://hornaffairs.com/2010/10/03/eprdfs-new-leadership/ accessed on September 23, 2017
[101] Abebe, above n 22, p.8

to Central Committee of EPRDF, or Council of EPRDF. Not only their membership to different committees in EPRDF, they also hold other high official positions such as ministerial or equivalent positions from executive branch of government.[102] At regional level they hold position in legislative and executive offices as well.[103]

3.3.2 Membership to EPRDF Creates Justified Doubts

"Article 7.1.d of the African Charters requires the court or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality. It thus violates Article 7.1.d."[104]

Membership to a political party and organs of judicial nature, political affiliation, will create at least justified doubts as to the existence of appearance of independence and impartiality.[105] Based on representative of Oromia to HoF; those representatives are members to HoF and OPDO/EPRDF at the same time.[106] This political membership creates justified doubt on the existence of independence and impartiality of HoF as an institution and individual members.

3.3.3 Membership to EPRDF Creates Conflict of Interest

Two types of conflict of interest can be established from the setting of HoF. The first is personal conflict of interest which can result from individual interest against government interest. The second one is institutional conflict of interest in which HoF has two divergent mandates: political, and 'judicial review' mandates.

The political contexts and a paper by Dr. Aseffa suggests that, the career, promotion, or demotion of individual members of EPRDF depends on their contribution, diligence, obedience and the ultimate sacrifice they pay for the execution of the political agenda of the ruling political party or the interest of government; a government formed 'only by EPRDF' since the fall of *Derg*. The conflict of interest comes here when members of EPRDF are also members of HoF who are mandated to decide on the (un)constitutionality of laws or any acts of any organ of government. This scenario puts members in trap and they must choose between government

[102] Awramba Times, above n. 25
[103] Mr. *Sammaa A/Goojjam A/Garoo,* above n.96
[104] Communication 87/93, above n1, par. 14
[105]Ibid
[106]Oromia State Council's Minutes, above n.10; interview with Mr. *Sammaa A/Goojjam A/Garoo,* above n.96

interest which will bring them individual advantages (personal interest) and human rights of complainants. If members of HoF critically argue against laws or acts of government; then, it is likely that, that member will be personally affected in different aspects especially promotion to a higher position after his/her term of HoF. Because in the presence of politically obedient and loyal members of HoF, the one who argues against laws, acts, and policies of government will not have a better place. A good example can be a former Ethiopian President DR. Negassso's case.[107] The relevant aspect of this case is the fact that Dr. Negasso resigned from his presidency as a result of disagreement and the disagreement is caused by the activism of Dr. Negasso.

Additionally, loyalty to EPRDF has an award. "[b]ut the more pressing, though perhaps less obvious, challenge for EPRDF leaders will be to satisfy the growing demands of lower-level party cadres who were recruited with the promise that their patience and loyalty would be rewarded with career advancement within government and the EPRDF."[108] "The links between party membership and access to land, fertilizer, higher education, and civil-service jobs resulted in a virtual merger of the party and the government."[109] "The World Bank's 2012 report on corruption in Ethiopia notes that perceptions of party-member favoritism are widespread."[110] "[…] party members routinely gain preferred access to markets or special treatment in procurement."[111]

Institutionally, HoF is also mandated with both political and judicial functions.[112] This shows that HoF must choose between the political interest of government or human rights whenever there is conflict between the two. As discussed above, HoF is dominated by members of EPRDF. More importantly, the members of HoF have position either from executive or legislative body of Federal or regional government. These official duties and political membership are likely capable of compelling HoF to choose for the interest of government by undermining other constitutional and human rights values. Especially, with a mandate of deciding on the (un)constitutionality of laws or any acts of any organ of government; it will be unlikely that HoF

[107] *Dr.Negaso Gidada*, HoF, 29/10/97 E.C , Constitutional Decisions Journal, Volume 2, Megabit, 2009 E.C
[108] Leonardo R. Arriola and Terrence Lyons, 'Ethiopia: The 100% Election' (2016) 27(1) *Journal of Democracy* 76, p.79
[109] Ibid, p.81
[110] Ibid, p.86, citation omitted
[111] Ibid
[112] FDRE Constitution, Art 61 (3), above n.40

opt for Human rights than political interest. In fact HoF may rely on the constitutional provision to rule against human rights opting for political interest under the guise of the interest of nations, nationalities and peoples. The question is therefore, is it reasonable to expect HoF to declare laws or any acts of any organ of government unconstitutional in politically sensitive cases?

More importantly the drafters of the FDRE constitution needed "[…] to establish, and continue to retain, a dependent and weak constitutional review system"[113] despite independent constitutional review system is considered as the guardian of human rights.[114] One of the major purposes for the creation of HoF as opposed to constitutional court or mandating ordinary courts with the power of constitutional interpretation is to escape from judicial activism.[115] The constitutional drafters think that judges bring their personal philosophy in interpreting the Constitution.

The implication of their reasoning is that, HoF is created to decide cases not according to their understanding of facts, laws and evidences what they call it 'personal philosophy' but to decide cases according to their political significance to the political system typically according to the will and wish of EPRDF directly or indirectly. This is true because, judicial activism is not about being partisan rather about the highest possible quality of looking for the true meaning of laws from different perspectives. The experience of USA and other countries with developed culture of judicial activism imply that judicial activism promotes both democracy and human rights in not resulted in undermining neither the interest of people or justice. If judicial activism is not liked then it implies that HoF will be passive in politically charged/sensitive cases. On the other hand human rights laws are designed to protect rights in such scenario. Therefore, there is a justified doubt that HoF is dependent and partial.

Based on both personal and institutional conflict of interests; HoF creates a justified doubts that it is not in a position to decide case independently, impartially and competently especially in cases in which government has interest directly or indirectly. The mere existence of such justified doubt as to the independence and impartiality of HoF are sufficient to exonerate complainants from exhausting remedy from HoF since such doubt render the remedy

[113] Abebe, above n 22, p.17
[114] Ibid, p.32
[115] Assefa Fiseha, above n 32 [Foot note no. 32 from chapter one, note from chapter three], p.11

unavailable, ineffective and insufficient. The Commission decided that if the members of certain tribunal are chiefly composed of persons belonging to the executive branch of government, "[r]egardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality. It thus violates Article 7.1.d."[116] of ACHPR.

3.3.4 The Actual Reflection of Political Motives in Decisions of HoF

The execution of political motives are reflected both in decision of HoF and in different studies. In cases which involves the interest of government directly or indirectly, the reasoning of HoF is provided simply to safeguard the interest of government.[117] In the case between and *Tateq H/Mariam and Government Houses' Agency Vs. Ayele Habte Sillase*[118] the reasoning of HoF is made to serve the interest of the government as opposed to considering government agency just as a mere party to the case.[119] In its recommendation to HoF, the CCI stated that "**የስረአቱ ዋና አደጋ ነዉ ተብለዉ በግልጽ የተለየዉን ክራይ ሰብሳቢነት ከመድፈቅ አስተሳሰብና ከአስተሳሰቡም የመነጨ ፖሊሲ የወጣ ህግ በመሆኑ በ**1952 **ዓ.ም ከወጣዉ የንግድ ህግ ቁጥር** 145 **ንኡስ ቁጥር** 1 **ጋር ይጋጫል የሚባልበት አንዳች ምክንያት ቢኖር እንኳን ገዢነትን የበላይነት ልኖረዉ የሚገባዉ አዋጅ ቁጥር** 555/2000 **በመሆኑ**"[120] This reasoning is not legal reasoning rather politically bold statement.

Not only this but also both CCI[121] and HoF[122] in their reasoning targeted against "ክራይ ሰብሳቢነት" meaning 'rent seeking' this is completely political terminology used to protect political interest as both CCI and HoF are clear when they stated that "**የስረአቱ ዋና አደጋ...ከመድፈቅ አስተሳሰብ**" meaning to entomb/bury the principal challenge of the system. The mind set up of both the CCI and HoF as indicated by this decision is to safeguard the interest of

[116] Communication -60/91 Constitutional Rights Project (in respect of Wahab Akamu, G. Adega and others) v. Nigeria, par.14
[117] *Tateq H/Mariam and Government Houses' Agency Vs. Ayele Habte Sillase*, FDRE HoF, 5th Parliameny Year, 1st Year, 3rd Ordinary meeting, Ginbot 15, 2008 E.C
[118] *Tateq H/Mariam and Government Houses' Agency Vs. Ayele Habte Sillase*, FDRE CCI, File No.1397/07, Tahisas 27, 2008 E.C
[119] *Tateq H/Mariam*,.HoF, above n.117
[120] *Tateq H/Mariam*, CCI, above n.118
[121] *Ibid*
[122] *Tateq H/Mariam,HoF, above n.117*

the 'system' even when there is clear legal provision.[123] Additionally, both CCI and HoF designated one party "higawatoch" meaning illegal.[124]Similarly, some researches also argue that HoF justify the interest of government rather than providing a complete legal analysis.[125] For the purpose of exhaustion of local remedy; the existence of such improper motives at least create justified doubts as to the independence and impartiality of HoF; which result in exonerating complainants from exhaustion of local remedies.[126]

3.4 The Political Context: the Tradition of Politicizing Everything including HoF

"At all lower levels of the [EPRDF and its member party] hierarchy, submission [to the superior] is the rule, notably because it is the key to potential promotion. Very few dare to show any signs of independent thought. Orders are carried out, no matter how inappropriate or unrealistic they might be."[127]

The political and legal context is one of the decisive factors for human rights litigation.[128] African Commission also considers the general context in which the remedy operates.[129] It may promote or hamper the constitutional review[130] which is one of the power of the HoF. EPRDF has a tradition of politicizing every angle of activities, institutions, and individuals to get executed its political motives as "Ethiopia lives under a 'monolithic party-state system' […]".[131]

[123] *Ibid*
[124] Ibid, *Tateq H/Mariam, CCI, above n.118*;
[125] Abebe, above n 22, p.86-88
[126] Communication -87/93,above n.1, par.8, Communication -60/91, above n.116, par.10, for similar cases from other jurisdiction "*see Castedo v Spain*, HRC Communication 1122/2002, UN Doc CCPR/C/94/1122/2002 (2008), para 9.7; *Kyprianou v Cyprus* [2005] ECHR 873, para 118; *Wettstein v Switzerland* [2000] ECHR 695, para 44; *Ferrantelli and Santangelo v Italy* [1996] ECHR 29, para 58; *Jasinski v Poland* [2005] ECHR 883, para 53; *Sara Lind Eggertsdóttir v Iceland* [2007] ECHR 553, p, 42.
[127] René Lefort, below n.132, p.64"
[128] Abebe, above n ,22, p.31
[129] Communication 334/06 - *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Par. 92, *Communication 299/05, Anuak Justice Council v. Ethiopia, (2006), pars. 33-39 (hereafter, AJC v. Ethiopia)*, par.49
[130] Abebe, above n 22, p.33
[131] Christopher Clapham, 'Post-war Ethiopia: the trajectories of crisis', Review of African Political Economy 36, 120 (2009), pp.181–92. As cited in René Lefort, p.61

Interference in EPRDF itself, civil service, election, judiciary, media, economy, and other human rights activities are few of them.[132]

3.4.1 TPLF Dominates EPRDF.

One of the constituencies of EPRDF is TPLF from the Tigre ethnic group which also created the other constituencies.[133] Various researches indicate that "[i]t is indisputable that leaders from the Tigrayan minority (6 percent of the population) have dominated the EPRDF."[134] "EPRDF's Executive Committee, [is] the most important decision-making body in Ethiopia."[135] This "most important" executive committee is dominated by TPLF which can be demonstrated from the equal representation of TPLF in the committee with other co-constituent political parties despite the size of people they 'represent'.[136] In practice, centralism overrules democracy in the administration of EPRDF.[137] TPLF represent the small insignificant number of Ethiopian people just less than five million Tigrians. This implies that the Ethiopian socio-politico-legal activities of the entire people of Ethiopia, about 100 million in number, is under control of or at least undue influence of TPLF representing less than 5 million people.

In such above context; can HoF be in a position to be immune to the influence, interference, or even control of TPLF/EPRDF to the standard of reasonable man? Is there any reasonable factor which stops TPLF/EPRDF from controlling HoF especially in the case that involves their interests directly or in directly? Given such context the researcher concludes that at least to the standard of reasonable man; HoF and its members cannot be free of the influence of TPLF/EPRDF when it comes to any interest that TPLF/EPRDF wants to protect. This leads to the existence of, at least, justified doubts of undue influence and interference in the affair of HoF in some cases.

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[132] Rene Lefort, 'The Theory and Practice of Meles Zenawi: A Response to Alex Dewaal ' (2013) 112(448) *African Affairs* 460, pp.61-64, 67

[133] Lyons, above n 108, p.76

[134] See René Lefort, 'Meles rules from beyond the grave, but for how long?', Open Democracy,<http://www.opendemocracy.net/opensecurity/ren%C3%A9-lefort/ethiopia-meles-rules-from beyond-grave-but-for-how-long> (11 February 2013). Cited in Lefort, above n 152, p.63, see also Lyons, above n 108, pp.76.82

[135] Lyons, above n 108, p.77, see also p. 79

[136] Ibid, p.83

[137] Lefort, above n 132, p.62

3.4.2 TPLF/EPRDF Dominates Civil Service and other key Positions

In case of civil service, Assefa noted that, Ethiopia civil service "[…] suffers from extreme politicization."[138] Though "For a number of authors, 'a powerful, competent, and insulated bureaucracy' is considered as a necessary pillar of a developmental state."[139] Some research indicates that EPRDF managed to recruit more than 95 percent in the civil service in certain places.[140] In other words, "[p]olitical loyalty and merit equally compete in the recruitment, retention, and promotion of civil servants."[141] "[TPLF] also hold the key positions in the army, police, security services, public economic sector, and the para-public economic sector that is mostly in the hands of 'endowments' owned by the TPLF."[142]

In the presence of such effort of EPRDF; what will stop it from interfering, influencing or Ordering HoF in cases which involves the interest of government, EPRDF, TPLF, or even cases that involves individuals and various organization linked to EPRDF? Given such situations; can a reasonable man conclude that EPRDF influences others but not HoF? Precisely no practical mechanisms are in place to shield HoF and its members from political undue influence. More importantly the fact that the appointment of the members of HoF is conducted by the political body i.e. by state councils assists the politicization of the HoF. Then this leads to the existence of, at least, justified doubts of undue influence and interference in the affair of HoF in some cases.

3.4.3 Civil and Political Rights are undermined by EPRDF

"Owing to ideological shift towards a developmental state, there is an evolving trend that focuses more on economic growth and less on civil rights and political freedoms despite the constitution placing equal weight on all generations of rights."[143] The undermining of civil and political rights is of course claimed to promote development. But development also includes such

[138] Assefa Fiseha Yeibyio, 'Ethiopia:Development with or without Freedom?' in Christophe Van der Beken Eva Brems, and Solomon Abay Yimer (ed), *Human Rights and Development: Legal Perspectives from and for Ethiopia*, International studies in human rights (Brill Academic Publishers, 2015) , p.113
[139] Ian Taylor, 'Botswana as a "development-oriented gate-keeping state": a response', African Affairs 111, 444 (2012), pp. 466–76, p. 466. Cited in Lefort, above n 132, pp.60 and 61
[140] Yeibyio, above n 138, p.114, foot note No. 34
[141] Ibid, p.101
[142] Lefort, above n 132, p.63
[143] Yeibyio, above n 138 p.101, see also Lyons, above n 108, p.80

undermined rights because rights are indivisible.[144] Above all what will stop government/EPRDF or TPLF to interfere in HoF under the guise of development? Is it not reasonable to expect HoF will favor government interest under the undue influence of EPRDF in cases that involve developmental mega projects on one hand and individuals or groups on the other hand? Of course this research strongly argues that HoF will favor government because first it will be unreasonable to expect HoF will decide cases against the policy choice of the state. Second the HoF itself prefers policy than laws in some cases.[145]

3.4.4 Election is Completely Dominated by EPRDF/TPLF

Researches indicate that EPRDF is also well known for its interference in the election process, virtually in all of the five elections conducted since its seizing of power. The 1995 Ethiopian National election "[…] on paper it seemed free and fair, but in practice it was everything but that. It was also completely dominated by TPLF, and it was undemocratic.[146] In the 2000 election; EPRDF did not invite foreign observers because EPRDF stated that *"[…] a democratic country did not need to have its elections approved by foreign observers."* (Pausewang et al. 2002: 44)."[147] "NEB is appointed by parliament dominated by EPRDF which raises concerns by opposition" as to its impartiality.[148]

Regarding the 2010 election; "The EPRDF was doing all in its power to shut the opposition voices [as] "[t]he EPRDF went in to the 2010 elections with the tactic to target opposition parties, their members, human rights defenders and individuals in order to eliminate their voices of criticism and mistrust in the ruling government."[149] Their supporters were harassed, pressured, private media outlets were closed, "reporters who were voicing their criticism towards the ruling government were harassed and intimidated, forcing many to flee the country."[150] "It is clear, that

[144] Vienna Declaration and Programme of Action, : 12/07/93, A/CONF.157/23 12 JULY 1993, World Conference on Human Rights, Vienna, 14-25 JUNE 1993, Art.5
[145] *Tateq H/Mariam, HoF, above n. 117*
[146] Carolina Dahla, *The Ethiopian Quest for Democracy in a Dominant Party State: A Case Study on Democratization in Ethiopia Since the Implementation of Ethnic Federalism in 1995* (Master Thesis Thesis, Leiden University 2012),pp.24, 27, 29, 32
[147] Ibid, p.28-29
[148] Ibid, p.34
[149] Ibid, p.36
[150] Ibid

these elections lacked the freeness and fairness which a politically democratic procedure would need."[151]

Based on the research conducted on whether the 1995, 2000, 2005 and 2010 elections were conducted on a free and fair basis it can be "concluded that the fact that Ethiopia was single party dominated has not been an enabler for democratization to take place in the country. The Ethiopian state has re-entered the state of authoritarianism led by the EPRDF with the principle of 'dividing and conquering'."[152]

It was warned by scholars that the closing of political space will result in violent conflicts because "[t]he only opposition avenue remaining open appears to be that of armed struggle."[153] The good examples are different demonstrations took and taking place and the establishment of *Ginbot Sabat,* armed group by former peaceful political party, CUD, leader Prof. Dr. Birhanu Nega. Especially, the remaking of Addis Ababa the capital city of Oromia, *de jure*, is a typical example of how EPRDF systematically closed political space to CUD under the guise of the question of Oromo People. Of course the question of the people is correct but why at that time in point? It is simply to dismantle CUD as they exactly succeeded but not to answer the questions of Oromo people.[154]

"In Ethiopia, an election victory of 100 percent of parliamentary seats sends the message to potential rebels that there is only one game in town and that to imagine otherwise would be futile."[155] What does this sends to African Commission? Absolving complainants from exhausting local remedy from HoF? Yes this research concludes that Commission shall better consider the matters that look health so seriously in ruling on exhaustion of local remedies.

3.4.5 TPLF Dominated the Economic Sector

TPLF is also well known for its interference and control of economic sector. "[TPLF] also hold the key positions […] in public economic sector, and the para-public economic sector that is

[151] Ibid, p.37
[152] Ibid,p.43
[153] Lovise Aalen & Kjetil Tronvoll, 'The End of Democracy? Curtailing Political and Civil Rights in Ethiopia' (2009) 36(120) *Review of African Political Economy* 193, p.204, p. 194
[154] For related implication See ibid, p.199
[155] Lyons, above n 108, p.86

mostly in the hands of 'endowments' owned by the TPLF."[156] "Tigrayan leaders control around two-thirds of the country's economy, excluding traditional agriculture."[157] This means that if these leaders are capable of doing these then what will stop them from unduly influencing the HoF in any directions they want particularly in cases that affects their and interest directly or indirectly? These gives the inference that there is a reasonable doubt as to the existence of undue influence in HoF which in turn gives as the inference that exhaustion of local remedies from HoF is undesirable.

3.4.6 EPRDF Dominates Miscellaneous Human Rights Activities

Peaceful demonstrations are not treated democratically and proportionally. "The regime responded to this totally unexpected setback by increasing the level of repression, as evidenced by a series of draconian laws, arrests on a massive scale, and parodies of elections in 2008 and 2010."[158] The social movement or continuous protest such as the case of Oromo is the result of EPRDF's domination.[159] "[T]he government rolled out a deliberate plan to prevent any future large-scale protest against their grip on power by establishing an elaborate administrative structure of control, developing new legislative instruments of suppression and, finally, curbing any electoral opposition as seen in the conduct of the 2008 local elections. As a result, Ethiopia has by 2008 returned firmly into the camp of authoritarian regimes."[160] Killing, arrest and detention of protestors after 2005 election was observed and criticized both as excessive measure.[161] "Subsequent opposition demonstrations were put down brutally by state security forces, leaving nearly 200 dead. The regime arrested many top opposition leaders, as well as an estimated 30,000 alleged opposition supporters."[162] The political situation in Ethiopia since 2014 is also a good example for different human rights violations committed by government which proves the commitment of EPRDF/TPLF to safeguard its interest at any cost. Based on such context; can a reasonable man conclude that EPRDF/TPLF will not unduly influence HoF in the cases that involves its interest?

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[156] Lefort, above n 132, p.63
[157] Access Capital, 'Ethiopia: Macroeconomic Handbook 2011–12' (Addis Ababa, 2011), p. 3. Cited in Rene Lefort above n.132, p.63 FN 20
[158] Kjetil Tronvoll, 'The Ethiopian 2010 federal and regional elections: re-establishing the one party state', African Affairs 110, 438 (2011), pp. 121–36. Cited in Lefort, above n 132, p.63, see also Lyons, above n 108, p.79
[159] Lyons, above n 108, p.79
[160] Tronvoll, above n 153, p.193
[161] Ibid, pp.195-196
[162] Lyons, above n 108

3.4.7 EPRDF Dominates Media and Press

"The 'Mass Media and Freedom of Information Proclamation' law, ratified on 1 July 2008, further legalised the restrictive policies that the government had been practicing since 2005. Repressive elements of the previous proclamation were maintained, while new articles allowed prosecutors to summarily stop any publication deemed a threat to public order or national security, and the punishment for defamation was increased (CPJ 2008). The new press law also restricts media ownership by preventing non-Ethiopian citizens from owning a media outlet."[163] "[…] the regime has sought to muzzle its critics by adopting laws aimed at eliminating independent media and civil society institutions."[164] "As such, the relationship between government and the private media has been one of tension, with journalists and editors working for privately owned newspapers regularly fined and jailed. The power of the media – particularly in the 2005 pre-election phase – appeared to have come as a surprise to EPRDF. The TV/radio broadcasts of political debates prior to the elections were probably the factor which made the population aware of possible alternatives to EPRDF in government."[165] The frequent jamming of foreign based private TV/Radio and blocking of various social media by government is a proof that EPRDF will do anything in its hand to protect itself even illegally. Then how is it possible for HoF to be immune to such interference of undue influence of EPRDF/TPLF?

3.4.8 EPRDF Dominates Activities of Civil Societies

"Attacks on civil society and the opposition have hampered democratization across much of sub-saharan Africa, but few countries have experienced as severe an erosion in political rights as Ethiopia has without experiencing either a military coup or a civil war."[166]

Regarding the closure of Ethiopian Bar Association "Representatives from the Association believe that the Ministry's reaction is a retaliation to the volunteer/pro bono work members of the association gave to CUD during the complaints process in the summer of 2005, and filing habeas corpus cases to the court during the arrests in November the same year."[167] "Similar to the press law and the party formation law, this [proclamation] also restricts Ethiopian civil

[163] Tronvoll, above n 153, p.200
[164] Lyons, above n 108,p.81
[165] Tronvoll, above n 153, p.200
[166] Lyons, above n 108, p.80
[167] Tronvoll, above n 153, p.202

society's access to funds from abroad, thereby undermining their ability to work effectively"[168] "It particularly targets domestic human rights organisations which will not be allowed to do their work unless they redefine themselves as 'Ethiopian' NGOs, obtaining 90 per cent of their funds from inside the country. As this is hardly possible in a country as poor as Ethiopia, it is probable that affected NGOs will have to close down entirely. Furthermore, the proclamation stipulates that individuals who participate in any 'unlawful' or unregistered NGO will face up to five years imprisonment. The Societies and Charities Proclamation will thus provide the Ethiopian Government with an efficient tool in curbing both organisational and individual capacity to carry out work of which the government does not approve."[169]

3.4.9 Conclusion of Political Context

From the discussion of all the above different contextual issues; it is possible to reasonably conclude one central inference. This central inference is, EPRDF/TPLF led Ethiopian government will do anything in its hand to defend its interest or any other interest it wants to defend, let alone interfering in the activities of HoF. On the other hand there is no any reasonable practical context which can stop EPRDF/TPLF to interfere in the business of HoF if it wants to interfere. This is valid conclusion because "[…] independence is a state of mind. Note, however, that to disqualify an arbitrator, it is not necessary that she feels this pressure, since pre-existing relationships (which are a matter of fact, i.e., objective) are usually sufficient in themselves – both in domestic law and international arbitration. This shows that not only is it important that the adjudicator be independent, but they must also appear to be independent."[170]

[168] Ibid
[169] Ibid
[170] Papayannis, above n , p.36

The purpose of creating HoF by itself also supports such interference because HoF is purposely made a weak body with no resistance capacity since it is a political body. More importantly the drafters of the FDRE constitution needed "[…] to establish, and continue to retain, a dependent and weak constitutional review system."[171] At least the contexts discussed above raises a justified doubt as to the existence of political interference which in turn raises justified doubt as to the independence and impartiality of HoF, since HoF is a political body. Some studies support this view. Adem concluded that HoF is not independent because it is a political organ.[172] The existence of such justified doubt as to the independence and impartiality of HoF alone is capable of absolving complainants from exhausting local remedies[173] because the existence of such justified doubt makes the local remedy unavailable, ineffective, and inefficient.[174] The Commission also decided that, there is no obligation to exhaust local remedies from a source which does not operate impartially because such remedy is not effective.[175]

[171] Abebe, above n 22, p.17
[172] Ibid, p.25
[173] Communication 87/93, above n.1. Par.14
[174] Ibid
[175] Ibid, par.8, Communication -60/91 above n.116, par.10

CHAPTER FOUR

Conclusion and Recommendation

4.1 Conclusion

The main thesis of the research is to identify whether exhausting local remedies under Ethiopian HoF is mandatory or not. To answer this question, factors such as general political and legal context in Ethiopia, actual political membership of members of HoF to the ruling party, the legal knowledge and experience in constitutional interpretation of members of HoF, and the quality of few illustrative decisions of HoF were taken into consideration.

Exhaustion of local remedies is mandatory under international human rights tribunals including ACHPR except in few defensible exceptions. These exceptions include unavailability, ineffectiveness and insufficiency of the local remedy. A given local remedy is unavailable, ineffective, or insufficient when the source of the local remedy lacks independence, impartiality, or competence among others.

The political and legal context of a given country is one of the critical factors for human rights litigation. African Commission and other human rights tribunals also considers the general context in which the remedy operates since it may promote or hamper the constitutional review. Extreme politicization of various sectors in Ethiopia by EPRDF, the ruling political party over the past 25 years is common phenomenon. For example, there are interference in the election process, civil service and other key positions, media, press, activities of civil societies, control of economic sector, and in other human rights activities.

Based on the data from Oromia state council, *Caffee Oromiyaa,* and findings of some researches, members of HoF are actually members of political party, EPRDF. Those members of HoF also do not have sufficient legal training and experiences required to discharge their mandate of interpreting the constitution. Some of the decisions HoF also confirms that HoF is not competent, impartial and independent. It is generally unsuitable for constitutional interpretation.

The existence of clear political affiliation between members of HoF and EPRDF may not necessarily result in actual bias, undue influence and conflict of interest. However, the existences

of such factors necessarily result in creating justified/reasonable doubt as to the independence and impartiality of HoF. If there is such justified/reasonable doubt, then the local remedy is deemed to be unavailable, ineffective, or insufficient. According to the African Charter and African Commission exhausting local remedy which is unavailable, ineffective, or insufficient is not mandatory. In other words since there is justified/reasonable doubt as to the independence and impartiality of HoF it is not mandatory to exhaust local remedy from HoF at least in cases that involves government interests directly or indirectly and the interests of other entities affiliated to government.

The political context and actual political membership of members of HoF also creates a clear case of conflict of interest. The existence of factors that result in conflict of interest also compromises the independence and impartiality of the HoF and its members. Therefore, coupled with the existence of justified/reasonable doubt as to the independence and impartiality of HoF, there is no need of exhausting local remedy from HoF.

Based on the representatives of Oromia to the HoF and the general political context of Ethiopia members of HoF lack sufficient experience and legal training. Owing to the rationale behind the establishment of CCI, lack of legal knowledge and experience is uncontestable fact. This lack of knowledge and experience required for the constitutional interpretation renders them incompetent to interpret the constitution. Some decisions of HoF also confirm that members of HoF do not have sufficient knowledge and experience required for constitutional interpretation. Unlike it is believed that CCI can fill the gaps of HoF, CCI cannot fill the gaps of HoF.

This research identified that there are several gaps that need further deep and empirical researches to help HoF to become viable constitutional interpreting body. Some of the area that demands such researches are the extent to which CCI can mitigate the gaps of HoF; the possibility of conformational bias under the undue influence of Chair and vice- chairman of the CCI, the time constraint members of HoF have in deciding the cases and its adverse impact on the rights of litigants. The relevant work experience and educational background of all members

of HoF from all regions have implication for constitutional interpretation and the right to competent, impartial and independent body.

4.2. Recommendation

In relation to human rights affairs; it is very demanding to have an independent, impartial and competent body with necessary and sufficient legal training and experience in constitutional interpretation and its application. However, currently since this mandate is constitutionally given to CCI and HoF jointly with their respective roles and more importantly these bodies lack the required legal training, experiences, and sufficient time according to the research problem, analysis and findings of the research; the following specific recommendations are forwarded. The Constitution needs to be amended regarding the CCI and HoF. To be more specific:-

1. There shall be an independent and impartial body to interpret the Constitution and therefore Art.62 (1) with Art.83 (1) should be amended accordingly.
2. The criteria for the election of the members of constitutional interpreting body shall be legal education, experience in interpreting laws, independency, and impartiality.
3. The members of constitutional interpreting body should be full time legal experts therefore, Art.67(1&2) should be amended accordingly
4. Alternatively, if the above mentioned recommendations appear to be difficult; then the following recommendations are suggested:-
    a. There shall be both practical and theoretical mechanisms to safeguard HoF from undue political influence which creates justified doubts as to the absence of impartiality and independence of HoF both institutionally and personally.
    b. The members of HoF shall be full time legal experts with sufficient experience in legal interpretation, and necessary expertise
    c. The members of CCI should be proportional to the cases submitted to the CCI therefore Art.82 (2) should be amended accordingly.

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Appendix

Interview Guide for Oromia Regional State Council on how the members of HoF are elected, their educational back ground, their work experiences, and their political background.

1. What is the numbers of representative of Oromia to HoF on each term?
2. Are the members of HoF appointed or elected?
3. What is the procedure of electing/appointing the members of HoF?
4. What are the criteria to elect/appoint the members of HoF?
5. Is the political commitment the focal point in electing/appointing the members of HoF?
6. What are their educational type, qualification and level?
7. What is their official duty by the time they hold office in HoF?
8. What is their previous work experience?
9. Are they members to political party?
10. If members of political party their position in their political party?
11. How frequent members re-elected to the HoF?
12. If re-elected what are the major considerations for that person to get re-elected?