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METHODS OF CONSTITUTIONAL INTERPRETATION IN CONSTITUTIONAL DISPUTE SETTLEMENT IN ETHIOPIA

BY

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ADDIS ABABA UNIVERSITY

SCHOOL OF GRADUATE STUDIES

SCHOOL OF LAW

JANUARY 2010

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A THESIS SUBMITTED TO THE SCHOOL OF LAW AT ADDIS ABABA UNIVERSITY IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF LL.M IN PUBLIC AND CONSTITUTIONAL LAW

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DECLARATION

I, **Mustefa Nasser Hassen**, hereby declare that this thesis is my own original work and has never been presented in any other institution. I also declare that where sources are used, they are duly acknowledged.

With Regards!

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Acknowledgement

First and foremost, I shall praise Allahu subhane we-ta'ala for keeping me healthy to finalize this thesis. Then my great respect and appreciation goes to my advisor, Dr. Getachew Assefa, without whose constructive comments, the thesis would not have been realized. His friendly approach makes the work easier for me. My sincere gratitude really should reach to him.

My honest gratitude also extends to Yoseph Gaim, constitutional interpretation expert at HoF, for his invaluable support in the searching documents and cases.

My heartfelt thanks also extends to my wife Arefat Nesredin for she was at front in my endeavor of every sort including provision moral support in doing this paper.

Last not least, is the contribution of the Secretariat of the House of Federation, towards the actualization of this paper occupies significant place.

Thank you all who deserve it.

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Acronyms and Abbreviations

ANRS	Amhara National Regional State
CCI	Council of Constitutional Inquiry
CUD	Coalition for Unity and Democracy
FDRE	Federal Democratic Republic of Ethiopia
FSC	Federal Supreme Court
FSCCB	Federal Supreme Court Cassation Bench
HoPR	House of People Representatives
HoF	House of Federation
PDRE	Peoples' Democratic Republic of Ethiopia
RSA	The Republic of South Africa
i.e.	that is

Abstract

The gist of constitutional interpretation is maintaining supremacy of the constitution. Yet, constitutional interpretation invariably involves complex questions having equally competing but conflicting socio-politico-legal dimensions and choices. Finding a viable and constitutionally appealing way out from the web of these three-dimensional issues obviously requires a sound background of constitutionalism and knowledge of appropriate principles of constitutional interpretation. In this regard the FDRE Constitution offers little guidance on how the constitution should be interpreted where the need arises, except for fundamental rights and freedoms specified in chapter three of the constitution. The general reference to international instrument in the interpretation of fundamental rights and freedom does not help much if it is not specified. Apart from the constitution Proclamation No. 251/2001 authorizes HoF to identify, develop and implement principles of constitutional interpretation as it deems appropriate. However, constitutional interpretive principles have not developed yet by HoF. Hence, lack of constitutional interpretive principles/methodology result in lack of consistency and predictability of how the constitution is interpreted as well as the outcome of the decisions itself. The research contends that the Ato Ashenafi Amare et al vs. the Ethiopian Revenues and Customs Authority (ERCA) case and Coalition for Unity and Democracy (CUD) vs. Prime Minister Meles Zenawi Asres cases would have been decided in a more consistent and rational manner, had they been analyzed by employing proportionality and balancing analysis method of interpretation. Hence, this research argues that apart from the existing interpretive methodologies that the CCI\HoF is applying, proportionality and balancing method of analysis could transform the interpretive mandate of CCI\HoF in the event of possible limitation of fundamental rights and freedoms occurs. It analyzes in a case by case basis the legality and legitimacy of the action where legality refers to the requirement that the limitation to be 'prescribed by law' where as legitimacy refers to the requirements of proportionality which has three criteria (suitability, necessity and proportionality). Therefore, HoF should adopt proportionality and balancing method of analysis as one of its constitutional interpretive methods.

Key Words: principles of constitutional interpretation, balancing, proportionality, suitability, necessity, supremacy of constitution

Chapter One

Introduction

1.1 Background of the study

Ethiopia's nascent constitutional system has been in place for about two decades now. It adventurously attempted a novel institution of constitutional importance in the area of constitutional dispute settlement. Some people criticize the constitution as to why it risks its impotence by 'inventing new wheel' for there were plenty of proven experiences of constitutional dispute settlements mechanisms and institutions in other older jurisdictions.[1] This is, of course, about the mandate of The House of Federation in interpreting the constitution. Although there is still ongoing debate whether HoF is the ideal institution or not, yet the House has been engaged and disposed a number of cases of constitutional issues.

Recently the number of cases decided by the House is raising so much so that the number of cases disposed in the last three years amount to over 90 percent of all the cases decided by the House since its inception. However, there grows a criticism by many about the HoF's lack of constitutional interpretation methodology in resolving constitutional issues. This indicates that there is lack of clarity as to well defined and fully fledged methods of constitutional interpretation the HoF/CCI has to make use of in discharging their constitutional mandates. This in turn could result in lack of consistency and predictability of how the constitution is interpreted as well as the outcome of the decision itself.

In light of this assertion it is important to look in to the decisions of the HoF to investigate the interpretive trends it has adopted. The study attempts to respond to questions like whether the HoF have developed methods of constitutional interpretation through practice in order to decide

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[1] Yonatan Tesfaye is of the opinion that the Ethiopian approach to constitutional interpretation can be commended for the novelty of the system that attempted to avoid the counter-majoritarian problem. However, he argued that it is not a commendable system of constitutional review. This is not only because it fails to represent an adequate response to the counter-majoritarian problem but also because it is not institutionally and 'functionally' suited to discharge the task of constitutional interpretation and constitutional review. He recommended that courts should have the power to interpret the constitution. However, courts should not have the power to enquire into or rule on the constitutionality of any legislation rather the CCI shall have the final and ultimate power on the interpretation of the Constitution including the power of determining the constitutionality of legislation. Yonatan Tesfaye Fisseha (2004),***Who Interprets the Constitution: A Descriptive and Normative Discourse on the Ethiopian Approach to Constitutional Review***, Faculty of Law, The University of Western Cape, Cape Town South Africa.

the cases brought before it or not. Moreover, an attempt will be made whether it is possible to discern those constitutional interpreting methodologies from the decisions of the HoF.

By studying the decisions of the HoF, the research attempts to uncover the state of constitutional interpretation methodology of the House. The study also helps to recommend a constitutional interpretation approaches by drawing lessons from other constitutional jurisprudences.

1.2 Statement of the Problem

The history of Ethiopian constitutional development has witnessed four[2] written constitutions so far the latest of which is the FDRE Constitution which has came in to force in 1995. All the past constitutions have lived so short that they had little or no history of constitutional review, nor did they have methods of constitutional interpretation. The first written constitution of 1931 failed to provide provisions of constitutional review. The 1955 revised constitution also failed to provide a specific organ empowered to exercise the power of constitutional review[3]. This is, however, despite the fact that the 1955 constitution provide the supremacy clause under Article 122 which states that '*the constitution together with those international treaties, conventions and obligations to which Ethiopia is a party shall be the supreme law of the Empire, and all future legislations, decrees, orders, judgments, decisions and acts inconsistent therewith shall be null and void.*[4] It in fact is plausible to infer from provisions bestowing all judicial power on the judiciary such as Article 108 that courts were empowered to undertake constitutional control perhaps short of challenging the prerogatives of the Emperor recognized in the Constitution itself. Although the 1987 PDRE Constitution was short lived, it conferred the power to interpret the constitution to the Council of State.[5] Perhaps chiefly due to the lack of stable constitutional system, Ethiopia has failed to develop its own jurisprudence of constitutional interpretation.

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[2] Some articles contend that Ethiopia has only witnessed three written constitutions by three different regimes whereby the 1931 and 1955 constitutions are considered a continuum of the imperial regime. The other two are the 1987 PDRE Constitution of the 'derg' regime and the 1995 FDRE Constitution of the EPRDF regime. See Yonatan Tesfaye Fisseha (2004),***Who Interprets the Constitution: A Descriptive and Normative Discourse on the Ethiopian Approach to Constitutional Review***, Faculty of Law, The University of Western Cape, Cape Town South Africa, p. 9

[3] Yonatan Tesfaye Fesseha (2008),***Whose Power Is It Any Way: The Courts and Constitutional Interpretation in Ethiopia***, Journal of Ethiopian Law, Vol. 22 No. 1, p.122

[4] Article 122 of the Revised Constitution of the Empire of Ethiopia.

[5] PDRE Constitution of 1987, Article 82 sub 1 (b).

The FDRE Constitution also contains explicit provisions on constitutional interpretation. It has also established the institutional framework necessary to discharge such function. It mandates the HoF to be the ultimate arbiter of constitutional matters.[6] Moreover, it has established an auxiliary body which conducts constitutional inquiries to present its findings in the form of recommendations to the House.[7] So far more than 2700 cases have been filed before these two institutions demanding for constitutional review[8], out of which 43 cases are found worthy of constitutional interpretation[9]. The bulk of cases, however, are rejected due to lack of the need for constitutional interpretation. Such decisions should be well buttressed with justifications and be easily understandable by the parties to the cases. Moreover, the parties who have the right to approach the CCI/HoF should be aware how the constitution should be applied and interpreted.[10] Furthermore, there should be clarity as to the methods of constitutional interpretation for the public at large.

Moreover, clear and uniform principles of constitutional interpretation have yet to be developed in the country. Apart from a lack of understanding of the existing principles, there seems to be inconsistency in the application of the principles by the CCI and HoF on cases involving the same issue or subject matter.[11]

As far as methods of constitutional interpretation are concerned, the proclamation simply instructs the HoF to identify and implement principles of constitutional interpretation which it deems necessary for the proper examination and decision of constitutional cases[12]. Hence, the task of developing methods of constitutional interpretation is indicated in by Proclamation No.

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[6] Article 62 sub 1 of the FDRE Constitution

[7] Article 82 of the FDRE Constitution; Proclamation No. 798/2013, a proclamation to re-enact for the strengthening and specifying the powers and duties of the Council of Constitutional Inquiry of the Federal Democratic Republic of Ethiopia

[8] Archive of the CCI, December 2017.

[9] Archive of the HoF, December 2017.

[10] Heinrich Scholler (2003), ***Notes on Constitutional Interpretation in Ethiopia***, the Federal Supreme Court of the Federal Democratic Republic of Ethiopia and Friedrich-Ebert-Stiftung, Ethiopia Office, Addis Ababa, p.5.

[11] _______(2012), ***Survey Report on Constitutional Interpretation in Ethiopia***, Report of A Need Assessment for Training on Constitutional Interpretation in Ethiopia, Justice and Legal Systems Research Institute, Addis Ababa,(unpublished)

[12] See Article 7 (1) of the Proclamation No. 251/2001

251/2001 to the HoF[13]. However, the House did not develop such methodology that will help approach constitutional issues in the interpretation process. Such method of constitutional interpretation if developed would also benefit the CCI to discharge its mandate of presenting constitutional interpretation recommendation to the House.

1.3. Objective of the Study

1.3.1. General Objective

The general objectives of the thesis are:

- investigating the methods for constitutional interpretation under the FDRE Constitution and other relevant laws; and,
- exploring the practical jurisprudence of methods of constitutional interpretation which has been employed by the HoF and CCI in the course of constitutional dispute settlement.

1.3.2. Specific Objectives

In particular the study attempts to:

- to examine the adequacy of the methods of constitutional interpretation stipulated in the constitutions and other relevant laws
- to discuss the various types of methods of constitutional interpretation.
- to explores and draw lessons from the experiences of foreign jurisprudences with regard to methods of constitutional interpretation.

1.4. The Research Questions

The study sets out to raise and address certain questions related to the methodology employed in constitutional interpretation. Hence, the fundamental research questions to be addressed are the following:

1. What are the methods of constitutional interpretation that the HoF/CCI employed in constitutional dispute settlements?
2. Whether there are consistencies in the application of the interpretation principles by the HoF on cases involving the same issue or subject matter?

[13] Ibid.

3. What can be inferred from the decisions of the HoF with regard to methods of constitutional interpretation?

1.5. Scope of the Research

The study mainly limited to the constitutional methods that are employed by the House of Federation and the Council of Constitutional Inquiry in adjudicating constitutional issues. It also attempts to uncover inconsistencies in the application interpretation principles cases involving the same issue or subject matter if any by analyzing cases.

1.6. The Research Method

The research primarily employed doctrinal research methodology which is a qualitative inquiry. In order to achieve its objective, the study placed emphasis on analysis of relevant decisions of the HoF mainly of constitutional cases. Moreover, interviews with key persons in authority and legal experts from both institutions.

1.7. Data Sources

With regard to data sources, both primary and secondary sources are considered. Accordingly, Primary sources include mainly cases that have been decided by the HoF, laws such as the FDRE Constitution, Proclamation No. 251/2001. Moreover, interviews with legal experts of HoF and CCI who are relevant in the interpretation of the constitution are considered. Primary information from legal advisors, and other experts in the field were gathered as found relevant.

As far as secondary source is concerned, data from various kinds of published and unpublished materials on the topic are considered. Thus, to the maximum effort relevant books, journals, laws, and other relevant materials from libraries and from internet are considered.

1.8. Significance of the Study

The study will have significance mainly to HoF in discharging its constitutional mandate in interpreting the constitution in a manner that upholds the supremacy of the constitution. It will also provoke for further research on the subject matter and will be used as research material for future researchers and as secondary source for students.

The research at its outcome will try to indicate some recommendations which could help HoF to develop its own method of constitutional interpretation.

1.9. Limitation of the Study

The author believes that lack relevant materials on the subject matter under the Ethiopian legal system may reduce the quality of the research. However, the research made an attempt to remedy such constraint to a lesser extent by resorting to materials written in other legal systems and trying to relate to the decision of the HoF. Moreover, a time constraint to go through the study is also another challenge that has to be dealt with.

1.10. Organization of the Study

The research paper is organized in four chapters. Accordingly, the first chapter provides general introduction and overview of the study, which includes introduction, background of the study, statement of the problem, objective of the study, scope of the study, research methodology, significance of the study, limitation of the study and organization of the study.

Chapter two of the study deals with conceptual and theoretical framework of constitutional interpretation and the different methods of constitutional interpretations in brief. Chapter three deal with constitutional and legal framework of constitutional interpretation. Chapter four mainly devotes for the analysis of HoF decisions to identify the areas of inconsistencies in the application of methods of constitutional interpretation in cases involving the same issue or subject matter. Moreover, an assessment is made the overall trend of constitutional interpretation by analyzing the cases decided. Finally, in Chapter five the paper concludes by drawing conclusion and forwards recommendation.

Chapter Two

Conceptual and Theoretical Framework of Constitutional Interpretation

2.1. Theories of Constitutional Interpretation

Theories of constitutional interpretation refer to different philosophical approaches the interpreters take in construing the meaning of the constitution. The theories are both prescriptive and descriptive.[14] They describe what interpreters usually do, but also prescribe what they ought to do. They lay out philosophical approaches to analyze the text of the constitution.[15]

Principles of constitutional interpretation represent the methods by which interpretive theories are applied. There are a number of principles/methods of constitutional interpretation that are indispensable in employing the methodological aspect of constitutional interpretation as it leaves the interpreter little room to give meaning to constitutional text as it wishes[16]. Moreover, predictable and coherent constitutional interpretation develops institutional trust by the public towards the institution mandated to discharge such a responsibility.

There are quite a number of terminologies employed by different scholars to categorize and explain interpretive methodologies to describe similar concepts. There are instances where the descriptive terms differ yet they attempt to convoy something very similar. However, even in the absence of a common lexicon, the methods may be reduced to a single general dichotomy.[17]

> *On the one hand, there is a tradition that sees constitutional adjudication as a matter of strict law application and, on the other, one that allows constitutional courts to play a political and lawmaking role. In each account, certain descriptors abound — positivistic, literalistic, legalistic, textualist, formalist, and black-letter law, in the case of the former; as distinct from generous, dynamic, purposive, structuralist, sociological, teleological, and activist, in the latter. The former relies on the certainty*

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[14] David A. Strauss (1999), ***What is Constitutional Theory***, Volume 87, Issue 3, Article 3, California Law Review, p. 586.

[15] Ibid.

[16] Mulu Worku (1999) **The Role of the Council of Constitutional Inquiry of the FDRE in Interpreting the Constitution: a Comparative Study**, prepared in partial fulfillment of the requirement for the LL.B Degree at the Faculty of Law, Addis Ababa University, (Unpublished) p. 20.

[17] Conrado Hübner Mendes (2008) Book Reviews of Jeffrey Goldsworthy, ed., **Interpreting Constitutions: A Comparative Study**. Oxford University Press, 2006

and explicitness of a written text to avoid the exercise of an independent judicial will. The latter accepts some degree of judicial discretion in building up an unwritten and implicit constitution…The dichotomy between them evokes the old dispute between what John Hart Ely once called "interpretivism" and "noninterpretivism."[18]

There is no definitive list of methods of constitutional interpretation and every commentator has his or her own take on the matter[19]. This paper aims; however, to introduce the most commonly used methods employed by most of constitutional interpreters around the world. Still some literatures forward relatively definitive methods of constitutional interpretation namely the literal, intentional, systematic and teleological.[20]

The purpose of this paper is not forward a single constitutional interpretation methodology that will resolve all constitutional disputes brought before the CCI/HoF. It rather attempts to show the various methods of interpretation that should be employed singularly or a combination of them as needed. Yet, there is no single definitive method of constitutional interpretation exists. That is why scholars in the field recommend an eclectic approach to constitutional interpretation that 'needs a meta-principle that mediates among conflicts'[21] of constitutional in nature. In this regard

The multiple standards of interpretation, which reflect both actual and necessary judicial practice, vary in force for different constitutional provisions, and no single standard resolves all the problems raised by any provision. Against the logical possibility that [constitutional interpreters] could line up standards in a neat lexical ordering, using an initial technique, such as the evident sense of the constitutional language, and turning to a second technique only if the first fails to

[18] The debate concerns the epistemological and methodological aspects of constitutional interpretation where interpretivists, objectivists, and originalists claim that constitutional interpretation should follow the original intentions of the framers as closely as possible. On the other hand, non-interpretivists, subjectivists, and non-originalists that argues that interpreters are allowed to distance themselves from the intentions of the framers. Read the full article Rik Peters (2011), **Constitutional Interpretation: A View from a Distance**, Wesleyan University, Theme Issue 50, pp. 117-135

[19] Gerard J. Clark (2002), **An Introduction to Constitutional Interpretation**, Suffolk University Law School Faculty Publications. 9.

[20] Supra note 1, p. 17

[21] Kent Greenawalt (2015), **Interpreting the Constitution,** Oxford University Press, New York, p.68

resolve a case, the reality is that more than one technique is often relevant at the same stage.[22][Emphasis added]

In the following section the attempts to briefly discuss the common methods of constitutional interpretation which are texualism, originalism, doctrnalism, dynamic, purposive and proportionality and balancing.

2.1.1 Textualism

Textualism is a method of constitutional interpretation often labeled as *legal positivism* essentially regards constitutional norms as rules, requiring that constitutional interpretation strictly respect the text of the constitution as well as the original meaning of that text which can be deduced from its preparatory works and historical background.[23] It is a method which strictly adheres to the constitutional text in the process of constitutional interpretation.[24] It embodies the notion that the words of the constitution are to be taken at face value and are to be given their "ordinary," "accepted" meaning.[25]

2.1.2 Originalism

Originalism implies that a constitutional norm means exactly what it meant or must have meant when it was originally adopted.[26] The mainstream originalists give much emphasis on the original intentions of the framers of the constitution.[27] Despite disagreement between various proponents of this methodology, almost all originalists agree that the linguistic meaning of each constitutional provision was fixed at the time that constitutional provision was adopted.[28] Unlike

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[22] Ibid.

[23] Supra note 3, p. 258.

[24] Danielle E. Finck (1997), **Judicial Review: The United States Supreme Court Versus the German Constitutional Court**, Boston College International and Comparative Law Review, Volume 20, Issue 1 Article 5, p.129.

[25] Craug R. Ducat (2009), **Constitutional Interpretation**, 9th Edition, Wadsworth, Cengage Learning, p.77.

[26] Ibid.

[27] Ibid.

[28] G. Huscroft & B. W. Miller(Ed.) (2011), **The Challenge of Originalism: Theories of Constitutional Interpretation**, Cambridge University Press, USA, p.12.

texualism, originalism permits the Court to look beyond the language of the Constitution but limits it to ascertaining the meaning that the Framers intended.[29]

Moreover, originalists agree that the constitutional practice that solely rely on the original meaning of the Constitution constrains judicial practice so much so that sticking to the original meaning and intentions of the framers of the constitution serve as a restraint against judicial activism.[30] However, this position provokes some serious objections. Particularly *'objections both epistemic (How can we really know what the enactors intended?) and ontological (Is there really even such a thing as a collective intention to know?)'.*[31]

2.1.3 Doctrinalism

Doctrinalism is a method of constitutional interpretation where considerable attention is given to the decisions, reasoning, and dicta of previous cases[32]. The interpretation of a constitutional text over a long period of time will result in an accumulation of precedents that may come to assume more importance than the original text.

2.1.4 Purposive Interpretation

Purposive interpretation is a method of constitutional interpretation which may be labelled *legal normativism* or *teleological and dynamic approach,* essentially regards constitutional norms as principles, holding that constitutional interpretation should, above all, realize the object and purpose of the constitution and so the text cannot always be decisive, and that the constitution is dynamic so that original intent and meaning cannot be decisive, if subsequent developments call for a different interpretation.[33]

Purposive interpretation constitutes a particular type of functional interpretation. It involves an attempt at reading the meaning of a constitutional provision taking into consideration the aim of

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[29] Erwin Chemerinsky (1987), **Interpreting the Constitution**, Praeger Publishers, Greenwood Press, Inc., NY, USA

[30] Ibid.

[31] Grant Huscroft (ed.) (2008), **Expounding the Constitution: Essays in Constitutional Theory,** Cambridge University Press, UK, p.26.

[32] Jeffrey Goldsworthy (2006), **Interpreting Constitutions: A Comparative Study,** Oxford University Press, p.130

[33] Ibid.

the legislator making it. Purposive interpretation is exceptional and is acceptable only if the linguistic method leaves us with doubts, but even then it cannot lead to results contradictory to this method of interpretation. Purposive interpretation is acceptable also when the text is unequivocal, which, in extreme situations, may result in purposive interpretation giving legal texts the meaning which is far from their linguistic meaning.[34] While performing a systematic interpretation, one interprets a legal text as part of the legal system as a whole, components of the legal system such as a branch of law, a normative act or any other set of legal rules or even a single legal rule.[35]

2.1.5 Proportionality and Balancing

Balancing and Proportionality is one of the most widespread contemporary influential theories with respect to the deployment of the principle of proportionality, and balancing in particular.[36] It is a methodological ground which attempts to forge a rational basis for constitutional adjudication. It attempts to draw a distinction between rules and principles where it build on the premises that constitutional rights as principles. Principles, as Robert Alexy explained it, carry with them a requirement of optimization i.e. realization in the context of the greatest possible extent.[37] Optimization is achieved through a case-by-case balancing of competing rights. Balancing, in turn, is a formal process that engages in a proportionality analysis using a weighing formula that considers the abstract weights of the competing rights, the extent to which they interfere with one another, the degree to which one principle is not realized, and the reliability of empirical assumptions standing behind the competing rights[38]. Since constitutional adjudication inevitably deals with principles, and not only with rules, the procedure is to balance principles in

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[34] Rafał Dowgier (2003), **The Purposive Interpretation of Polish Tax Law**, Studies In Logic, Grammar And Rhetoric 33 (46), Versita, University of Bialystok, Poland, pp. 25-27.

[35] Anna Piszcz (2013), **Purposive Interpretation Of The Term "Undertaking" As Defined Under Polish Antitrust Law: Some Observations**, Studies In Logic, Grammar And Rhetoric 33 (46), Versita, University of Bialystok, Poland, p. 116.

[36] Juliano Z. Benvindo(2010), **On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism,** Springer-Verlag Berlin Heidelberg, Germany, p.138.

[37] Robert Alexy (2010), **The Construction of Constitutional Rights**, Christian Albrechts University Law & Ethics of Human Rights, , Volume 4, Issue 1, Article 2, p.21

[38] Supra note 48.

accordance with their weight, which corresponds to a rational methodology for deploying basic rights in constitutional cases.[39] Juliano z. Benvindo explains the potential ability of the method to provide 'correctness' and 'coherence' in constitutional interpretation that:

> *…he [Alexy] transforms the principle of proportionality into the basis of a method that aims to provide correctness and coherence to a particular decision. The correctness and coherence, which are also the manifestation of rationality, are closely associated with the conviction that the application of constitutional rights can be rationally controlled and guaranteed by an abstract and analytically structured method that places arguments in logical grounds.*[40]

Aharon Barak explains in a nutshell that the principle is based on two principle components which are legality and legitimacy.[41] Legality refers to the requirement that the limitation to be 'prescribed by law' where as legitimacy refers to the requirements of proportionality that has three criteria.[42] According to Jeffrey Goldsworthy, three criteria must be met in applying the principle of proportionality to an infringement of a basic right. First, suitability that is a statute restricting a basic right must be an appropriate means to a legitimate end. Second, necessity that is the means used to limit the right must be required to achieve the law's purpose. Finally, proportionality that is the burden on the right must be proportionate to the benefit secured by the law.[43]

Alexy forwards what is known as the 'Law of Balancing' "*The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.*" [44] According to Alexy the Law of Balancing shows that balancing can be broken down into three stages. He explained that in the law of balancing:

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[39] Imer Flores (2013), **Proportionality in Constitutional and Human Rights Interpretation,** Georgetown Public Law and Legal Theory Research Paper No. 13-005, p.101

[40] Supra note 48, pp. 145-146

[41] Aharon Barak (2010), **Proportionality and Principled Balancing**, Law & Ethics of Human Rights, Volume 4, Issue 1, Article 1, pp.5-6

[42] Ibid.

[43] Jeffrey Goldsworthy (2006), **Interpreting Constitutions: A Comparative Study,** Oxford University Press, p.202

[44] Supra note 49, p.28

the first stage is a matter of establishing the degree of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage, in which the importance of satisfying the competing principle is established. Finally, the third stage answers the question of whether or not the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first principle.[45]

It is appealing for at least two reasons. First, it provides a means to control the strong discretion of constitutional interpreter by ascertaining legal principles such as legal certainty and security, legality and normativity, so on and so forth.[46] Second, it also indirectly provides a means to direct the activity of a legislative authority characterized by the creation or recognition of legal standards other than rules such as principles and policies into the legal system, which most probably will conflict.[47] Considering the possibility of legal authorities not only having to realize certain principles in the form of both rights and policies but also having to recognize certain limits to such rights and policies.[48] Those limitations and restrictions must be legitimate and as such justifiable and reasonable to stand a challenge on their constitutionality, and a hint on whether they will be up held or not can be found in the principle of proportionality itself.[49]

2.2 Choosing Constitutional Interpretive Methods/Principles

As mentioned earlier there is no single definitive method of constitutional interpretation that would solve all the issues that will arise in the course of constitutional interpretation. Hence, interpreters of the constitution often obliged to choose between the various methods or principles of constitutional interpretation. According to Richard H. Fallon, such choice should be based on which method or principle will

'best advance shared, though vague and sometimes competing, goals of: (i) satisfying the requirements of the rule of law, (ii) preserving fair opportunity for

[45] Robert Alexy (2010), **The Construction of Constitutional Rights**, Christian Albrechts University Law & Ethics of Human Rights, , Volume 4, Issue 1, Article 2, p.28

[46] Ibid.

[47] Ibid.

[48] Ibid, p.102

[49] Ibid.

> *majority rule under a scheme of political democracy, and (iii) promoting substantive justice by protecting a morally and politically acceptable set of individual rights'.*[50]

Accordingly, HoF should identify a similar sort of criteria to choose between the different types of methods/principles of constitutional interpretation in a case by case bases which best advance the rule and law, fundamental principles of the constitution and promotion and protection of fundamental human rights and freedoms.

[50] Richard H. Fallon (1999), ***How to Choose a Constitutional Theory,*** Volume 87, Issue 3, Article 2, California Law Review, p.539.

Chapter Three

Constitutional and Legal Framework of Principles of Constitutional Interpretation

3.1 Constitutional Interpretation in General

Interpretation of legal texts whether it be a sub-constitutional law or the constitution itself has presented problems from the earliest times[51] to the present day.[52] Hence, interpretation of constitutions is no exception in this regard; hence, it is worth defining what the meaning of constitutional interpretation is all about. Theoretically speaking constitutional interpretation may be regarded as just another branch of legal interpretation.[53] This is because a constitution is a law though with a higher significance. The constitution deals with *issues more fundamental than do must other legal documents, such as proclamations*[54]. Moreover, from a political perspective *the stakes involved in constitutional interpretation are much higher than in others fields of legal interpretation*[55], because the constitution is the superior law of the legal system, commanding all branches of the government.

Constitutional interpretation can be defined as *'the activity aimed at extracting from a written constitution the general normative content and specific meaning of its provisions'*.[56] It is not however only assigning certain meaning to the constitutional text. It has a lot to do with maintaining the supremacy of the constitution. The supremacy clause is provided in the FDRE Constitution that *'any law, customary practice or a decision of an organ of state or a public official which contravenes [the] shall be null and void'*[57] which establishes an '*objective*

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[51] Plato urged that laws be interpreted according to their spirit rather than literally. Voltaire expressed the view that to interpret the law is to corrupt it. Montesquieu viewed the judge as simply the mechanical spokesman of the law. John L. Murray, Methods of Interpretation – Comparative Law Method, Report of Mr. Justice John L. Murray, President of the Supreme Court and Chief Justice of Ireland. Read the full article in the following website : https://curia.europa.eu/common/dpi/col_murray.pdf

[52] Ibid.

[53] Jens Elo Rytter (1999), **Constitutional Interpretation – Between Legalism and Law-Making**, Scandinavian Studies In Law, p.256

[54] Ibid.

[55] Ibid.

[56] Ibid.

[57] Article 9(1) of the FDRE Constitution

normative order and value system'[58] so as to provide 'a yardstick against which the legal validity of legislations and governmental actions and inactions are measured'[59]. Takele Seboka refered the constitution as a '*grand norm'* against which all governmental actions are required to conform to it.[60]

Constitutions are not self executing documents, hence they have to be interpreted to adapt to changing circumstances by keeping in consistence with the underlying fundamental principles and values of the constitution. The determination of constitutional validity of the executive and other branches of government and interpretation of constitution do invariably involve complex questions having equally competing but conflicting socio-politico-legal dimensions and choices. Finding a viable and constitutionally appealing way out from the web of these three-dimensional issues obviously requires a sound background of the Constitution, constitutionalism as well as interpretive principles. In the following sub sections, an attempt is made to assess the constitutional and legislative basis of constitutional interpretive principles in Ethiopia.

3.2 Interpretative Principles in Constitutions

Certain constitutions like the Republic of South African Constitution, provide a detailed provision as to how the constitution be construed by the constitutional court[61], some other constitutional systems develop a distinct constitutional interpretive system like that of in Germany[62] that the principles of proportionality and rationality is employed where the state must satisfy to justify laws that limit basic rights.[63]

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[58] Takele Soboka Bulto (2011), ***Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory***, African Journal of International and Comparative Law Vol.19.1, Edinburgh University Press, African Society of International and Comparative Law, p. 102.

[59] Ibid.

[60] Supra note 19.

[61] Section 39 cum. Section 36 of the Republic of South African Constitution

[62] In Germany, the constitutional interpretation approaches include four methods of judicial reasoning commonly employed in both statutory and constitutional interpretation i.e., historical, grammatical, systematic, and teleological. But they also embrace principles of proportionality and rationality that the state must satisfy to justify laws that limit basic rights. See Jeffrey Goldsworthy (2006), **Interpreting Constitutions: A Comparative Study,** Oxford University Press. P.195

[63] Jeffrey Goldsworthy (2006), **Interpreting Constitutions: A Comparative Study,** Oxford University Press. P.195

The Ethiopian constitution offers little guidance on how the constitution should be interpreted where the need arises, except for fundamental rights and freedoms specified in chapter three of the constitution wherein it stipulates to '*be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia'*.[64] The general reference to international instrument in the interpretation of fundamental rights and freedom does not help much if it is not specified. Otherwise, the constitution keeps silent regarding its interpretive methodology. In *Wesen Alemu et. al vs. The Amhara National Regional State (ANRS) Justice Professionals Training Institute case,* for instance the CCI invokes 'international convention which Ethiopia is a party' but which international convention and which principle is pertinent to the case is not stated clearly.

> [illegible] … [illegible][65]

Moreover, a mere invocation of the phrase 'international convention which Ethiopia is a party' in the reasoning of the CCI cannot be considered as a helpful practice as envisaged in Article 13(2) of the Constitution if it is not well articulated. However, lack of a clear provision which stipulates interpretive principle in the FDRE Constitution does not mean it lacks certain interpretive guidelines which are equally important in constitutional interpretation process.

3.3 Constitutional Guides on Interpretation

Many constitutions provide some level of interpretive guides to constitutional interpreters. These could be stated broadly as principles or some other constitutions go further and provide more specific approaches to interpretation by which interpreters need to be guided. The following sub sections deal with some of the guidelines that can be used as a guide line in interpreting the Constitution.

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[64] Article 13 (2) of the FDRE Constitution

[65] Reasoning of CCI in *Wesen Alemu et. al vs. The Amhara National Regional State (ANRS) Justice Professionals Training Institute case*

3.3.1 The Preamble of the Constitution as a Guide line

A preamble of a constitution may have different purpose to serve. Basically it has an explanatory purpose. It serves to specify the reasons for the constitution's enactment, its raison d'être and eternal ideals.[66] In addition, the preamble has a formative purpose whereby it constitutes a political resource for the consolidation of national identity.[67]

The preamble of a constitution is not an independent source of rights like the rest of the constitutional provisions[68]. However, the preamble has a legal purpose as well. The constitution's preamble embodies a guiding framework for constitutional interpretation.[69] Liav Orgad explained that when several interpretations exist, '*courts prefer the option consonant with the preamble'*. The FDRE Constitution preamble could also serve as an important guideline in constitutional interpretation. It contains commitments the need to respect fundamental rights and freedom and aspirations to 'live as one economic community[70]' which can be an interpretive tool for the rest of constitutional provisions. The experiences of other countries also show the need to use constitutional preamble as an input in constitutional interpretation.

> *In many countries, the preamble has been used, increasingly, to constitutionalize unenumerated rights. A global survey of the function of preambles shows a growing trend toward its having greater binding force—either independently, as a substantive source of rights, or combined with other constitutional provisions, or as a guide for constitutional interpretation.*[71]

Therefore, it is wise to consider the use of the FDRE Constitution preamble in the process of constitutional interpretation.

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66 Liav Orgad (2010), **The Preamble in Constitutional Interpretation**, I.CON. Vol. 8, Oxford University Press and New York University School of Law, pp. 714-738.

67 Ibid.

68 Ibid.

69 Ibid.

70 Preamble of the FDRE Constitution

71 Supra note 48, p. 715.

3.3.2 Fundamental Principles of the Constitution

Articles 8 to 12 of the FDRE Constitution are considered as pillars of the constitution so much so that those principles are so fundamental that other provisions are built around this principles. These principles are popular sovereignty[72], supremacy of the constitution[73], respect for fundamental rights and freedoms[74], secularism[75], and government transparency and accountability[76]. It is, therefore, prudent to employ these principles as interpretive guidelines.

3.3.3 Guidelines for the Interpretation of Human Rights

One of the explicit indications of the FDRE Constitution as to the how some of its provisions are interpreted is indicated under Article 13(2). Hence, as far as fundamental rights and freedoms enumerated in Chapter Three of the Constitution are concerned, interpretation of such provisions should be in conformity with international human rights instruments. The Article provides the following:

> *'The fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.'*[77]

This provision authorizes HoF to identify, develop and implement interpretive principles of international human rights instruments.

3.3.4 Legal Authority of the Amharic version of the Constitution

One of the guidelines mentioned explicitly in the FDRE Constitution is the preference of the Amharic version over the English version if an ambiguity arises as to the meaning of the two versions of the same constitutional provision. In other words the version with final legal

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[72] See Article 8 of the FDRE Constitution

[73] See Article 9 of the FDRE Constitution

[74] See Article 10 of the FDRE Constitution

[75] See Article 11 of the FDRE Constitution

[76] See Article 12 of the FDRE Constitution

[77] Article 13(2) of the FDRE Constitution

authority is the Amharic version of the constitution. The provision reads as follows: '*The Amharic version of this constitution shall have final legal authority.'*[78] However, with reference to Chapter Three of the FDRE Constitution the Amharic version should consult the good services of the English language because the interpretation of fundamental rights and freedoms should be in conformity with international human rights instruments[79] that require a profound knowledge and skill of English language. To this end Heinrich Scholler argues that:

> *'...the CCI and the House of Federation, the Amharic version is relevant. Nevertheless, as far as international documents or international jurisprudence on fundamental human rights and liberties', which corresponds to the fundamental rights and liberties guaranteed in the Ethiopian constitution, are concerned, it is the English version that is relevant.'*[80]

3.4 Proclamation No. 251/2001 and Principles of Constitutional Interpretation

The Constitution does not say anything about the relevance of foreign law and jurisprudence as far principles of constitutional interpretation is concerned. However, Proclamation No. 251/2001 authorizes the HoF to identify, develop and implement principles of constitutional interpretation as it deems appropriate.[81] Moreover, the legislation which was enacted to establish the Council of Constitutional Inquiry reiterates the same authorization.[82] This could allow the HoF to look into foreign law and comparative jurisprudence in consolidating its own principles of interpretation. However, the subsequent legislation[83] which repealed Proclamation No. 250/2001 has kept silent on the issue.

The intent of the law maker couldn't be ascertained because the raison d'être of Proclamation No. 251/2001 cannot be found either in archives of HoF or HoPR. This can be attributed to poor documentation and preservation of relevant documents by the Secretariat of the HoF. It can be assumed, however, that identifying and developing principles of constitutional interpretation

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[78] Article 106 of the FDRE Constitution

[79] Article 13 (2) of the FDRE Constitution, see also Article 7(2) of Proclamation No. 251/2001

[80] Supra note 8, p.25

[81] Article 7 (1) of Proclamation No. 251/2001

[82] Article 20 (1) of Proclamation No. 250/2001

[83] Proclamation No. 798/2013

is left to the HoF as it is the ultimate arbiter of the constitution. There is a possibility that foreign laws and jurisprudence could be identified and developed as constitutional interpretive method.

In RSA however, the use of foreign laws and jurisprudence in constitutional interpretation is authorized by the constitution itself. In fact it is one of the peculiar natures of in the RSA Constitutional Court to recognize the jurisprudence of both international and foreign law considerations in interpreting fundamental human rights and freedoms.[84] This interesting innovation can be reasoned in such a way that the founders of the constitution intended fundamental rights and freedoms *'to be interpreted dynamically, in response to global developments in the understanding of human rights'*.[85] Section 39 of the new Constitution, entitled 'Interpretation of Bill of Rights', provides that:

> *When interpreting the Bill of Rights, a court, tribunal or forum:*
>
> *(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
>
> *(b) must consider international law; and*
>
> *(c) may consider foreign law.*[86]

Similarly, Article 13(2) of the FDRE Constitution and Article 7(1) of proclamation No. 251/2001 could open a door to allow foreign jurisprudences and introduce practically proven interpretive methodology. This is because written constitutions are not self-actualizing. If they are to be maintained over time, they require interpretation and adaptation to changing circumstances.[87] Hence, interpreters have developed methods of analysis and approaches to interpretation designed to keep consistency with the fundamental principles and underlying values of the constitutional text.[88] In Germany, embrace principles of proportionality and rationality that the state must satisfy to justify laws that limit basic rights.[89]

Generally speaking, Proclamation No. 251/2001 is much concerned with procedural part of constitutional interpretation rather than provide interpretive principles for the HoF. However,

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[84] Section 36 of the Constitution of The Republic of South Africa

[85] Supra note 1, p. 705.

[86] Section 167 (4) of The Constitution of The Republic of South Africa

[87] Supra note 4

[88] Ibid.

[89] Ibid.

Article 9(1) of the same proclamation forwards the principle of presumption of constitutionality, an assumption the enacted law is presumed to be constitutional while the House starts to review its constitutionality which can be considered as an interpretive principle that has a lot to do with the interpretive principle of constitutional avoidance.

3.4.1 The Principle of Constitutional Avoidance

The principle of avoidance is a well-established principle governing the prudent exercise of the Court's jurisdiction that the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case[90]. In cases where the alleged legislation happens to contravene the constitution, and where other legislations could be applied without striking down the legislation in question. Professor Frickey has stated, is that:

> *'the avoidance canon, purportedly designed to avoid the fraught business of judicial review and potential confrontations with a coordinate branch, actually amounts to a robust version of judicial review without the safeguards of reasoned elaboration o\f constitutional law'*.[91]

This principle is presumed to be employed in one of famous case of Melaku Fenta[92] where the HoF avoided in indulging constitutional interpretation by relaying on legal interpretation which avoids striking a law to that effect. This principle is important in that it provides a means to mediate the borderline between statutory interpretation and constitutional law[93]. The strategy of avoidance comes into play when the more straightforward reading of the text of the provision would present a constitutional issue, and the interpreter chooses a different interpretation to avoid resolving that issue.[94]

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[90] Ernest A. Young (2010), **The Continuity of Statutory and Constitutional Interpretation: an Essay for Phil Frickey**, California Law Review, Vol.98, p.1373.

[91] Ibid.

[92] The 2nd case of Melaku Fenta where the new Customs Proclamation No. 859/2017 Article 182 is constitutionally challenged to have contradicted with Article 22 (2) of the FDRE Constitution. The HoF decided that it is up to the court to choose between laws that would benefit the accused most. Hence, the case referred back to the court not worthy of constitutional interpretation.

[93] Ibid, p. 1376

[94] Kent Greenawalt (2015), **Interpreting the Constitution,** Oxford University Press, New York, p.75

Kent Greenawalt puts it in a more explanatory way.

> *…a statute may be interpreted to avoid the need to decide a constitutional question. Everyone agrees that between two equally persuasive understandings of a statutory text, courts should choose the one that conforms with the Constitution over the one that violates it.*[95]

This principle is not explicitly provided under Proclamation No. 251/2001, however, the HoF consciously or otherwise employed it to avoid striking down a potentially unconstitutional provision of Proclamation No. 859/2017 of article 182 where it reads as '*without prejudice to the provisions of other laws cases pending before the effective date of this proclamation shall be disposed in accordance with the previous laws'*. This provision happens to contravene with Article 22 (2) of the FDRE Constitution where it provides '*a law promulgated subsequent to the commission of the offence shall apply if it is advantageous to the accused or convicted person'*.

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[95] Ibid.

Chapter Four

Constitutional Interpretation in Ethiopia

4.1 Ethiopia's Constitutional Interpretation Arrangement

The FDRE constitutional interpretation arrangement is characterized as a centralized system of constitutional review as opposed to decentralized system of constitutional review. For instance, in some countries, constitutional interpretation is carried out by general jurisdiction courts capped by a supreme court which is decentralized[96]; yet in some countries constitutional interpretation is performed by a specialized constitutional court like *Conseil Constitutionnel* in France or Federal Constitutional Court in Germany which can be considered as centralized systems[97]. The same is true with Ethiopian constitutional arrangement too, i.e. though it was not conferred up on a special court like to that of Germany, it is a business of the second chamber of the FDRE parliament known as The House of Federation. However, some argue that the Ethiopian system of constitutional interpretation arrangement can be characterized as mixed system of judicial review which apportions constitutional adjudicating power between the regular judiciary and a separate constitutional interpreting body like HoF[98]. This argument is based on the constitutional provision which states that all branches of the Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce chapter three of the Constitution.[99] However, this argument is based up on a weak premise that ignored the constitutional provision which unequivocally apportioned the power to interpret the Constitution to the HoF by stating '*all constitutional disputes shall be decided by the House of the Federation'*[100]. Therefore, the Ethiopian constitutional interpretation

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[96] Paul Gawirtz (2000), ***Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics***, Hong Kong Law Journal, Vol. 31, Part II, p. 209.; Supra note 3, pp. 103-104.

[97] Danielle E. Finck(1997), ***Judicial Review: The United States Supreme Court Versus the German Constitutional Court***, Boston College International and Comparative Law Review, Volume 20, Issue 1 Article 5, pp.127-132. .; Supra note 3, pp. 103-104.

[98] Takele Soboka Bulto (2011), ***Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory***, African Journal of International and Comparative Law Vol. 19.1, Edinburgh University Press, African Society of International and Comparative Law, p. 106.

[99] See Article 13 (1) of the FDRE Constitution.

[100] See Article 83(1) of the FDRE Constitution.

arrangement can be considered as a centralized system of constitutional review where by the HoF and the CCI are the only institutions entrusted to this business.

4.2 The House of Federation and the CCI

The House of Federation is one of the two houses of the Federal parliament established as per the Constitution.[101] Unlike bicameral parliaments of other federations, it is, however, a non-legislative chamber of the parliament with different set of powers and responsibilities one of which is the power to interpret the constitution. Members of the House of Federation are selected from each respective Regional State's Council for a period of five years term. They are meant to represent the diverse nations, nationalities and peoples of Ethiopia so much so that each nation and nationality is represented by a representative, and for an extra one million population of the respective nationality an extra representative is allowed.[102] The number of representatives in the HoF has increased over the years due to an increase in population and recognition of new nationalities either by the HoF or Regional State Councils as per the Constitution.[103]

In order for the proper discharge of the responsibility of settling constitutional disputes through interpretation of the Constitution, the FDRE Constitution has established the Council of Constitutional Inquiry[104] so as to support the House in the process of interpretation. Here the Council submits its recommendation to the HoF with regard to the constitutionality of the matter submitted to it yet the final decision on the constitutionality or otherwise of the matter rests with the House.[105]

The Council of Constitutional Inquiry, established under Article 82 of the Constitution, hears the first level of constitutional matters before submission to the Council of the Federation.[106] It is

[101] See Article 53 of the FDRE Constitution.

[102] See Article 61(2) of the FDRE Constitution.

[103] The current total number of members of the House of Federation reached 153 compared to the earlier term of the House which was 135. This increment is attributed due to the recognition of a new nationalities and an increase in the total population of certain nations and nationalities. The newest nationality to take a seat in the second chamber is the *Kimant* people which assumed the status of nationality by the decision of the Amhara Regional State Council in 2016.

[104] See Article 82 of the FDRE Constitution

[105] See Article 84 (2) of the FDRE Constitution

[106] See Article 84 of the FDRE Constitution and Article 3 of Proclamation No.798/2013

composed of eleven members, consisting of the President and Vice-President of the Federal Supreme Court, 'six legal professionals appointed by the President of the Republic on recommendation by the House of Peoples' Representatives, who shall have proven professional competence and high moral standing', and three persons among members of the HoF.[107]

The Council of Constitutional Inquiry has the power of constitutional interpretation, but its decisions must be approved by the HoF. The CCI serves as a filter for those cases adjudicated by the House; if the constitutionality of a federal or state law is at issue and is submitted by a "concerned party to the dispute or court," the CCI hears the case and submits its final decision to the HoF.[108] In situations where the constitutional issue arises in courts, the CCI has the option of remanding the case if they determine no constitutional issue exists, or interpreting the case and submitting their recommendation to the HoF.[109]

4.3 The Role of Courts and Other Institutions in Constitutional Interpretation

One of the unique features of the FDRE Constitution is that it bases its premises on direct and indirect popular participation[110]. That is why beyond a mere ratification, the FDRE Constitution is framed in such a way that its implementation requires a popular participation so much so that the power of constitutional interpretation is conferred to the HoF, the second chamber of the FDRE parliament more of political body presumed to represent the various nations, nationalities and peoples of Ethiopia further proves the aforementioned assertion. It is an attempt to respond to a debate of counter majoritarian dilemma[111].

With reference to maintaining constitutional order in Ethiopia, there are several stake holders. On the one hand we have institutions and individuals engaged in the application and protection of the constitution. It comprises the three branches of government i.e. the executive, legislative

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[107] See Article 84 of the FDRE Constitution; and Article 15 of Proclamation No.798/2013

[108] See Article 84 of the FDRE Constitution, T.S. Twibell(1999), ***Ethiopian Constitutional Law: The Structure of the Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems***, Comparative Law Review, Loyola Marymount University and Loyola Law School, p.420.

[109] See Article 84 (3) of the FDRE Constitution

[110] See Article 8 (3) of the FDRE Constitution

[111] It is a challenge against judicial review which questions the legitimacy of the judiciary overturning duly enacted decisions of democratically elected legislature and executive on unconstitutionality grounds. See also Tom Ginsburg (2003), **Judicial Review in New Democracies: Constitutional Courts in Asian Cases**, University of Illinois, Cambridge University Press.

and judiciary, political parties, individuals holding political office, all citizens and civic societies.[112] These institutions have the power to interpret the constitution to the extent that their decisions and actions do not contradict to the constitution. In other words their power to interpret the constitution is to the extent necessary so that they can ensure laws they enact or decisions they made are in conformity with the constitution. They have to understand and apply the values and principles of the constitution, hence; their interpretational power is limited to that extent. As far as the role courts in constitutional interpretation is concerned, their role is only limited to referring the case to CCI when encountered with constitutional disputes[113]. Though there are contradicting views about the role of courts in interpreting the constitution, a cumulative reading of Article 61(2) and Article 83(1) of the constitution is explicit in demarcating the sole mandate of HoF in constitutional interpretation. Where Article 62(1) mandates the HoF to interpret the Constitution and Article 83(1) stipulates that 'all constitutional disputes' to be decided by the HoF only.

Constitutional interpretation is important because as stated in Article 9(1) of the FDRE Constitution, laws and decisions of such institutions will not have legal effect if they undermine the values and principles of the constitutional provisions. Therefore institutions must make sure that their laws, procedures, judgments or decisions are inconformity with the values and principles of the constitution. This is because institutions are tasked with implementing the constitution. Hence, whenever there is a law, decision or a customary practice that violates the constitution, the HoF has exclusive mandate to ensure that the unconstitutional decision or customary practice has no legal effect. Therefore it is of paramount importance to develop a methodology of constitutional interpretation in Ethiopia.

4.4 Constitutional Interpretation Practice in Ethiopia

Constitutional rights and norms are guaranteed in a supreme constitution so much so that systems often devise an institution, a regular court, a special court or an institution like ours with an overriding power to maintain supremacy of the constitution. Hence, citizens have recourse for potential infringement of constitutional rights where potential relief, interdict[114] or

[112] Article 9(2) of the FDRE Constitution

[113] Article 84 (2) of the FDRE Constitution

[114] The HoF ordered an interdiction on the *Girmanesh Girmay vs Etsay Tsega'ab et. al case* in a letter written to Mekelle City Central Court in February 01, 2015 (See the letter ref. No. □□□/□□□/2/159 at HoF archive)

unconstitutionality of legislation[115] or decisions of governmental acts[116] are among the ranges of the rulings of the House.

Citizens' recourse to constitutional review has grown tremendously in Ethiopia that the number of cases presented before the HoF/CCI has reached well over 2700 out of which 90 percent of it comprises of land and property issues[117]. To date the HoF has pronounced the need to interpret the Constitution in 43 cases worth interpreting the constitution.[118] As can be learnt from the practice of CCI/HoF, almost all of the cases brought before the CCI/HoF are cases which have already been decided by courts[119]. Parties aggrieved by the final decision of the court often seek constitutional recourse as a final resort. This is why a considerable number of cases are rejected for being not merited for constitutional interpretation.

4.5 The Practice of HoF and CCI with regard to Methods of Constitutional Interpretation

This section provides a summary of selected cases decided by the HoF and analyzes them to identify the method of interpretation employed to reach at the decisions and inconsistencies thereof, if any. It can be concluded that the FDRE Constitution embodies three groups of provisions. These are provisions with juridical effects[120], declaratory provisions[121], as well as

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However, the interdiction was lifted a year later in February 15, 2016 after the HoF gave a final decision over the case.

[115] Although no legislation is annulled for its unconstitutionality, but Article 8(1) of the Federal Court Establishment Proclamation No. 25/88, Article 6 and 7(1) of Anti-corruption Proclamation No. 434/97 are invalidated for contradicting with the FDRE Constitution.

[116] *Ato Wesen Alemu et. al vs. The Amhara National Regional State (ANRS) Justice Professionals Training Institute Case*

[117] □□□□□□□□□ □□□□□□□ □□□□□□ □□□□□□□ □□□□□□ □□□□□ 2009, A paper prepared by the CCI, 2017

[118] Archive of the HoF, December 2017

[119] Only 5 cases i.e. *Ato Wesen Alemu et. al vs. The Amhara National Regional State (ANRS) Justice Professionals Training Institute Case, the Beneshangul Gumuz election case, the silte identity case, and the two Melaku Fenta Cases which were court pending cases referred to the CCI for issues of constitutionality that are not resulted out of the court decision , the rest* 39 cases that HoF pronounced for constitutional interpretation are decisions of courts

[120] Most of the Constitutional provisions enumerated in chapter 3 of the Constitutions can be considered as provisions with judicial effects. Such rights include rights of persons arrested (Art. 19), rights of persons accused (Art. 20), non-retro-activity of criminal law (Art. 22), prohibition of double jeopardy (Art. 23), and the like.

[121] Declaratory provisions of the constitution include provisions like nomenclature of the state (Art. 1), Ethiopian flag (Art. 3), national anthem of Ethiopia (Art. 4), nationality (Art. 6), form of government (Art. 45), capital city (Art. 49), the federal house (Art. 53), and the like.

policies, objectives and principles[122]. A given methods of interpretation that is appropriate for one may not be suitable to the other category. The majority of cases decided by the HoF constitute land and property related issues which often employ textual method of interpretation. For instance, decisions of HoF such as *Aliye Dawe vs. Mumad Adem*[123], *Hasay Doye vs. Tinsaye Kutale et.al*[124], *Banchamlak Dersolgn vs. Abebaw Mola*[125], *Kelebe Tesfa vs. Ayelegn Derbew*[126], *and Muyedin Yunis vs. Nazi Aliye et. al*[127] cases are made by a literal application of a constitutional provision. In a nutshell, in the above decisions, court decisions are overturned to

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[122] See articles 85 to 92 of the FDRE Constitution which deal with national policy principles and objectives.

[123] The *Aliye Dawe vs. Mumad Adem case* is basically about the sale of a land where the applicant logged a compliant for the return of the land in controversy. The court having learnt the fact of a sale of the land has confirmed the sale. Textual interpretation of the constitution is evident as the The HoF nullified the court decision as it contravenes with Article 40(3) of the FDRE Constitution which clearly stipulates that land shall not be subject of sale or exchange. Moreover, the courts have the responsibility to respect and enforce the constitution as stated under Article 13(1) of the FDRE Constitution. Hence, by virtue of Article 9(1) of the FDRE Constitution the decision of the court is overturned. (HoF 4th Term, 5th Year, 2st regular session, 'sene' 18, 2007 E.C.[June 2015])

[124] The *Hasay Doye vs. Tinsaye Kutale et.al case,* the case refers to the disagreement regarding ownership of rural agricultural land where the respondents claimed to have the land purchased from the applicant and have used it for long period of time. The court decided that since the respondents are using the land for a long period of time, the land should not be returned to the applicants. The HoF nullified the court decision as it contravenes with Article 40(3) of the FDRE Constitution which clearly stipulates that land shall not be subject of sale or exchange. Moreover, the courts have the responsibility to respect and enforce the constitution as stated under Article 13(1) of the FDRE Constitution. Hence, by virtue of Article 9(1) of the FDRE Constitution the decision of the court is overturned. (HoF 5th Term, 1st Year, 2nd regular session, 'megabit' 3, 2008 E.C.[March 2016])

[125] The *Banchamlak Dersolgn vs. Abebaw Mola case*, in a nutshell, the case is about the ownership of a house and a piece of land where the defendant alleged to have purchased it with 900 birr. The court has confirmed the sale of it and passed a ruling in favor of the defendant. However, the HoF overturned the court decision by condemning the action of the court for not respecting and enforcing the constitution as per Article 13(1) of the FDRE Constitution and it based its reasoning by invoking Articles 40(3) and 40(4) of the constitution as well as Article 9(1) of the FDRE Constitution. (HoF 5th Term, 1st Year, 2nd regular session, 'megabit' 3, 2008 E.C.[March 2016])

[126] The Kelebe Tesfa vs. Ayelegn Derbew case, the case also is about rural agricultural land where the HoF in its reasoning analyzes the relevant Regional and Federal Rural Land Administration and Usage proclamations No. 456/1997 Article 8(4) and proclamation No. 133/1998 Article 19(1) respectively in combination with Articles 40(3) and 40(4) of the constitution as well as Article 9(1) of the FDRE Constitution in order to overturn the decision of the court. (HoF 4th Term, 5th Year, 2st regular session, 'sene' 18, 2007 E.C.[June 2015])

[127] The *Muyedin Yunis vs. Nazi Aliye et. al. case*,[HoF File No. 017/08] here also another instance of a sale of land is challenged its constitutionality where the applicant at some point sold the land and wanted the revocation of the contract of sale and reinstatement of the right over the land. The CCI in its reasoning stated that the court erred in giving effect an illegal contract of sale hence contradicts with Article 40(3) of the FDRE Constitution. (HoF 5th Term, 2nd Year, 1st regular session, 'tikimt 2, 2008 E.C.[October 2015])

give effect to Article 40(3) of the FDRE Constitution which reads as *'...Land is a common property of the Nations, Nationalities and People of Ethiopia and shall not be subject to sale or to other means of exchange.'* The above examples of decisions show a literal interpretation of the constitution is employed where the decisions of the court are found in clear contradiction of the text of the constitution.

4.5.1 Practice of HoF with regard to Methods of Interpretation against the Decision of Courts

Methods of constitutional interpretation adopted by the interpreter are usually articulated in the judgment part of the decision. But as noted in the above examples, neither the CCI in its recommendation nor the HoF provides detailed arguments depicting its interpretive approaches. In addition to this, little justifications are provided as to why they resort to interpret the text of the constitution in a certain way. This is due to lack of a clear method of constitutional interpretation that should be employed during the process.

The lack of methodology of constitutional interpretation has made the CCI and HoF in some occasions beyond their mandate which should have been decided by the court. This is evident in *Ato Tatek Hailemariam et. al vs. Ato Ayele Habteselasie case* where the issue is about a government house leased for business purpose which was leased to Ato Ayele Habteselasie 'the respondent'. The issue revolves around distinguishing 'lease of a business' and 'lease of a business house' in which the CCI considers all lease contracts to be governed by proclamation 555/2007. Proclamation 555/2007 gives a power to the Agency to unilaterally revoke a contract of lease when a party to given contract re-leases to a third party without the knowledge of the Agency. Hence, in this case, the Government Houses Agency 'the 2nd petitioner' in the case revoked the contract of lease with the respondent which in turn nullified the contract of lease between the respondent and Ato Tatek Hailemariam 'the 1st petitioner' in the case.

The respondent aggrieved by the administrative decision of the second petitioner logged a complaint against both petitioners in a court of law to allow the resumption of the previous contract between the respondent and the 2nd petitioner. The controversy went up to the Federal Supreme Court Cassation Bench where a verdict in favor of the respondent is given. Aggrieved with the decision of the FSCCB, the 1st and 2nd petitioners brought the case to the attention of the CCI and HOF claiming the unconstitutionality of the decision.

In its reasoning the CCI argued that *'the respondent has breached the contract between the respondent and the 2nd petitioner the terms of the lease of contract under article 5(4) where the lessee has a duty to inform the lessor upon sub-leasing the business house to a third person'*[128]. Hence, the CCI stated that there is nothing wrong in the actions of the Agency to revoke the contract with the respondent and lease the business house to the 1st petitioner who previously leased the house from the respondent. This action, the CCI goes to say, '*is compatible and in line with Article 145(1) of the Commercial Code that the legislator knew that Article 145(1) of Commercial Code and Article 2962(2) of the Civil Code'*[129].

The CCI goes to say *'there is no contradiction between proclamation no. 555/2007 Article 6(3) and 145(1) of the Commercial Code. The legislator knew that Article 145(1) of Commercial Code has not been repealed. The intention of the law maker should be taken into consideration in curbing rent-seeking'*. The intention of the law maker in enacting proclamation no. *555/2000* is that, the CCI explained that:

> "[illegible] 2 [illegible]…."[130]

The CCI reasoned that the mandate to take measure against those lessees who rented the business house with lower prices and sublease it without adding any value to third parties to unlawfully enrich themselves is emanated from the need to curb rent-seeking. Hence, Proclamation No. 555/2007 promulgated mainly to combat rent seeking political, economic and social setting. Therefore, the CCI reasoned that it does not contradict with Article 145(1) of the Commercial Code. The CCI goes to say that if it is alleged to contradict, the proclamation should govern over the Commercial Code. Moreover, the CCI criticized the decision of the FSCCB for it prohibited the 1st petitioner from benefiting from government policy. The entire reasoning of the CCI revolves around justifying the legality of the proclamation that leads the controversy in question.

[128] *Tatek Hailemariam, Government Houses Agency Vs. Ayele Habteselasie Case*

[129] Ibid.

[130] Ibid.

It failed to show clearly which article of the constitution is violated by the court decision. Even if the CCI mentioned certain constitutional provisions in its reasoning, the provisions are too remote to show the unconstitutionality of the court decision.

The CCI reasoning tries to conclude its argument by citing certain constitutional provisions. It first mentioned Article 25 of the FDRE Constitution and goes to say the court decision violates the right of the petitioner to equally benefit from the proclamation like others did. It also argued that the decision of the court contravenes with Article 50(3) of the FDRE Constitution whereby in the name of interpreting the law the court has limited the enforcement of the proclamation enacted by the law maker. The court; moreover, questioned the mandate of the agency which was given by the law maker in the pretext of interpreting the civil code which is in clear violation of art 79(3) and 40(2) of the constitution. The HoF in similar fashion accepted the recommendation of CCI.

However, the minority in the CCI is totally disagree with the whole reasoning of the case perhaps conforms to the decision of the FSCCB. The dissenting opinion argued that the issue is all about a legal argument as opposed to constitutional dispute. as indicated in the court decision that the respondent leased the business as whole not the building in particular which is based on the promise that the respondent has made contract of lease of the business not the building which is different from a contract of lease for the building. Therefore, the agency cannot terminate the contract of lease for the sole reason that the respondent has leased his business to the 1st petitioner.

The dissenting opinion goes to state that the issue of the controversy concerns mainly Article 145(1) of the Commercial Code and its scope of application on buildings. Hence, it is important to look in to Article 145(1) of the Commercial Code and proclamation no. 555/2007 Article 6(4) closely.

Article 145(1) of the Commercial Code reads as

> *Notwithstanding the provisions of Article 2959 of the Civil Code, any provision in the contract of lease which prevents the lessee from assigning the contract of lease or from sub-letting the premises to the person who buys his business, or which makes such assignment or sub-lease dependent on the lessor's consent, shall be of no effect.*

In contrast proclamation 555/2007 Article 6(3) states that the Agency has a power to:

> *"give and execute expulsion orders to tenants of government house who have breached their obligation under their lease contract…"*

Therefore, Proclamation no. 555/2007 does not contradict with the objective of the Commercial Code where the Code explicitly states that transaction of business should be effected without the need for the consent from the owner of the building. The Agency's mandate is only covers those tenants who violated the terms of the contract of lease, the issue here is that the Agency cannot prohibit assigning or sub-letting the building on the event of transacting the business, in this case leasing the business itself.

Therefore, the whole controversy is a matter of proper legal argument which can be tackled though legal interpretation. In other words, the matter should not require a constitutional interpretation. Hence, matters that will not call for constitutional interpretation automatically fall under the jurisdiction of courts.

In my view, the dissenting opinion is correct. This is because the whole reasoning and arguments of the majority is common legal arguments which do not call for constitutional interpretation what so ever. The reasoning is more of political rhetoric than a legal analysis in a proper constitutional interpretation. Moreover, the CCI overstepped its jurisdiction to consider the case which was not worth constitutional interpretation. The writer of the paper argue that lack of well defined constitutional interpretive methodology resulted in the absence of a system to properly strike the right balance between the legal and political analysis. The issue should have been seen by the court to give the final verdict on the matter.

It is undeniable that constitutional interpretation is a political process with in the concept of written constitution. As Goldford puts it 'constitutional interpretation may be seen as a political process wherein deliberation centers on questions of the common good framed within the terms of a written constitution.'[131]

[131] Dennis J. Goldford(1990), **The Political Character of Constitutional Interpretation**, Drake University, Vol. 23, No. 2, The University of Chicago Press, pp. 255-281

Another case related to the right to property is *Alemitu Gebre vs. Chane Desalegn case*. This case relates to the right on rural agricultural land which first initiated as Southern Nations, Nationalities and Peoples Region (SNNP), Keffa Zone, Ginbo wereda court. Where W/o Alemitu Gebre (herein after known as 'the applicant') stated that she has rented two acres of agricultural land to Ato Chane Desalegn (here in after known as 'the respondent') for a period of five years. The respondent who has a title deed over the land in controversy stated that the rent is for 50 years. Hence, the applicant requested for the land to be returned. The court ruled that since the now respondent have been using the land with legal document of possession for the past 16 years. Thus the applicant right has been relapsed citing period of limitation. Where Article 1845 (1) states that

> *Unless otherwise provided by law, actions for the performance of a contract, actions based on the non-performance of act and actions for the invalidation of a contract shall be barred if not brought within ten years.*

The case went as far as the Federal Supreme Court Cassation Bench, which upheld the decision of lower courts. Aggrieved by the decision of courts by exhausting the judiciary remedies, the case is brought to the attention of the CCI. The CCI, after reviewing the case, has stated that the contract that stipulate for the agricultural land to be rented for 50 years by itself evicts the farmer from her agricultural land. The court's decision based on the mere claim of the respondent to have rented the land for 50 years and produced document of ownership is unconstitutional as it allows the farmer to be evicted from her agricultural land. By doing so it violates Article 40(4) of the FDRE Constitution. Consequently the recommendation of the CCI is approved by the HoF. Basically the issue was barred by lapse of time under ordinary legislation. However, the CCI/HoF interpreted the constitution that the purpose of Article 40(4) is given priority over period of limitation.

The CCI and HoF turned a deaf ear to the court reasoning of turning down the petitioner's claim by invoking relapse of a right due to period of limitation. Ato Yosef Gaym, a senior legal expert in the HoF, explained this case by saying:

> *We [legal experts of the constitutional interpretation directorate] consulted members of the Constitutional and Regional Affairs Standing Committee the importance of upholding the principle of period of limitation. It serves a crucial*

role to serve in court litigation where the principle operates with in the constitutional system. Moreover, interpreting otherwise [i.e. undermining the period of limitation in such cases] would have serious consequences as decisions of constitutional cases have the effect of precedence, that rights would will not relapse over period hence, in turn defeats the very purpose of period of limitation.[132]

The writer the paper argues that the period of limitation in the civil code and such other laws should operate against constitutional guaranteed rights over property and economic rights. In this regard the constitution clearly makes a distinction between fundamental human rights with other constitutionally guaranteed rights such as property rights. Accordingly, Article 28 of the FDRE Constitution stipulates that:

Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia… shall not be barred by statute of limitation.

Therefore, it can be concluded that the above constitutional provision envisaged that property rights could be barred by a period of limitation. Hence, CCI\HoF should have upheld the principle of period of limitation in the above case.

4.5.2 Practice of HoF with regard to Methods of Interpretation against Customary Practice

The only case decided on a customary practice which has been decided to have contravened the constitution is the *Ato Wesen Alemu et. al vs. The Amhara National Regional State (ANRS) Justice Professionals Training Institute case*. The gist of the case is trainees in the respondent's facility were allowed a lottery based choice to be assigned as a judge or public prosecutor. Yet applicants who are visually impaired were denied such option and were assigned only to public prosecutor. In its response to the HoF, the respondent stated that the nature of responsibility associated with being a judge make too difficult for visually impaired trainees to deliver their responsibilities. Consequently, visually impaired trainees were assigned to public prosecutor post

[132] Interview with Ato Yosef Gaym, Senior legal expert in Constitutional Interpretation and Identity Affairs Directorate at the Secretariat of the House of Federation May, 2017

by default. Moreover practices with in Ethiopia and abroad also affirm their stand that visually impaired individuals are not suited to undertake the immense responsibility of being a judge.

The CCI in its recommendation stated that the respondent's decision to deny trainees from becoming judges as the result of their visual impairment contradicts Article 41(2) and Article 25 of the constitution. The HoF reviewed the case with reference to proclamation no.676/2010 that ratifies the Convention on Rights of Persons with Disability and proclamation no. 568/2008 that regulates rights of disabled person to work along with the constitution. The issue was whether visually impaired trainees of the respondents institute should be allowed to be judges.

The HoF cited proclamations 676/2002 and 568/2000 that provides right of employment for persons with disability to further illustrate article 25 and 41(2) of the constitution. And as defined in the proclamations unless the nature of the work dictates, discrimination shall not be made based on a particular disability. The nature of the jobs said to dictate when even with appropriate accommodations the disabled parson is unable to the do the work. And beyond stating the customary practice, the respondents have failed to show that even with accommodations visually impaired trainees couldn't do the job, the decision violates the aforementioned proclamations and Article 25 and 41(2) of the FDRE constitution and ruled to have no effect as per Article 9(1) of the constitution.

The HoF ruling shows that it has used textual approach as it attempts to provide meaning by looking at the text and at the same time making reference to the whole constitutional text by aggregating Article 25, Article 41(2) which stipulates that *every Ethiopian has the right to choose his or her means of livelihood, occupation and profession* and proclamation Article 676/2010 which has constitutional significance. Moreover it also sought to achieve a particular purpose i.e. avoiding discriminatory ruling without providing a logical justification weather in fact visually impaired persons can carry out the responsibilities of a judge.

Interesting to see in the reasoning is the invocation of 'experience of countries', The Reasoning of the case reads as

[illegible]

However, it is not clear as to the invocation of the 'experience of countries' as a basis of reasoning in this case. The reasoning does not tell us much which countries' experience with regard to persons with disability is relevant to this case. Moreover, the CCI reasoning cited Article 27 of the Convention on Rights of Persons with Disability a substantive right to substantiate its argument, but in fact it could have been reached the same conclusion without citing the Convention. Article 27 of the Convention on Rights of Persons with Disability reads as:

> *Article 27 Work and employment*
>
> *1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:*
>
> > *(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;*

This is because it would suffice to cite Proclamation No. 568/2008[133] since the rights of persons with disability had already been guaranteed by the same proclamation. The reasoning of CCI Article 4 of Proclamation No. 568/2008 is applied which reads as:

> 4. *Protection of the Right of Persons with Disability to Employment*

[133] Article 4 of Proclamation No. 568/2008, A Proclamation to Provide For the Right to Employment of Persons with Disability, 14th Year No 20 Addis Ababa 25th March, 2008

1/ Unless the nature of the work dictates otherwise, a person with disability having the necessary qualification and scored more to that of other candidates shall have the right without any discrimination:

a) to occupy a vacant post in any office or undertaking through recruitment, promotion, placement or transfer procedures; or ..

b) to participate in a training program to be conducted either locally or abroad.

2/ Subject to the provision of Sub-Article (1) of this Article, where a person with disability. acquires the necessary qualification and having equal or close score to that of other candidates, preference shall be given to the conditions provided for in Sub-Article 1 (a) and (b) of this Article.

3/ No selection criteria shall refer to disabilities of a candidate unless the nature of the work dictates otherwise.

It would be prudent if the CCI had employed international interpretive jurisprudence of fundamental rights and freedoms relevant to this case. Otherwise, a mere citation of certain right from the Convention which had already been enacted by the HoPR cannot be considered as principles of constitutional interpretation and it is not the intention of Article 13(2) of the Constitution as well as Article 7(1) of Proclamation No. 251/2001.

4.5.3 Practice of HoF with regard to Methods of Interpretation against Constitutionality of Laws and Decrees

Since the adoption of the FDRE Constitution, there are several laws enacted by the federal parliament and state legislatures. There has never been, to date a law which has been annulled on constitutionality ground on the basis of contradicting with the constitution. In fact there are provisions of two legislations that are invalidated for contradicting with the constitution.[134] Yet there is no clear methodology to deal with issues concerning the constitutionality of laws. For instance, the lack of clear methodology in dealing with constitutionality of laws is evident in *Ato*

[134] Only Article 8(1) of the Feder`al Court Establishment Proclamation No. 25/88, Article 6 and 7(1) of Anti-corruption Proclamation No. 434/97 are invalidated for contradicting with the FDRE Constitution.

Ashenafi Amare et al vs. the Ethiopian Revenues and Customs Authority case[135], The claim by the complainants, who dismissed by the defendant, claim that Article 37 (2) of the regulation[136] is contrary to the constitutional right of access to justice which provides that everyone has the right to bring any justiciable matter to courts…". The contested law is a regulation issued by the Council of Ministers which provides, under Article 37(1), *'notwithstanding any provision to the contrary, the Director General may, without adhering to the formal disciplinary procedures dismiss an employee from duty whenever he has suspected him of involving in corruption and lost confidence in him.'* Sub-article 2 of same provides that *'an employee who has been dismissed from duty in accordance with sub article 1 of this Article may not have the right to reinstatement by the decision of any judicial body.'* In this regard the CCI in its reasoning simply accepts the constitutional limit by the legislature without justifying the need to limit the right in question is legitimate or not as per the constitution. The decision of the CCI for not meriting a constitutional interpretation in this case gave a green light for the legislature to limit any constitutional right even with a simple majority. This interpretation in turn could make entrenching fundamental rights in the constitution valueless. Yemane Kassa also commented on this particular case by stating the following.

> *A noticeable oversight of the CCI in this regard is that, apart from saying that the legislature (HoPR) has made the matter non-justiciable according to the Constitution, it failed to flesh out its reasons justifying that the legislature has acted in line with the Constitution. Furthermore, the CCI did not stipulate the possible constitutional limit on the power of the HoPR to determine justiciable and non-justiciable matters. Nor does the Constitution contain a clause that helps to address the issue.*[137]

In the Republic of South Africa, however; a sort of balancing and proportionality analysis will be done on a contested legislation which allegedly limits Bill of Rights. This is largely achieved by checking whether interferences with the protected conduct and interests of rights withstand

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[135] See the *Ashenafi Amare et al vs. the Ethiopian Revenues and Customs Authority case* Council of Constitutional Inquiry (CCI) File No 101/2009, 9, 2010.

[136] See Administration of Employees of the Ethiopian Revenues and Customs Authority Council of Ministers Regulation, 2008, Art.37, Reg. No.155, Fed. Neg. Gaz., 14th Year No.49

[137] Yemane Kassa (2015), **Dealing with Justiciablity: in Defense of Judicial Power in Ethiopia**, Mekelle University Law Journal Vol.3, No. 1, p.53.

limitation analysis in terms of the general limitation provision in Section 36 of the RSA Constitution.[138] This provision controls not only the legality of an interference in that it must be based on a "law of general application", but also directs its legitimacy by requiring that each interference must be "reasonable in a democratic society"[139]. Reasonableness must be ascertained by weighing the following factors:

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and the extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.[140]

However, if the *Ato Ashenafi Amare et al vs. the Ethiopian Revenues and Customs Authority case* was analyzed by employing balancing and proportionality method of analysis. The conflicting principles in this concrete case would be the right to access to justice and right to appeal vis-à-vis fighting corruption. The first step in the analysis would be ascertaining the legality of the infringement of the constitutional right by invoking policy consideration i.e. fighting corruption. This would be done by analyzing the nature of the right i.e. whether or not it contains a limitation clause to assess its legality. Article 37 (1) stipulates that: *everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.* Since this right is an absolute right which cannot be limited by the legislature. The same analysis could be made with the right to appeal. Hence, the regulation which states *'an employee who has been dismissed from duty in accordance with sub article 1 of this Article may not have the right to reinstatement by the decision of any judicial body',* fells to pass the legality test. Therefore, without going through the legitimacy test (where the suitability, necessity and proportionality analysis of the contested law) the provision of the regulation which limits the right to access to justice and the right to appeal should be annulled unconstitutional.

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[138] Gerhard Van Der Schyff (2010), **Judicial Review of Legislation: A Comparative Study of The United Kingdom, The Netherlands and South Africa,** IUS Gentium Comparative Perspectives on Law and Justice, Volume 5, Springer, p.167

[139] Ibid

[140] Ibid

Moreover, in another case, *Coalition for Unity and Democracy (CUD) vs. Prime Minister Meles Zenawi Asres*[141] case[142], the CCI turned down the case for not meriting constitutional interpretation. In its reasoning the CCI based its analysis on Articles 49, 72(1) and 74(13) of the FDRE Constitution that there is nothing wrong with the decree of the Prime Minister prohibiting demonstration in Addis Ababa for one month on the ground that the Prime Minister is the highest executive organ vested with wide powers and Addis Ababa city is accountable to the federal government under Article 49 of the Constitution and Article 61 of Addis Ababa City Charter[143].

However, I argue that the CCI should have reached a different conclusion had it analyzed the case by employing proportionality and balancing methodology. In proportionality method analysis, the conflicting constitutional principles in the above case would be 'maintaining public peace and order' vis-à-vis 'freedom of assembly including right to public demonstration'. Proportionality analysis basically analyzes both the legality and legitimacy of the decree of the Prime Minister. Legality refers to the requirement that the limitation to be 'prescribed by law'. Hence, the first question that should be asked is 'total ban of the right under discussion' prescribed by law or not. Hence, Article 30 (1) of the FDRE Constitution reads as follows:

Article 30

[141] The *Coalition for Unity and Democracy (CUD) vs. Prime Minister Meles Zenawi Asres* case was first brought before the Federal First Instance Court requesting the lift of ban of freedom of assembly including public demonstration which was decreed by the Prime Minister for a period of one month. The court referred the case to the CCI by relinquishing its mandate in favor of constitutional interpretation. The CCI assumed the case by framing two issues which are whether the decree issued by the Prime Minister violated the Constitution, and whether there were sufficient conditions to issue the decree. The CCI dismissed the case for not meriting constitutional interpretation by justifying the suspension of the right under the question is in conformity the Constitution.

[142] Jibril Abdi in his comment said that the CCI erred in considering the constitutionality of a decree suspending right of assembly, demonstration and petition for one month which was decreed by the then Prime Minister Meles Zenawi. He goes to say that the CCI failed to distinguish suspension of constitutional rights from their limitation in CUD v Prime Minister Meles Zenawi Asres. The Council mistakenly held that declaration of the Prime Minister constituted limitation on right of assembly, demonstration and petition. Given its nature and the short period for which it lasted, the declaration should have appropriately held to constitute suspension of those rights. His entire comment on the case shows the failure to employ pertinent constitutional interpretation methodology to reach at the conclusion. Abdi Jibril Ali(2013), **Distinguishing Limitation on Constitutional Rights from their Suspension: A Comment on the CUD Case,** Vol. 1, No. 2, Haramaya Law Review, College of Law, Haramaya University

[143] The Proclamation *to Provide for Peaceful Demonstration and Public Political Meetings*, Proclamation No. 3/1991, FEDERAL NEGARIT GAZZETA , 50th Year No. 4, Addis Ababa, 12 August 1991.

The Right of Assembly, Demonstration and Petition

1. *Everyone has the right to assemble and to demonstrate together with others peaceably and unarmed, and to petition. Appropriate regulations may be made in the interest of public convenience relating to the location of open-air meetings and the route of movement of demonstrators or, for the protection of democratic rights, public morality and peace during such a meeting or demonstration.*

Accordingly, the right is not an absolute right hence it could be limited 'for the protection of democratic rights, public morality and peace' relating to the location and route of movement of demonstration. Yet, a total ban of the right is not allowed. However, for the enumerated grounds the legislature could limit the right accordingly which has still to pass the legitimacy test i.e. the suitability, necessity and proportionality. When we analyze the decree of the Prime Minister, it banned the right totally for a period of one month which is against the Constitution. That is the Prime Minister does not have the mandate to limit constitutional rights by his discretion let alone banning it. If it has to be limited on the grounds enumerated in the Article, then the legislature has to prescribe the limitation by law. Moreover, unless in the event of state of emergency, the Prime Minister cannot suspend or ban constitutionally guaranteed right by a simple decree, hence, the Decree is illegal. Accordingly, the decree failed to pass the legality test hence, without going through the legitimacy test (i.e. suitability, necessity and proportionality analysis) the decree of the Prime Minister should have been ruled as unconstitutional. If the CCI carried out this sort of analysis, it would help to rationally analyze the issue by looking in to the legality and legitimacy of the action in question. Moreover, it has been forwarded that the interpretation of fundamental human rights and freedoms should be interpreted in conformity with international human rights instruments[144] which the CCI failed to do so.[145]

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[144] Article 13(2) of the FDRE Constitution, see also Article 7(2) of Proclamation No. 251/2001

[145] See also the full article by Abdi Jibril, Abdi Jibril Ali (2013) **Distinguishing Limitation on Constitutional Rights from their Suspension: A Comment on the CUD Case,** Vol. 1, No. 2, Haramaya Law Review, College of Law, Haramaya University.

As far as a challenge against the constitutionality of laws is concerned, one of the prominent case is the *Melaku Fenta et al. vs. Federal Public Prosecutor case*[146] where for the first time legislations (though specific provisions not the entire proclamations) which contradict with the constitution are made ineffective. The CCI/HoF has employed a textual interpretation of the relevant provisions of the Constitution. However, it would be better for the HoF/CCI to adopt a suitable and predictable method of constitutional interpretation for such cases like proportionality and balancing analysis. I argue that if the legality and legitimacy of challenged laws or decisions are analyzed based on the proportionality and balancing methodology, difference in approach and lack of predictability would not have happened in cases of the *Coalition for Unity and Democracy (CUD) vs. Prime Minister Meles Zenawi Asres* case, the *Ashenafi Amare et al. vs. the Ethiopian Revenues and Customs Authority case, and the Melaku Fenta et al. vs. Federal Public Prosecutor case.* If such cases arise in the future, there is no guideline to approach the case. Hence, lack of such a methodology would leave the analysis of the issues to be overshadowed by the personal and/or political whims of the interpreters.

[146] *Melaku Fenta et al. vs. Federal Public Prosecutor case, otherwise known as the 'melaku fenta case'* This case was brought to the CCI by the Federal High court which has been hearing the public prosecutors corruption charge against former director (with mistrial capacity) of revenue and customs authority. Considering the ministerial status of the defendant The court then face the task of determining which federal court have jurisdiction on the case. The court identified Article 8(1) of the Federal Court Establishment Proclamation No. 25/88, Article 6 and 7(1) of Anti-corruption Proclamation No. 434/97 and Articles 20(6) and 25 of the FDRE Constitution as the relevant laws. For determining jurisdiction calls for constitutional interpretation the court forwarded the case to the CCI. The HoF reviewed the case and stated that the right to appeal is a constitutionally protected right as stated under art 20(6) of the FDRE constitution. Moreover international conventions, to which Ethiopia is party, also recognize the right to appeal as a fundamental right. Article 8(1) of Proclamation No. 25/88 and Article 7(1) have undermined this protected right by subjecting public officials who are suspected of committing crime with no recourse for appeal by giving jurisdiction to the Federal Supreme Court. The HoF further stated that public officials should be afforded with similar protection as any ordinary citizen. Article 25 of the FDRE constitution also articulates that no discrimination shall be made on political consideration. The HoF then concluded that allowing the Federal Supreme Court to hear the case is unconstitutional because it undermines the right to appeal protected under Article 20(6) of the Constitution. In addition to this denying right to appeal to Ato Melaku Fenta, a public official while other defendants are not subjected to the same treatment also amounts to discrimination and violates the right to equality stated under Article 25 of the FDRE Constitution. Therefore, by virtue of Article 9(1) of the FDRE Constitution, the HoF decided that, Article 8(1) of the Federal Court Establishment Proclamation No. 25/88, Article 6 and 7(1) of Anti-corruption Proclamation No. 434/97 are unconstitutional, and ruled that Ato Melaku's corruption case shall be heard at the Federal High Court. (HoF 4th Term, 4th Year, 1st regular session, 'tahsas' 24, 2006 E.C.)

Therefore, the HoF should develop what R. Alexy called *'institutionalized reason'*[147] by adopting well articulated methods of constitutional interpretation.

4.5.4 Methods of Constitutional Interpretation of Identity Claims

The HoF has been encountered with a number of cases of identity claims requesting recognition of the status of a 'nationality' or 'people'.[148] So far the House has recognized the identity claims of two nationalities: the '*silte*' and '*kimant'* peoples. It can be argued that lack of methods of constitutional interpretation has resulted in the application of contradicting methodologies in dealing with identity claims. One of the areas in which inconsistencies are evident in the methods of constitutional interpretation is the HoF decisions on identity claims of the *'silte'* and the *'kimant'* cases.

It can be argued that the *'silte'* case has laid down important methodological foundations in dealing with similar identity claims like that of the *'kimant'* case. This is because Article 11(1) of Proclamation No. 251/2001 states that decisions of the House on constitutional interpretation have precedence value which means similar cases will be interpreted accordingly. I sill argue that identity claims should be interpreted in a similar methodological manner the way the *'silte'* case has been settled. Records show that the *'silte'* case had posed a challenge as to who was the pertinent body to resolve the issue, and it also posed a challenge as to what are the proper methodology to amicably settle the case at hand. It has been found that there is no clear provision in the FDRE Constitution as to which level of government i.e. the regional Councils or the HoF could decide on identity claims where communities demand a status of 'nationality' as per article 39 of the Constitution.[149] In this regard the CCI learned that the constitution is silent

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[147] Sas Ansari (2011) A review of Matthias Klatt (ed), **Institutionalized Reason**: The Jurisprudence of Robert Alexy, Oxford University Press. Available at: http://ssrn.com/abstract=2381277

[148] Such identity claims include the silte, kimant, menja, kontoma, denta, welene peoples. The 'silte' and 'kimant' peoples has managed to assert themselves a status of 'nationality' while the quest for identity of 'menja' and 'kontoma' were denied by the decision of the HoF for failing to meet with the criteria set forth in article 39 sub 5 of the FDRE Constitution. Yet, the 'welene' and 'denta' communities' cases are pending.

[149] The House of Federation (2007), **Journal of Constitutional Decisions**, Vol.1 No.1, Birhanena Selam Printing Press, Addis Ababa, Ethiopia, p.41.

in dealing with such issue of recognition of identity claims and related self administration issues.[150]

Hence, in dealing with the case the HoF has requested the CCI a recommendation on the following two issues: 'Who is the pertinent body that can decide on identity claims?' and 'what is the proper procedure or methodology to deal with identity claims?'[151]

The '*silte'* case is an important case to set forth the procedures and the methodology in dealing with similar identity claims where it fills the gap of the constitution in this regard. To this effect the proclamation states that constitutional decisions would serve as precedence because decisions of the HoF can be considered as a 'law'. The proclamation forwards that:

> *The final decision of the House on constitutional interpretation shall have general effect which therefore shall have applicability on similar constitutional matters that may arise in the future.*[152]

This principle otherwise known as in other legal systems as '*the doctrine of stare decisis'*[153] which is more like treating like cases alike. It serves purposes in enhancing the predictability of constitutional law[154], strengthening judicial decision making[155], and furthering stability[156].

In the process of interpretation of the *'silte'* case has developed the following procedures and methodologies in dealing with identity claims.

1. In order for a community to assert itself as a distinct ethno-identity group, it has to conform to the criteria set forth in Article 39 (5) of the FDRE Constitution.[157]

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[150] Recommendation of CCI to the HoF over the 'silte' case. (HoF Archive)

[151] Supra note 67, p.40.

[152] Article 11 sub 1 of proclamation no. 251/2001

[153] Chad M. Oldfather (2014), **Methodological Pluralism and Constitutional Interpretation**, Brooklyn Law Review, Vol. 80, Issue 1, Article 1, p. 9. Available at: http://brooklynworks.brooklaw.edu/blr/vol80/iss1/1

[154] Ibid.

[155] Ibid.

[156] Ibid.

[157] In ascertaining the fulfillment of the criteria set forth in Article 39(5) of the FDRE Constitution 'who should ascertain the criteria set forth in Article 39(5) is a contentious matter that should be answered. The interpretation of this article has been decided in the following manner. Hence, documents in the archive of the HoF Secretariat

2. A referendum should be undertaken to ascertain the interest of the concerned community

As far as questions related of identity claims which aimed at recognition and self administration claims are concerned, the experience of 'silte case' is not incorporated in Proclamation No. 251/2001 fully. The procedure that a claimant ethno-national group that conform the criteria set forth in Article 39(5), an ethno-linguistic study which confirms the distinctiveness of the group, and the referendum criteria is not incorporated in the proclamation.

The '*kimant'* case, however, managed to assert its distinct identity in a manner different from to that of the *'silte*, case. Basically there is no clear information as to the procedure employed by the Amhara National Regional State (ANRS). The ANRS has made three decisions in three different times concerning the '*kimant*' identity claims which clearly indicate the lack of proper procedure and methodological basis to respond to the claim in question. Initially, the first decision passed by ANRS was that the '*kimant'* community lacks its own distinct language and independent identity so that it is part and parcel of '*amhara*' nation. However, the claim brought before the attention of the HoF, to appease the issue the ANRS took another stance to deal with the issue. This time the ANRS passed a decision indicating that '*kimant'* community is recognized as an ethnic group but did not deserve autonomous self administration. Aggrieved by the decision of the regional state, the case was again brought before the HoF as an appeal where the Constitutional and Regional Standing Committee with the help of experts conducts a study to recommend to the HoF for a final decision on the claim. In this instance, the ANRS informed to the HoF to resolve the issue amicably by itself where the HoF accepted the request. For the third time a decision has passed by the regional state concerning the '*kimant'* which finally acknowledged the distinct and independent identity of *'kimant'* community as a new ethnic group in the Ethiopian federation. Moreover, the long awaited quest for self administration is also recognized where the *'kimant'* community is given the right to self

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show that 'mutual intelligibility of language' to be ascertained by a thorough investigation or study conducted by the experts in the field. Similarly, the criterion *'a common culture or similar custom' is* to be ascertained by a study to be conducted by independent experts in the field. Moreover, the criterion, '*inhabit an identifiable, predominantly contiguous territory'* similarly to be ascertained on the ground by independent experts. However, due to the subjectivity of the criterion *'belief in a common or related identities and a common psychological makeup'* which cannot be ascertained by a thorough study, it has been decided that a referendum should be conducted to ascertain its existence.

administration comprising 42 kebele administrations[158]. The HoF then was informed about the case in its regular meeting[159] where it accepted the decision of the ANRS without looking in to the procedure and methodology it had gone through. The minute in the HoF reads as:

> “□□□□ □□□□ □□□□ □□□□□ [□□□□□ □□□□□ □□□] □□□□ □□□ □□□□ □□□□□ □□□ □□□□…□□□□□ □□□□□ □□□□□□ □□□□□ □□□□□□ □□□ □□ □□□□□□ □□□□ □□□ □□□ □□□□ □□□ □□□□□ □”[160] [emphasis added]

The *‘silte’* and ‘*kimant’* cases clearly show the inconsistency in the constitutional interpretation methodology as far as identity claims are concerned where it indicates HoF’s failure in upholding its previous decisions particularity the procedures and methodology set out in the HoF’s first term. Moreover, the HoF has failed in upholding the rule of law. First, it has failed to uphold its own laws with regard to giving final decisions within two years time from accepting the case[161]. Secondly, it is against its laws to relinquish its mandate on the case presented before it where the respective region has already decided on the case. This is evident in the ‘kimant case’ where it was made to move ‘back and forth’ between the HoF and ANRS for three times. This ‘back and forth’ movement of cases is not envisaged by Proclamation No. 251/2001. Furthermore, the HoF should have reached a consensus with regional states as to the methodology and procedure of handling identity claims which it had already developed by the ‘silte’ case. So that regional states could employ predictable and consistent methodology with regard to resolving identity claims.

4.6 Factors that Affect Constitutional Interpretation

There are other factors which are equally important with problems of constitutional interpretation methods. The writer of this paper argues that developing interpretive methods cannot solve all the problem of constitution interpretation in Ethiopia. These factors include defects with respect to double membership of the CCI and institutional incompetence of the HoF.

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[158] Still the community demands for 12 ‘kebele’s to be included under the ‘kimant’ administration, recently the ANRS considering staging a referendum together with the National Election Board of Ethiopia (NEBE) on contested ‘kebele’s.

[159] HoF’s 4th Term, 5th Year, 2st regular session, in ‘sene’ 18, 2007 E.C.(June 15, 2015 G.C)

[160] Munities of the House of Federation

[161] Article 19 (4) of Proclamation No. 251/2001

4.6.1 Double Membership in the CCI and FSC

As has been mentioned in this paper two of members of the CCI are the president and vice president of the Federal Supreme Court (FSC) where neither the constitution nor Proclamation No.789/2013 forbids the president and the vice president from being a member of both institutions i.e. the CCI and FSC. This has made both members to see cases in the CCI which they have already decided as either FSC or FSCCB judge capacity. Parties aggrieved by the decision of the FSCCB often file a complaint against the president or vice president not to sit over their case in the CCI. However the CCI often rejects such complain for the sole reason that members of the CCI assume responsibility in a different capacity which is different from their other capacity. This has allowed the presidents to sit on the same cases in both institutions with assumed 'different capacities'. This is completely against the principle of separation of power where one person being a member of two different institution where the decision of FSC has a possibility to be overturned by the CCI. This situation clouds the impartiality the CCI as part of an interpreter of the constitution. In *recent S. A. Construction Pvt. Co. case*, the appellant logged a complaint against the vice president not to sit on the case because the vice president has already decided on the case as FSCCB judge capacity[162]. However, as usual the CCI turned a deaf ear on the complaint went on seeing the case.[163]

4.6.2 Institutional Incompetence of the HoF

Once of the problems of constitutional interpretation in Ethiopia besides problems related to lack of constitutional interpretive method is the decision making arrangement of the HoF. Currently the HoF is composed of 153 members representing 76 ethno-national groups where quorum will constitute with the presence of a two third of its members[164]. This means at least 102 members sit to discuss on cases of constitutional interpretation. This, of course, is not a proper venue to reach a decision on an issue like constitutional interpretation. This is because the large number of members in the House does not allow a proper and through discussion and debate on constitutional matters. This results in a situation where cases of constitutional interpretations are

[162] A compliant lodged at the CCI by the S.A. Construction Pvt. Co. against the Vice president of the FSC against sitting over the case in the CCI again as a member of the CCI, a letter filed at the CCI in December 8, 2017.

[163] Interview with Ato Teklewold Tilahun, senior legal researcher at the CCI, November, 2017

[164] Article 64 (1) of the FDRE Constitution

decided in a manner like any other decisions of the House with a simple majority vote.[165] Moreover, the HoF has a variety of other constitutional tasks to perform166. Furthermore, the limited number of two annual 'sittings'[167] prevents it from indulging in thorough analysis and discussion of the constitutional issue at hand.[168]

For instance, the House, in its 5th term, 3rd year and first session in 2017, has passed a decision on 8 cases up on a recommendation of the CCI for meriting constitutional interpretation, and it has also rejected some 21 appeal cases for not meriting constitutional interpretation within half a day. Simply put the House decided on issues of constitutionality of almost 30 cases in four hours duration. The practice shows that the Constitutional Interpretation and Identity Affairs Standing Committee often read the case with recommendations to the House for a final decision where the House often cast a vote for endorsing the recommendation of CCI. This is done with little deliberation on constitutional matters where acceptance of the recommendation will automatically becomes the final decision of the HoF on the matter. In general this shows that the fact that the large number of gathering in the House to deliberate on issue of constitutional matter created a hindrance for proper and thorough discussion on the cases which clearly shows the incompetency of the HoF to handle constitutional interpretation properly.

Chapter Five

Conclusion

The discussion in this chapter has revealed that the Ethiopian approach to methods of constitutional interpretation lacks predictability even in some cases experiences inconsistencies

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[165] Ibid.

[166] Article 62 of the FDRE Constitution

[167] Article 67 (1) of the FDRE Constitution

[168] K. I. Vibhute (2014), **Non-Judicial Review in Ethiopia: Constitutional Paradigm, Premise and Precinct**, African Journal of International and Comparative Law, 22.1. pp. 120-139, Edinburgh University Press. P. 131

in the decisions of HoF in similar cases. The lack of and/or unable to develop a method of constitutional interpretation added to the existing problems. Moreover, the reasoning of the CCI/HoF, in almost all cases, is very brief and lack proper explanation and argumentation to reach at conclusions which clearly show lack of workable methodology.

Furthermore, having failed to have a guide line on methodology of constitutional interpretation, the CCI and HoF acted in some occasions beyond their mandate which should have been decided by the court. This is evident in the *Ato Tatek Hailemariam et. al vs. Ato Ayele Habteselasie case* where it based 'fighting corruption' as a basis for its reasoning. It is also been revealed that the lack of well defined constitutional methodology resulted in the absence of a system to properly strike the right balance between the legal and political analysis.

Lack of proper methodology of constitutional interpretation is also evident when constitutional rights are limited or suspended. The reasoning of CCI/HoF lacks in depth analysis of the alleged act of a legislative or executive against the essential elements of the limitation clause provided in those constitutional provisions. This is evident in *CUD vs. Prime Minister Meles Zenawi Case* and *Ashenafi Amare et al vs. the Ethiopian Revenues and Customs Authority case* where the legality and legitimacy of infringement of rights against constitutionally guaranteed rights. It is also revealed that lack of balancing and proportionality analysis has left the analysis of the issues to be overshadowed by the personal and/or political whims of the interpreters.

It is interesting to observe the invocation of the 'experience of countries' as a basis of reasoning in *Ato Wesen Alemu et. al vs. The Amhara National Regional State (ANRS) Justice Professionals Training Institute case*. However, it is not clear how foreign countries experience is used in the reasoning.

Moreover, the HoF failed to uphold its own laws with regard to giving final decisions within two years time from accepting the case and also relinquishes its mandate after it has been presented before it. Its institutional incompetence is exacerbated by the fact that its large number of gathering has hindered a thorough and in-depth debate over constitutional values and principles pertinent to the case.

Furthermore, the parties trust towards the CCI has been questioned by the fact that in certain cases, appellants often lodge a complaint over some members of the CCI not to sit over their case as they have already seen the case as FSC judge capacity.

It has been revealed that unable to introduce the proportionality and balancing analysis in dealing with the limitation and possible interference of fundamental rights and freedoms enshrined in the constitution has resulted in the lack of proper analysis of the legality and legitimacy the interference or limitation concerned. This in turn resulted in the lack of certain level of predictability and transparency in the decisions of HoF so much so that it has failed to attain institutionalized reason in constitutional interpretation.

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የኢ.ፌዴሪ የፌዴሬሽን ምክርቤት 5ኛ የፓርላማ ዘመን፣1ኛ ዓመት፣2ኛ መደበኛ ስብሰባ

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የዚህ አቤቱታ መነሻ የሆነው ጉዳይ ተጠሪ የሆነው ግለሰብ የአመልካች ይዞታ የሆነውን የእርሻ መሬት ለሃምሳ ዓመታት በኪራይ የያዝኩት ነው በማለት የይዞታ ማረጋገጫ ደብተር ያወጣበት ከመሆኑ ጋር ተያይዞ የስር ፍርድቤት በአመልካች የቀረበውን ክስ የይርጋ ጊዜን መሰረት በማድረግ ውድቅ በማድረጉ ለአጣሪ ጉባኤው የሕገመንግስት ትርጉም እንዲሰጥበት በመቅረቡ ነው፡፡

የሕገመንግስት ትርጉም ጥያቄ የቀረበለት የሕገ-መንግስት ጉዳዮች አጣሪ ጉባኤ ለምክርቤቱ ያቀረበው የውሳኔ ሀሳብ የሚከተለው ነው፡፡

አመልካች መጋቢት 27 ቀን 2005 ዓ.ም ለጉባኤው ጽፈው ባቀረቡት አቤቱታ በ1989 ዓ.ም ከተጠሪ ጋር ባደረኩት የኪራይ ውል ስምምነት በገጠር የሚገኝ 2 ሄክታር የእርሻ መሬት ይዞታዬን ለ5 ዓመት እንዲጠቀም ያከራየሁት ቢሆንም ተጠሪ ግን ከአመልካች ጋር የኪራይ ውሉን የተፈራረምነው ለ5 ዓመት ሳይሆን ለ50 ዓመት ነው፡ በማለት በይዞታው ላይ የባለይዞታነት ማረጋገጫ ደብተር አውጥቶ ግብር እየከፈለ የሚጠቀምበት በመሆኑ የዚህ ይዞታ ባለመብት መሆኑ ተረጋግጦ እንዲወሰንለት በወረዳ ፍ/ቤት በአመልካች ላይ ባቀረበው ክስ መነሻነት ሲሆን አመልካች በ1989 ዓ.ም. በተደረገ የውል ስምምነት 2 ሄክታር የገጠር የእርሻ መሬት ይዞታቸውን ለተጠሪ ያከራዩት ለ50 ዓመት ሳይሆን ለ5

ዓመት በመሆኑ እና የኪራይ ጊዜውም ያለቀ ስለሆነ መሬቱ ይመለስልኝ በማለት ተከራክረዋል፡፡

ጉዳዩን የተመለከተው ፍ/ቤትም ተጠሪ ከአመልካች ጋር ያደረገው የገጠር መሬት ኪራይ ውል ለ5 ዓመት ሳይሆን ለ50 ዓመት ነው፡፡ ተጠሪ ከአመልካች በኪራይ ባገኘው የገጠር መሬት ይዞታ ላይም ለ16 ዓመት ግብር በመገበር የባለይዞታነት ማረጋገጫ ደብተር ወስዶበታል በማለት የአመልካች ክስ በፍትሐብሔር ሕግ ቁጥር 1168(1) እና 1845 በይርጋ ይታገዳል በማለት ወስኖ የፌዴራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎትም አያስቀርብም በማለት ውሳኔ ሰጥቷል፡፡ ውሳኔው ከሕገ-መንግሥቱ አንቀጽ 40 ንዑስ አንቀጽ 4 እና አንቀጽ 35 ንዑስ አንቀጽ 7 ድንጋጌዎች ጋር ይቃረናል በማለት ትርጉም እንዲሰጣቸው ጠይቀዋል፡፡

ጉባኤው በአመልካች የቀረበውን አቤቱታ መርምሮ አመልካች እና ተጠሪ ክርክር በተነሳበት ይዞታ ላይ የይዞታ ማረጋገጫ ደብተር በማን ስም ተመዝግቦ እንደሚገኝና ግብሩም በማን እንደሚገበር በተደረገው ማጣራት መሰረት የከፋ ዞን የጊምቦ ወረዳ ግብርናና ገጠር ልማት ጽ/ቤት በቁጥር 3443/Q-32 በቀን ሰኔ 11 ቀን 2007 ዓ.ም. በተፃፈ ደብዳቤ ክርክር ከተነሣበት 2 ሄክታር የመሬት ይዞታ ውጪ 6.4 ሄክታር የመሬት ይዞታ ለአመልካች የተሰጣቸውና የባለይዞታነት ማረጋገጫ ደብተር በስማቸው የተመዘገበ እና ግብርም የሚገብሩት እኚሁ አመልካች መሆናቸውን አረጋግጧል፡፡ ተጠሪ ደግሞ ክርክር የተነሳበትን 2 ሄክታር ጨምሮ 4.2 ሄክታር የመሬት ይዞታ ያለው እና በዚህ ይዞታ የባለይዞታነት ማረጋገጫ ደብተር አውጥቶበት ግብር የሚገብር መሆኑን አረጋግጦ ተጠሪ ክርክር የተነሳበትን 2 ሄክታር ይዞታ ጨምሮ በ4.2 ሄክታር ላይ የባለይዞታነት ማረጋገጫ ደብተር ሊሰጠው የቻለውም ክርክር የተነሳበት ይዞታ በ1997 ዓ.ም. ሲለካ አመልካች ተቃውሞ ባለማንሳታቸው መሆኑን ገልፆአል፡፡

ተጠሪ ከአመልካች ላይ በ1989 ዓ.ም በኪራይ የወሰደው የገጠር መሬት ይዞታ ላይ በስሙ የባለይዞታ ማረጋገጫ ደብተር የወሰደበት መሆኑን ከመዝገቡ መረዳት ተችሏል፡፡የኢ.ፌዴ.ሪ ሕገመንግስት አንቀጽ 40 ንዑስ አንቀጽ 3 መሬት የማይሸጥ የማይለወጥ የኢትዮጵያ ብሔር፣ብሔረሰቦችና ሕዝቦች የጋራ ንብረት ነው ተብሎ የተደነገገ ሲሆን የዚህ ድንጋጌ ዋና ዓላማ አርሶ አደሮች ከመሬታቸው ያለመፈናቀል መብታቸውን ለማረጋገጥ የተደነገገ መሆኑን ስንመለከት ምንም እንኳ ተጠሪ ከአመልካች ጋር ያደረገው የ50 ዓመት የእርሻ

መሬት የኪራይ ውል የሽያጭ ውል ነው ባይባልም አንድ አርሶ አደር ለ50 ዓመት ያህል መሬቱን ማከራየቱ በእራሱ አርሶ አደሩን ከመሬቱ የሚያፈናቅለው ተግባር ነው፡፡

በደቡብ ብ/ብ/ሕ/ክልል መንግሥት የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ቁጥር 110/99 አንቀጽ 8 ንዑስ አንቀጽ 1 ፊደል(ሀ) ላይ አርሶ አደር ለአርሶ አደር መሬቱን ሲያከራይ እስከ 5 ዓመት ይሆናል የሚለውን ድንጋጌ ስንመለከት አርሶ አደሮች መሬታቸውን በማከራየት ሰበብ ከመሬታቸው እንዳይፈናቀሉ ጥበቃ ለማድረግ የተደነገገ መሆኑን መረዳት ይቻላል፡፡ ከዚህ አንፃር የፍ/ቤቱ ውሳኔ ሲታይ ተጠሪ በ1989 ዓ.ም ከአመልካች ላይ ለ50 ዓመት በኪራይ በወሰደው የገጠር መሬት የእርሻ ይዞታ ላይ የባለይዞታነት ማረጋገጫ ደብተር አውጥቼበታለሁ በማለቱ አመልካች በኪራይ የሰጡትን የእርሻ መሬት ይዞታ እንዲያጡ የሚያደርጋቸው ስለሆነ በሕገ-መንግሥቱ አንቀጽ 40 ንዑስ አንቀጽ 4 የኢትዮጵያ አርሶ አደሮች መሬት በነፃ የማገኘትና ከመሬታቸው ያለመነቀል መብታቸው የተከበረ ነው፡ ከሚለው የሕገ-መንግሥቱ ድንጋጌ ጋር የሚቃረን በመሆኑ በአመልካች የቀረበው አቤቱታ የሕገ-መንግሥት ትርጉም ያስፈልገዋል በማለት ጉባኤው በሙሉ ድምፅ ተስማምቶ የውሳኔ ሐሳቡ ለመጨረሻ ውሳኔ ለፌዴሬሽን ምክር ቤት እንዲተላለፍ በማለት ወስኗል የሚል ነው፡

ምክርቤቱም የአጣሪ ጉባኤውን የውሳኔ ሀሳብ መሰረት በማድረግ በጉዳዩ ላይ የምክርቤቱ የሕገመንግስት ትርጉምና የማንነት ጉዳዮች ቋሚ ኮሚቴ ያቀረበውን የውሳኔ ሀሳብ ተመልክቷል፡፡ በዚህም መሰረት ምክርቤቱ እንደተረዳው የፍርድቤቱ ውሳኔ ተጠሪ ከአመልካች ላይ ለሃምሳ ዓመታት በኪራይ የእርሻ መሬት ተከራይቻለሁ በማለት የክልሉ የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ከሚደነገገው ውጪ የባለይዞታነት ማረጋገጫ ደብተር አውጥቼበታለሁ በማለቱ ብቻ ይዞታቸውን እንዲያጡ እና እንዲፈናቀሉ የሚያደርጋቸው ነው፡፡

በመሆኑም የጊምቦ ወረዳ ፍርድቤት በአመልካች ጉዳይ የሰጠው ውሳኔ በሕገ-መንግሥቱ አንቀጽ 40 ንዑስ አንቀጽ 4 የኢትዮጵያ አርሶ አደሮች መሬት በነፃ የማገኘትና ከመሬታቸው ያለመነቀል መብታቸው የተከበረ ነው ከሚለው የሕገ-መንግሥቱ ድንጋጌ ጋር የሚቃረን ነው ስለሆነ በሕገ መንግስቱ አንቀፅ 9 ንኡስ አንቀፅ 1 ድንጋጌ መሰረት ተፈፃሚነት ሊኖረው አይገባውም በማለት ምክርቤቱ በሙሉ ድምጽ ወስኗል፡፡

ትዕዛዝ

በጊምቦ ወረዳ ፍርድቤት የተሰጠውና በደቡብ ብ/ብ/ሕ/ክልል መንግስት ጠቅላይ ፍርድቤት እና በፌዴራሉ ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎቶች እንዲጸና የተደረገው ውሳኔ ሕገ-መንግስቱን የሚቃረን በመሆኑ ተፈጻሚነት እንዳይኖረው የተደረገ መሆኑን እንዲያውቁት ለፍርድቤቶቹ የውሳኔው ግልባጭ እንዲደርሳቸው ይደረግ።

የፌዴራሉ የሕገመንግስት ጉዳዮች አጣሪ ጉባኤ ያቀረበው የውሳኔ ሀሳብ ተቀባይነት ማግኘቱን እንዲያውቀው የዚህ ውሳኔ ግልባጭ ይላክለት።

የምክርቤቱ የውሳኔ ግልባጭ ለአቤቱታ አቅራቢዋ ይሰጥ።

የኢትዮጵያ ፌዴራላዊ ዴሞክራሲያዊ ሪፑብሊክ

የፌዴሬሽን ምክር ቤት 4ኛ የፓርላማ ዘመን 4ኛ ዓመት 1ኛ አስቸኳይ ጉባኤ

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የፌዴራል ከፍተኛ ፍርድ ቤት በመዝገብ ቁጥር 141356 ህዳር 11 ቀን 2006 ዓ.ም በዋለው ችሎት በሙስና ወንጀል የተከሰሱት እነ አቶ መላኩ ፈንታ ቻይ 31 ሰዎች ጉዳይ የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን ዋና ዳይሬክተር የነበሩት አቶ መላኩ ፈንታ በሚኒስትር ማእረግ ሆነው ሲሰሩ ስለቆዩ የተከሰሱበት ጉዳይ መታየት ያለበት በፌዴራል ጠቅላይ ፍርድ ቤት ወይስ በፌዴራል ከፍተኛ ፍርድ ቤት በሚለው ጭብጥ ላይ የግራ ቀኙን ክርክር አድምጧል፡፡

በዚህም መሠረት ለጉዳዩ አግባብነት ያላቸው የፌዴራል ፍርድ ቤቶች ማቋቋሚያ አዋጅ ቁጥር 25/88 አንቀጽ 8 ንኡስ አንቀጽ 1 እና የተሻሻለው የፀረ-ሙስና ልዩ የሥነ ሥርዓትና የማስረጃ ሕግ አዋጅ ቁጥር 434/97 አንቀጽ 7 ንኡስ አንቀጽ 1 የሕገ መንግስቱን አንቀጽ 20 ንኡስ አንቀጽ 6 እና አንቀጽ 25 ይጥሳሉ ወይስ አይጥሱም የሚለው ነጥብ ሕገ መንግስታዊ ትርጉም የሚያስፈልገው ነው በማለት ለም/ቤቱ እና ለሕገ መንግስት ጉዳዮች አጣሪ ጉባኤ ጥያቄ ማቅረቡ የሚታወስ ነው፡፡

በዚህም መሠረት የኢፌዴሪ የፌዴሬሽን ምክር ቤት ታህሳስ 24 ቀን 2006 ዓ.ም በ4ኛ የፓርላማ ዘመን 4ኛ ዓመት 1ኛ አስቸኳይ ጉባኤ አካሂዶ ከሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤ በቀረበው የውሳኔ ሃሳብ ላይ ሰፊ ውይይት በማድረግ የሚከተለውን ውሳኔ ሰጥቷል፡፡

1

ውሳኔ

ለሕገ መንግስት ትርጉም ጥያቄ መነሻ ሆኖ ለቀረበው ጉዳይ የፌዴራል ፍርድ ቤቶች ማቋቋሚያ አዋጅ ቁጥር 25/88 አንቀጽ 8 ንኡስ አንቀጽ 1 እንዲሁም የተሻሻለው የፀረ ሙስና ልዩ የሥነ ሥርዓትና የማስረጃ ሕግ አዋጅ ቁጥር 434/97 አንቀጽ 7 ንኡስ አንቀጽ 1 ከሕገ መንግስቱ አንቀጽ 20 ንኡስ አንቀጽ 6 እና አንቀጽ 25 አንጻር ታይቷል፡፡

በኢፌዴሪ ሕገ መንግስት መሰረታዊ መብቶችና ነጻነቶችን በሚደነግገው ምዕራፍ ሶስት ስር በአንቀጽ 20 የተከሰሱ ሰዎችን መብት በተመለከተ በንዑስ አንቀጽ 6 ሥር ክርክሩ በሚታይበት ፍርድ ቤት በተሰጠ ትዕዛዝ ወይም ፍርድ ላይ ሥልጣን ላለው ፍርድ ቤት ይግባኝ የማቅረብ መብት እንዳላቸው ተመልክቷል፡፡

በተመሳሳይ መልኩ ኢትዮጵያ በተቀበለቻቸው የዓለም አቀፍ የሲቪልና የፖለቲካ መብቶች ኮቬናንት እና የአፍሪካ የሰዎችና የህዝቦች መብቶች ቻርተር ሥር እያንዳንዱ ሰው በሕግ ፊት እኩል መብት ያለው መሆኑ እና እኩል የሕግ ጥበቃ ሊደረግለት እንደሚገባ፣ ተከስሰው የተፈረደባቸው ሰዎችም ይግባኝ የማቅረብ መብት እንዳላቸው ደንግገዋል፡፡ የተከሰሱ ሰዎች ቢፈረድባቸው የይግባኝ መብት ያላቸው መሆኑ በሕገ መንግስቱ ምዕራፍ ሦስት ሥር ሲደነገግ መብቱ ከ1950ዎቹ መጀመሪያ ጀምሮ በአዋጅ ደረጃ ከነበረበት ከፍ ብሎ ሕገ መንግስታዊ ዋስትና እንዲኖረው መደረጉን ስለሚያሳይ በሕገ መንግስቱ ከተቀመጠው ውጭ መብቱን በማስፈጸም ሂደት በማንኛውም አሰራር ሊጣስ ወይም ሊገፈፍ አይችልም፡፡

የይግባኝ መብት እንደ መብት ሕገ መንግስታዊ ዕውቅና የተሰጠው ከመሆኑም በላይ ከዚህ ድንጋጌ ጋር የሚቃረን ማንኛውም ሕግ ልማዳዊ አሰራር ወይም

የባለስልጣን ውሳኔ በሕገ መንግሥቱ አንቀጽ 9 ንኡስ አንቀጽ 1 መሠረት ተፈጻሚነት አይኖረውም፡፡

ስለሆነም በአንድ ጉዳይ ላይ የመጀመሪያ ደረጃ ስልጣን ባለው ፍርድ ቤት በሚሰጥ ውሳኔ የመጨረሻ ሆኖ በዚያው እንዲያበቃ ያልተደረገበት እና ይግባኝ የሚባልበት እንዲሆን የተደረገበት ምክንያት በዋናነት በውሳኔ አሰጣጥ ላይ ከህግ ወይም ከማስረጃ ጋር ተያይዘው ሊፈጸሙ የሚችሉ ስህተቶች ሊታረሙ የሚችሉበት ዕድል ካልተመቻቸ የስርአቱ ፍትህዊነት /fairness/ ስለሚጓደል እንዲሁም በሕገ መንግስቱ የተረጋገጡ ሌሎች መብቶች ተፈጻሚነት ላይ አደጋ ሊያስከትል ይችላል፡፡

የይግባኝ መብት ተከሰው በሕግ ጥላ ስር ላሉ እና ከሰሽ ለሆነው ወገን እኩል መብት የሚሰጥ በመሆኑ እንዲሁም የይግባኝ መብት ወንጀል የፈጸሙ ሰዎች በነጻ እንዲሰናበቱ የሚያደርግ ሳይሆን ዜጐች ፍትሐዊ ውሳኔ እንዲያገኙ የአንደኛው ፍርድ ቤት ውሳኔ ከሱ በላይ ባለው ፍርድ ቤት ሊታረም የሚችልበትን ዕድል የሚፈጥር ሥርዓት ነው፡፡

ከዚህ በተጨማሪ የይግባኝ ስርአት የውሳኔ ወጥነትንና ተገማችነትን እንዲሁም የዳኞችን ተጠያቂነት ለማረጋገጥ የሚያስችል መሳሪያ ስለሆነም የይግባኝ መብት ትዕዛዝ ወይም ፍርድ ለተሰጠባቸው ሰዎች ልዩነት ሳይደረግባቸው የተረጋገጠ መብት እንደሆነ የህገ መንግስቱ አንቀጽ 20 ንኡስ አንቀጽ 6 እና አንቀጽ 25 ጣምራ ንባብ ያስገነዝባል፡፡ የይግባኝ መብት በሕገ መንግስቱ ከተረጋገጠው የእኩልነት መብት እንዲሁም ተከሰው የተቀጡ ሰዎች በሀይማኖት፣ በፖለቲካ ወዘተ ምክንያት የተለያየ አቋም ላይ መገኘታቸው በመብቱ አተገባበርና አጠቃቀም ላይ ልዩነት ለመፍጠር ምክንያት ሊሆን እንደማይችል የሕገ መንግሥቱ አንቀጽ 25 ይደነግጋል፡፡

3

በሕገ መንግሥቱም ሆነ ኢትዮጵያ ከተቀበለቻቸው ዓለም አቀፍ ሕግጋት አንጻር የይግባኝ መብትን በሚመለከት ለቀረበው የሕገ መንግስት ትርጉም ጥያቄ ምክንያት ሆነው የተጠቀሱትን ሕጎች ምክር ቤቱ በዝርዝር ተመልክቷቸዋል፡፡

አዋጅ ቁጥር 25/88 ስለፌዴራል ፍርድ ቤቶች የዳኝነት ስልጣን በአንቀጽ 8 ንኡስ አንቀጽ 1 ላይ ሲወስን የፌዴራል ጠቅላይ ፍርድ ቤት የፌዴራል መንግሥቱ ባለሥልጣኖች በስራ ኃላፊነታቸው ምክንያት ተጠያቂ በሚሆኑባቸው የወንጀል ጉዳዮች ላይ የመጀመሪያ ደረጃ ብቸኛ የዳኝነት ሥልጣን ይኖረዋል በሚል ደንግጓል፡፡ የፌዴራል ፍርድ ቤቶች በሙስና ወንጀል ጉዳዮች ላይ ያላቸውን የመጀመሪያ ደረጃ የዳኝነት ስልጣን ከመወሰን አንጻር የተሻሻለው የፀረ ሙስና ልዩ የሥነ ሥርዓትና የማስረጃ ሕግ አዋጅ ቁጥር 434/97 አንቀጽ 7 ንኡስ አንቀጽ 1 ይህንኑ ነጥብ በማጠናከር አግባብ ባለው ሕግ መሰረት በፌዴራል ጠቅላይ ፍርድ ቤት የመጀመሪያ ደረጃ የዳኝነት ሥልጣን እንዲታዩ የተደነገጉት እንደተጠበቁ ሆነው ሌሎች በፌዴራል መንግስት ሥር የሚወድቁ የሙስና ወንጀሎችን በሚመለከት የፌዴራል ከፍተኛ ፍርድ ቤት የመጀመሪያ ደረጃ የዳኝነት ስልጣን ይኖረዋል በማለት ደንግጓል፡፡

የፌዴራል ፍርድ ቤቶች የወንጀል ይግባኝ የዳኝነት ስልጣንን አስመልክቶ አዋጅ ቁጥር 25/88 በአንቀጽ 8 ንኡስ አንቀጽ 1 ላይ የፌዴራል ጠቅላይ ፍርድ ቤት የፌዴራል ከፍተኛ ፍርድ ቤት በመጀመሪያ ደረጃ የዳኝነት ስልጣኑ በሰጠው ውሳኔ ላይ የይግባኝ ስልጣን እንዳለው አስቀምጧል፡፡

ከአዋጅ ቁጥር 25/88 አንቀጽ 8 ንኡስ አንቀጽ 1 እና ከአዋጅ ቁጥር 434/97 አንቀጽ 7 ንኡስ አንቀጽ 1 ድንጋጌዎች መረዳት የሚቻለው ከሃላፊነታቸው ወይም ከስራቸው ጋር በተያያዘ ወንጀል ፈጽመው የተወሰነባቸው የፌዴራል

መንግስቱ ባለስልጣናት ወይም የዜጐችን መብት ወክሎ የሚከራከረው ዐቃቤ ሕግ በውሳኔው ቅር ቢሰኙ ቅር የተሰኙበት ውሳኔ የሚታረምበት ሥርዓት ያልተዘረጋ ወይም የተከለከለ መሆኑን ነው፡፡

ከስራና ከሃላፊነታቸው ጋር ተያይዞ ወንጀል ፈጽመዋል የተባሉ የመንግስት ባለስልጣናት ጥፋተኞች ሆነው ቢቀጡ ተመሳሳይ ወንጀል ፈጽመው ከሚቀጡ የመንግስት ሰራተኞች በተለየ ሁኔታ የይግባኝ መብት እንዳይኖራቸው መደረጉ በሕገ መንግስቱ አንቀጽ 20 ንኡስ አንቀጽ 6 የተረጋገጠውንና ፍርድ ለተሰጠባቸው ሰዎች የተፈቀደውን ይግባኝ የማቅረብ መብት የሚጥስ ሲሆን በመንግስት መስሪያ ቤት የሚሰሩ ሰዎች ከስራ እና ከሃላፊነታቸው ጋር ተያይዞ ለሚፈጽሟቸው ወንጀሎች ባለስልጣናቱ በፌዴራል ጠቅላይ ፍርድ ቤት፣ ቀሪዎቹ ሰራተኞች ደግሞ በፌዴራል ከፍተኛ ፍርድ ቤት እንዲዳኙ መደረጉ በሕገ መንግስቱ አንቀጽ 25 ላይ የተረጋገጠውን በሕግ ፊት እኩል የመሆን መብትን የሚቃረን ነው፡፡

የመንግሥት ባለስልጣናት ከስራ እና ከሃላፊነታቸው ጋር በተያያዘ የሚፈጽሙት ወንጀል ከሚያንቀሳቅሱት ሃብትና በስራቸው አጋጣሚ ከሚኖራቸው መረጃ አንጻር ወንጀሉ በሕዝብና በአገር ጥቅም ላይ የሚያስከትለው ጉዳት ከፍተኛ እንደሚሆን ይገመታል፡፡ ሆኖም ይህን ጉዳይ መከላከል የሚቻለው በሕገ መንግሥቱ ለሁሉም ዜጋ በእኩል ደረጃ የተፈቀደውን የይግባኝ መብት በመከልከል ሳይሆን የሚቀርበውን ማስረጃ መሠረት በማድረግና የክርክሩን ሂደት በማፋጠን ፍትሃዊ ውሳኔ በመስጠት ነው፡፡

በመሆኑም የአዋጅ ቁጥር 25/88 አንቀጽ 8 ንኡስ አንቀጽ 1 እና ከአዋጅ ቁጥር 434/97 አንቀጽ 7 ንኡስ አንቀጽ 1 "አግባብ ባለው ህግ መሰረት በፌዴራል ጠቅላይ ፍርድ ቤት የመጀመሪያ ደረጃ የዳኝነት ሥልጣን

5

እንዲታዩ የተደነገጉት እንደተጠበቁ ሆነው" የሚለው ድንጋጌ ከሕገ መንግስቱ አንቀጽ 20 ንኡስ አንቀጽ 6 እና አንቀጽ 25 ጋር የሚቃረኑ በመሆናቸው በሕገ መንግስቱ አንቀጽ 9 ንኡስ አንቀጽ 1 መሰረት ተፈጻሚነት እንዳይኖራቸው ሊደረግ ይገባል፡፡

ለማጠቃለል ማንኛውም ዜጋ እንዲሁም የመንግሥት አካላት ሕገ መንግሥቱን የማክበርና የማስከበር፣ ለሕገ መንግሥቱ ተገዢ የመሆን ሃላፊነት እና ግዴታ ያለባቸው ስለመሆኑ በሕገ መንግሥቱ አንቀጽ 9 ንኡስ አንቀጽ 2 የተደነገገ በመሆኑ፣

በሕገ መንግሥቱ አንቀጽ 13 ንኡስ አንቀጽ 1 መሠረት በማንኛውም ደረጃ የሚገኙ የፌዴራል መንግሥትና የክልል ሕግ አውጪ፣ ሕግ አስፈጻሚና የዳኝነት አካሎች ስለ መሠረታዊ መብቶችና ነጻነቶች የተደነገጉትን ድንጋጌዎች የማክበርና የማስከበር ሃላፊነትና ግዴታ የተጣለባቸው በመሆኑ፣

የይግባኝ መብት ለተከሰሱ ሰዎች ሁሉ በሕገ መንግሥቱ አንቀጽ 20 ንኡስ አንቀጽ 6 ጥበቃ ያገኘ መብት በመሆኑ፣ ይግባኝ በሌለው የፌዴራል ጠቅላይ ፍርድ ቤት ክሳቸው እንዲታይ ማድረግ የሕገ መንግሥቱን አንቀጽ 20 ንኡስ አንቀጽ 6 የሚጥስ በመሆኑ፣ የተወሰኑ ተከሳሾች የይግባኝ መብት በሚፈቅድ ፍርድ ቤት ክሳቸው እንዲታይ ማድረግ በሌላ በኩል በተመሳሳይ ወንጀል የተከሰሱ ሌሎች ተከሳሾች ደግሞ የይግባኝ መብት በሌለው ፍርድ ቤት እንዲታይ የሚያደርግ ሕግ ሰዎች ሁሉ በሕግ ፊት እኩል ናቸው በመካከላቸውም ማንኛውም ዓይነት ልዩነት ሳይደረግ በሕግ እኩል ጥበቃ ይደረግላቸዋል የሚለውን የሕገ መንግሥቱን አንቀጽ 25 የሚጥስ ስለሆነ የአዋጅ ቁጥር 25/88 አንቀጽ 8 ንኡስ አንቀጽ 1 እና የአዋጅ ቁጥር 434/97

አንቀጽ 7 ንኡስ አንቀጽ 1 ድንጋጌዎች በሕገ መንግሥቱ አንቀጽ 9 ንኡስ አንቀጽ 1 መሠረት ተፈጻሚነት የላቸውም፡፡

ስለሆነም የፌዴራል ከፍተኛ ፍርድ ቤት የሙስና ጉዳዮችን ለመዳኘት አስቀድሞ ባለው የመጀመሪያ ደረጃ የዳኝነት ስልጣን መሰረት የመንግስት ባለስልጣናት ከስራና ሃላፊነታቸው ጋር በተያያዘ ተጠያቂ በሚሆኑበት የወንጀል ጉዳይ ላይ የመጀመሪያ ደረጃ የዳኝነት ስልጣን ይኖረዋል የሚል ውሳኔ ሰጥቷል፡፡

ትዕዛዝ

- የተጀመረው የእነ አቶ መላኩ ፈንታ ቻይ የሙስና ወንጀል ክስ በከፍተኛው ፍርድ ቤት መታየቱ ይቀጥል፡፡
- የውሳኔው ግልባጭ ለሚመለከታቸው ሁሉ ይተላለፍ፡፡
- መዝገቡ ተዘግቷል፡፡

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ቁጥር፡ ፌዴ/ጠ/ፍ/ቤ/5/198
ቀን 25/09/08

ለፌዴራል ጠቅላይ ፍርድ ቤት
<u>አዲስ አበባ</u>

ጉዳዩ፡- <u>የም/ቤቱን ውሳኔ ስለማሳወቅ</u>

በአመልካቾች 1ኛ አቶ ታጠቅ ኃ/ማርያም 2ኛ የመንግሥት ቤቶች ኤጀንሲ እና በተጠሪ አቶ አየለ ኃብተስላሴ መካከል በነበረው የንብረት ክርክር አመልካቾች ሕገ-መንግስታዊ መብታችንን የሚጻረር ውሳኔ በፌዴራል ጠ/ፍ/ቤት ሰበር ሰሚ ችሎት ስለተሰጠ የሕገመንግስት ትርጉም እንዲሰጥልን በማለት ለፌዴራሉ የሕገ-መንግስት ጉዳዮች አጣሪ ጉባኤ ማመልከታቸው ይታወሳል፡፡ ጉባኤውም አቤቱታውን መርምሮ ጉዳዩ የሕገመንግስት ትርጉም ያስፈልገዋል በማለት የውሳኔ ሀሳቡን ለም/ቤታችን አቅርቧል፡፡

በመሆኑም ም/ቤቱ ግንቦት 15 ቀን 2008 ዓ.ም ባካሔደው የ5ኛ የፓርላማ ዘመን፣ 1ኛ ዓመት፣ 3ኛ መደበኛ ስብሰባው የአጣሪ ጉባኤውን የውሳኔ ሀሳብ በመቀበል የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት የሰጠው ውሳኔ ተፈፃሚ እንዳይሆን የወሰነ በመሆኑ የውሳኔው 11 ገጽ ተያይዞ የተላከላችሁ ስለሆነ የሚመለከታችሁ በውሳኔው መሰረት እንድትፈጽሙ ም/ቤቱ አዟል፡፡

ከሠላምታ ጋር

ያለው አባተ ረታ
የፌዴሬሽን ም/ቤት አፈ-ጉባኤ

<u>ግልባጭ፣</u>
- ለሕገመንግሥት ጉዳዮች አጣሪ ጉባኤ
  <u>አዲስ አበባ</u>
- ለመንግሥት ቤቶች ኤጀንሲ
  <u>አዲስ አበባ</u>
- ለአቶ ታጠቅ ኃ/ማርያም
  <u>ባሉበት</u>

የኢፌዴሪ የፌዴሬሽን ምክርቤት 5ኛ የፓርላማ ዘመን፣1ኛ ዓመት፣3ኛ መደበኛ ስብሰባ

ግንቦት 15 ቀን 2008 ዓ.ም

አመልካቾች 1ኛ/ አቶ ታጠቅ ኃይለማርያም

2ኛ/ የመንግስት ቤቶች ኤጀንሲ

ተጠሪ፦ አቶ አየለ ኃብተስላሴ

የኢፌዴሪ የፌዴሬሽን ምክርቤት በአመልካቾች የቀረበውን የሕገመንግስት የትርጉም ጥያቄ መርምሮ የሚከተለውን ሕገመንግስታዊ ውሳኔ ሰጥቷል።

ውሳኔ

የዚህ ጉዳይ መነሻ የመንግሥት የንግድ ቤት ኪራይን የሚመለከት ሲሆን የአሁኑ 2ኛ አመልካች የሆነው የመንግሥት ቤቶች ኤጀንሲ ለአሁኑ ተጠሪ አቶ አየለ ኃብተስላሴ ባከራየው የንግድ ቤት ተጠሪው በንግድ ቤቱ የንግድ መደብር (Business) ስራ ሲያካሄድበት ከቆዩ በኋላ የንግድ መደብር ስራውን ለአሁኑ 1ኛ አመልካች አቶ ታጠቅ ኃይለማርያም ማከራየታቸውን ተከትሎ የአሁኑ 2ኛ አመልካች የመንግሥት ቤቶች ኤጀንሲ ከተጠሪው አቶ አየለ ሃብተስላሴ ጋር የነበረውን የንግድ ቤት ኪራይ ውል በማቋረጥ የተጠቀሰው የንግድ ቤት ለአሁኑ 1ኛአመልካች አቶ ታጠቅ ኃይለማርያም አሳልፎ በመስጠት አዲስ የንግድ ቤት ኪራይ ውል በመፈፀሙ ተጠሪው የአሁኑ አመልካቾች ያደረጉት የንግድ ቤት ኪራይ ውል ተሽሮ ቀደም ሲል የነበረውና በአሁኑ 2ኛ አመልካች የመንግስት ቤቶቸ ኤጀንሲና በተጠሪ መካከል የነበረው የንግድ ቤት ኪራይ ውል እንዲቀጥል እንዲወሰንላቸው በመጠየቅ በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ባቀረቡት ክስ መነሻነት የተጀመረ ክርክር ነው፡፡በክርክሩም የአሁን አመልካቾች በፌዴራል ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት የተሰጠው ውሳኔ ሕገመንግስታዊ መብታችንን ይነካል በሚል ለሕገመንግስት ጉዳዮች አጣሪ ጉባኤ አቤቱታ አቅርበው

ጉባኤውም ጉዳዩ የሕገመንግስት ትርጉም ያስፈልገዋል በማለት ለምክርቤቱ የውሳኔ ሀሳብ አቅቧል፡፡

የሕገመንግስት ትርጉም ጥያቄ የቀረበለት የሕገ-መንግስት ጉዳዮች አጣሪ ጉባኤ ለምክርቤቱ ያቀረበው የውሳኔ ሀሳብ የሚከተለው ነው፡፡

በአዲስ አበባ ከተማ ቂርቆስ ክፍለ ከተማ ወረዳ 7 የቤት ቁጥር 102/01 የሆነው የንግድ ቤት ባለቤት መንግስት ሲሆን ይህንን የንግድ ቤት በአዋጅ በተሰጠው ስልጣን መሰረት የሚያስተዳድረው 2ኛ አመልካች ነው፡፡ ተጠሪው የንግድ መደብር (business) ባለቤት ሲሆን የንግድ ስራውን የሚከናውነው ከ2ኛው አመልካች በተከራየው ከዚህ በላይ በተጠቀሰው ቤት ቁጥሩ 102/01 በሆነው የንግድ ቤት ነበር፡፡ ተጠሪው ባለቤት የሆነበትን በተጠቀሰው የንግድ ቤት የሚካሔደውን የንግድ መደብር ኪራይ ውል ለ1ኛ አመልካች አከራይቷል፡፡ ተጠሪው የንግድ መደብሩን ለ1ኛ አመልካች ከማከራየቱ በፊት የንግድ መደብሩን ለ1ኛው አመልካች የሚያከራይ መሆኑን በቅድሚያ ለ2ኛው አመልካች ለማሳወቅ በ2ኛው አመልካች እና በተጠሪው መካከል በተደረገው ውል አንቀፅ 5 ንኡስ አንቀጽ 4 የገባውን ግዴታ አላከበረም፡፡

2ኛው አመልካች ከተጠሪው ጋር የነበረውን የንግድ ቤት ኪራይ ውል በማቋረጥ በንግድ ማከናወኛው ቤት ውስጥ የንግድ ስራውን ከተጠሪ ጋር በገባው የንግድ መደብር ኪራይ ውል ምክንያት በማከናወን ላይ ከሚገኘው 1ኛ አመልካች ጋር የንግድ ቤት ኪራይ ውል በመፈፀም የንግድ ቤት ኪራዩን ከተጠሪው ወደ 1ኛ አመልካች አስተላልፏል፡፡

በዚህ ፍሬ ነገር መነሻነት ተጠሪው ከሌሎች የዳኝነት ጥያቄዎቹ በተጨማሪ ወይም በዋናነት 2ኛው አመልካች ከተጠሪው ጋር የነበረውን የንግድ ቤት ኪራይ ውል በማቋረጥ የንግድ ቤት ኪራይ ውሉን ወደ 1ኛው አመልካች ያስተላለፈው መመሪያ ቁጥር 4/2004ን ያለ አግባብ በመተርጎም በመሆኑና ተጠሪ ለ1ኛው አመልካች ያከራየሁት የንግድ ቤቱን ሳይሆን ባለቤት የሆንኩበትን የንግድ መደብር ስለሆነ 2ኛው አመልካች ከተጠሪ ጋር የነበረውን የንግድ ቤት ኪራይ ውል ያቋረጠው ያለአግባብ ነው ተብሎ እንዲሻር እና የንግድ ቤት ኪራይ ውሉን ከተጠሪ ጋር እንዲቀጥል ይወሰንልኝ በማለት ስልጣን ባለው ፍርድ ቤት ክስ ይመሰርታል፡፡

2ኛው አመልካች ተጠሪው የንግድ መደብሩን ለ1ኛው አመልካች ከማከራየቱ በፊት ስለ ሁኔታው ለ2ኛው አመልካች የማሳወቅ የውል ግዴታ እያለበት ይህንን የውል ግዴታውን በመተላለፍ የንግድ መደብሩን ለ1ኛው አመልካች ሲያከራይ የንግድ መደብር ስራ የሚያከናውንበትንም 2ኛ አመልካች የማስተዳድረውን የንግድ ቤት ይዞታ ለ1ኛ አመልካች ያስተላለፈ ስለሆነ በአዋጅ ቁጥር 555/2000 አንቀጽ 6 ንኡስ አንቀጽ 3 መሠረት በማስተዳድራቸው የመንግስት ቤቶች ላይ የውል ጥሰት ተፈፅሞ በተገኘ ጊዜ እርምጃ ለመውሰድ በተሰጠኝ ህጋዊ ስልጣን የተፈፀመና አግባብነት ያለው ስለሆነ የተጠሪው ክስ ውድቅ ሊደረግ ይገባል በማለት ተከራክሯል፡፡

1ኛው አመልካች በበኩሉ ከተጠሪው ጋር የንግድ መደብሩን ለመግዛት ድርድር የነበረው መሆኑንና ተጠሪው ከ2ኛው አመልካች ጋር በገባው የውል ግዴታ መሰረት የማሳወቅ ግዴታውን ያልተወጣ መሆኑን እንዲሁም በሁለት ቼኮች የንግድ መደብሩን ለመግዛት ለተጠሪው ክፍያ የፈፀመ መሆኑን በመጥቀስ የሚፈለግብኝ ቀሪ ክፍያ የለም በማለት ተከራክሯል፡፡

ጉዳዩን የተመለከተው ፍርድ ቤት በአብላጫ ድምፅ በሰጠው ውሣኔ ተጠሪው 2ኛ አመልካችን የማሳወቅ ግዴታውን በመተላለፍ የንግድ ቤቱን ለ1ኛው አመልካች በማስተላለፍ ህግ አውጪው በአዋጅ ቁጥር 555/2000 አንቀጽ 6 ንኡስ አንቀጽ 3 ለ2ኛው አመልካች ስልጣን የሰጠበትን አላማና ህጋዊ ውጤት አልጣሰም እና የንግድ መደብሩ ኪራይ ውል በባህሪው፣ በይዘቱና በህጋዊ ውጤቱ ከንግድ ቤት ኪራይ ውል በእጅጉ የተለየ በመሆኑ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በመዝገብ ቁጥር 31264 እና በሌሎች መዛግብት አንድ የንግድ መደብር ባለሀብት ባለቤት የሆነበትን የንግድ መደብር ለሌላ ሰው በማከራየቱ ምክንያት የንግድ ቤቱ ባለቤት የንግድ ቤት ኪራይ ውሉን ማቋረጥ የለበትም በማለት አስገዳጅ የህግ ትርጉም የሰጠበት ስለሆነ 2ኛ አመልካች ከተጠሪው ጋር የነበረውን የንግድ ቤት ኪራይ ውል በተናጠል የመሰረዝ ህጋዊ ስልጣን አለኝ በማለት ያቀረበው ክርክር ተቀባይነት የለውም በማለት የመጨረሻ ፍርድ ሰጥቷል፡፡ በዚሁ የአብላጫ ድምፅ በሰጠው ውሣኔ ያልተስማማው አነስተኛው ድምፅ በበኩሉ ህግ አውጪው በአዋጅ ቁጥ 555/2000 አንቀፅ 6 ንኡስ አንቀጽ 3 የውል ግዴታቸውን ያልተወጡ

ተከራዮችን በተመለከተ 2ኛው አመልካች በራሱ ውሣኔ የመሰለውን እርምጃ እንዲወስድ ስልጣን የሰጠው በበቂ የፖሊሲ ምክንያት ነው ተብሎ ይገመታል፡፡

በ1952 ዓ.ም የወጣው የንግድ ህግ ቁጥር 145 ንኡስ ቁጥር 1 ንግድን የማቀላጠፍ ዓላማ ላይ ብቻ ተመስርቶ ማንኛውም የንግድ መደብር ባለሀብት ባለቤት የሆነበት የንግድ መደብር በኪራይ ለሶስተኛ ወገን ሲተላለፍ የንግድ መደብሩ ስራውን በሚያከናውንበት የንግድ ቤት ባለቤቶች ፈቃድ በመጠየቅ ሂደት መጓተቶች እንዳይፈጠሩ የሚከለክል ቢሆንም አዋጅ ቁጥር 555/2000 በሚወጣበት ጊዜ የነበረው ማህበራዊ፣ ፖለቲካዊ እና ህጋዊ ሁኔታዎች ተለውጠዋል፡፡ በመሆኑም የንግድ ህጉ አግባብ ያላቸው ድንጋጌዎች መተርጎም ያለባቸው አሁን ካለው የሕገ መንግሥት ማዕቀፍ እና ሕገ መንግስቱን ተከትለው ከወጡት ህጎች በማጣጣም ነው፡፡ በዚህ አግባብ 2ኛው አመልካች ከመንግስት በአነስተኛ ዋጋ ቤቶችን እየተከራዩ ለሌላ ሶስተኛ ወገን በከፍተኛ ዋጋ መልሰው በሚያከራዩ ወይም ህገወጥ ተግባር በሚፈፅሙ ግለሰቦች እና ድርጅቶች ላይ ህጋዊ እርምጃ ለመውሰድ የሚያስችለው የህግ መሰረት አለው፡፡ የንግድ ህጉ በ1952 ዓ.ም ሲወጣ የነበረው ነባራዊ ሁኔታ ከመለወጡ ባሻገር ይህ የንግድ ህግ ቁጥር 145 ንዑስ ቁጥር 1 ባለበት ህግ አውጪው በአዋጅ ቁጥር 555/2000 2ኛው አመልካች ህጋዊ እርምጃ የመውሰድ ስልጣን ሰጥቶታል፡፡

በመሆኑም 2ኛው አመልካች በአዋጁ አንቀጽ 6 ንኡስ አንቀጽ 3 እና በመመሪያው አንቀጽ 7 ንኡስ አንቀጽ 1 መሰረት በተጠሪ ላይ ህጋዊ እርምጃ ለመውሰድ የህግ መሰረት እንዳለው መረዳት ይቻላል፡፡ በንግድ ህጉ ቁጥር 145 ንኡስ ቁጥር 1 እና በአዋጅ ቁጥር 555/2000 አንቀፅ 6 ንኡስ አንቀጽ 3 መካከል ልዩነት የሚታይ ቢሆን እንኳ ህግ አውጪው ለ2ኛ አመልካች የሰጠው ስልጣን ከንግድ ህጉ ይልቅ የገዥነት ባህሪ አለው፡፡ ለ2ኛው አመልካች በህግ የተሰጠውን ስልጣን በማንኛውም ሁኔታ የሚሸረሽር የህግ አተረጓጎምን በመከተል የንግድ ህጉ በይዘቱም ሆነ በአቀራረቡ ከአዋጅ ቁጥር 555/2000 በላይ የገዥነት ሚና እንዳለው መውሰድ የአዋጁን ይዘትና ዓላማ የሚያሳካ የአተረጓጎም ስርዓት አይደለም፡፡ ይህ ከሆነ ደግሞ ህግ አውጪው በአዋጅ ቁጥር 555/2000 ሊያሳካ ያሰበውን ዓላማ ሊያሳካ አይችልም፡፡ በእነዚህ ሁሉ ምክንያቶች ከአብላጫው ውሳኔ ተለይቻለሁ በማለት የልዩነት ሀሳባቸውን አስፍረዋል፡፡

አመልካቾች ለህገ መንግስት ጉዳዮች አጣሪ ጉባኤ ግንቦት 13 ቀን 2007 ዓ.ም ግንቦት 17 ቀን 2007 ዓ.ም በተፃፈ ማመልከቻ በፍርድ ቤት የተሰጠው ውሳኔ ህገመንግስታዊ መብታችንን ይቃረናል በማለት የህገ መንግስት ትርጉም ጥያቄ አቅርበዋል፡፡ በዚሁ መነሻነት ጉባኤው ጉዳዩን በመመርመር የሚከተለውን የውሳኔ ሀሳብ አቅርቧል፡፡

ጉባኤው ጉዳዩን በመመርመር ሂደት 2ኛው ተጠሪ የመንግስት ንብረት የሆነውን የንግድ ቤት የማስተዳደር ህጋዊ ስልጣን ያለው መሆኑን፣ ተጠሪው ክርክር ባስነሳው የንግድ ቤት የሚያከናውነው የንግድ መደብር ባለቤት መሆኑን እና ይህንኑ የንግድ መደብሩን በኪራይ ለ1ኛው አመልካች ሲያስተላልፍ የንግድ ቤቱንም ጨምሮ ማከራየቱን፣ ተጠሪው ይህንን ተግባር የፈፀመው ከ2ኛው አመልካች ጋር በገባው ውል አንቀጽ 5 ንኡስ አንቀጽ 4 በገባው ግዴታ መሠረት 2ኛውን አመልካች ሳያሳውቅም ቢሆን 2ኛው አመልካች በንግድ ህግ ቁጥር 145 ንኡስ ቁጥር 1 መሠረት የንግድ ቤቱን ኪራይ ለ1ኛ አመልካች በማስተላለፍ ከዚሁ የንግድ መደብሩን ተከራይቶ 2ኛው አመልካች በሚያስተዳድረው የንግድ ቤት ውስጥ የንግድ ስራውን ከሚያከናውነው 1ኛ አመልካች ጋር የንግድ ቤት ኪራይ ውል መፈፀሙም ሆነ 1ኛ አመልካች ለተጠሪው ሊከፍል የተስማማውን ኪራይ ዋጋ በቀጥታ እንዲከፍለው በፍ/ህ/ቁ 2962/2 መሠረት ባለው መብት መስራቱ ከንግድ ህጉ ቁጥር 145 ንኡስ ቁጥር 1 እና ከፍትሐብሔር ህግ ቁጥር 2962 አላማ ጋር የሚስማማ መሆኑን እና 2ኛው አመልካች የሚያስተዳድረውን የንግድ ቤት የንግድ መደብሩ ባለሃብት ከሆነው ተጠሪ ላይ በመከራየት እየተገለገለበት ካለው 1ኛ አመልካች ጋር ውል ሲፈጽም የንግድ ቤቱን በውል ግዴታው መሠረት ሳያሳውቀው ወደ 1ኛው አመልካች ካስተላለፈው ተጠሪ ጋር የነበረውን የንግድ ቤት ኪራይ ውል የማቋረጡን ፍሬ ነገሮች በመነሻ ወስዷል፡፡

1. 2ኛው አመልካች በሕግ በተሰጠው ስልጣን የሚያስተዳድረውን የንግድ ቤት ከሱ የተከራየው የንግድ መደብር ባለቤት በንግድ ቤት ኪራይ ውል አንቀጽ 5 ንኡስ አንቀጽ 4 በተመለከተው ግዴታው መሠረት የንግድ መደብሩን ለ1ኛው አመልካች በኪራይ ሲያስተላልፍ የንግድ ቤቱንም ይዞታ ለ2ኛ አመልካች ሳያሳውቅ በማስተላለፉ የውል ግዴታውን ያላከበረ የንግድ መደብሩን ተከራይቶ 2ኛ አመልካች በሚያስተዳድረው የንግድ ቤት ውስጥ የንግድ ስራውን በማከናወን ላይ ከሚገኘው 1ኛ አመልካች ጋር የንግድ ቤት ኪራይ ውል መፈፀሙ ከንግድ ሕጉ ቁጥ

145 ንኡስ ቁጥር 1 አላማ ጋር የሚስማማ እና በፍተሐብሔር ህግ ቁጥ 2962 ንኡስ ቁጥር 2 በተጠበቀለት መብት በስራ ላይ ከማዋል ያለፈ ተግባር ፈጽሟል የሚያስብል ምክንያት የለም፡፡

2. 2ኛው አመልካች ህግ አውጪው ቀልጣፋ የንግድ ዝውውርን ለማበረታታት አላማ በ1952 ዓ.ም የወጣውን የንግድ ህግ ቁጥር 145 ንኡስ ቁጥር 1 ያልተሸረ መሆኑን እያወቀ በአዋጅ ቁጥር 555/2000 አንቀጽ 6 ንኡስ ቁጥር 3 2ኛው አመልካች የሚያስተዳድራቸው የንግድ ቤቶች በአነስተኛ ዋጋ በመከራየት ምንም እሴት ሳይጨምሩ ለ3ኛ ወገናት በማከራየት ተገቢ ያልሆነ ጥቅምን የሚያገኙ ህገ ወጦችን ለመከላከል ለ2ኛ አመልካች የተሰጠውን ስልጣን አሁን ካለው የፖለቲካ፣ የኢኮኖሚ እና የማህበራዊ ሁኔታ ጋር የማይስማማ ይልቁንም የስርዓቱ ዋና አደጋ ነው ተብሎ በግልጽ የተለየውን ኪራይ ሰብሳቢነት ከመድፈቅ አስተሳሰብና ከአስተሳሰቡም በመነጨ ፖሊሲ የወጣ ህግ በመሆኑ በ1952 ዓ.ም ከወጣው የንግድ ህግ ቁጥር 145 ንኡስ ቁጥር 1 ጋር ይጋጫል የሚባልበት አንዳች ምክንያት ቢኖር እንኳን ገዥነት እና የበላይነት ሊኖረው የሚገባው አዋጅ ቁጥ 555/2000 በመሆኑ በጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት አናሳ ድምጽ የሀሳብ ልዩነት እንደተመለከተው ይህ ጉዳይ ከሀገሪቱ ሕገ መንግስት እና ከመንግስት ፖሊሲ ጋር ተጣጥሞ የወጣውን አዋጅ ቁጥር 555/2000 የፌዴራሉ ጠቅላይ ፍ/ቤት በጉዳዩ ላይ ሰጥቷቸዋል የሚባሉ አስገዳጅ የህግ አተረጓጎሞችንም ሆነ ከንግድ ህግ ቁጥር 145 ንኡስ ቁጥር 1 ጋር በይዘቱም ሆነ በአላማው የበላይነት ያለው መሆኑን መገንዘብ ይቻላል፡፡

3. በፍ/ቤቶች ውሳኔ እንደተመለከተው የንግድ መደብር የሚንቀሳቀስ ንብረት ሲሆን የንግድ መደብሩ የሚከናወንበት የንግድ ቤት የማይንቀሳቀስ ንብረት ነው፡፡ አከራካሪ በሆነ ጉዳይ የንግድ መደብሩ ባለቤት ተጠሪ ሲሆኑ የንግድ ቤት ባለቤት መንግስት ነው፡፡ የንግድ ህግ ቁጥር 145/1 ድንጋጌ የንግድ መደብር ሽያጭና ኪራዩን ከማቀላጠፍ አልፎ የንግድ ቤት ባለቤትነትን በንግድ ቤት ውስጥ ስራውን ወደሚያከናውነው የንግድ መደብር ባለቤት ሃብትነት የማስተላለፍ ውጤት ያለው አይደለም፡፡ ምክንያቱም በህጋዊም ሆነ ህጋዊ ባልሆነ ምክንያት የንግድ መደብሩ ባለቤት ስራውን ከሚያከናውንበት የንግድ ቤት ባለቤት ጋር ያለው የንግድ ቤት

ኪራይ ውል ሲቋረጥ የሚንቀሳቀስ ንብረት የሆነውን የንግድ መደብሩን ይዞ ሌላ የንግድ ቤት በመከራየት ስራውን ለማከናወን መብቱ በህግ የተሰጠው ነው፡፡

በተመሳሳይ ከማንኛውም የንግድ ቤት ባለቤት በንግድ ቤት ውስጥ የሚከናወነው የንግድ ስራ ባለቤትነትም ሆነ ይዞታ በንግድ መደብር ሽያጭም ሆነ ኪራይ ውል ሲለወጥ ባለቤት የሆነበትን የንግድ ቤት ለማስተዳደር እና ለንግድ ቤቱ የሚከፈለውን የኪራይ ዋጋ ለመቀበል በፍ/ብ/ሕ/ቁ 2962 ንኡስ ቁጥር 2 በተጠበቀለት መብት እና በንግድ ህግ ቁጥር 145 ንኡስ ቁጥር 1 በተጣለበት ግዴታ መሠረት የንግድ መደብሩን በመግዛት በባለቤትነት ከሚይዘው ወይም በመከራየት ባለይዞታው ካደረገው ሰው ጋር የንግድ ቤት ኪራይ የመዋዋል መብትና ግዴታ አለው፡፡ በዚሁ አግባብ 2ኛ አመልካች ከተጠሪው ጋር ያደረገው ለአንድ አመት የሚፀና የንግድ ቤት ኪራይ ውል ተጠሪው የውል ግዴታውን ባለመወጣቱም ሆነ በሌላ በማንኛውም ምክንያት በማቋረጥ በእርግጥ የንግድ ቤቱንም በእጁ አድርጎ የንግድ ሥራ በማካሄድ ላይ ካለው 1ኛ አመልካች ጋር የንግድ ቤት ኪራይ ውል መዋዋሉ ተገቢነት ያለው ነው፡፡

4. ፍርድ ቤት በአብላጫ ድምፅ በሰጠው ውሳኔ መንግስት የንግድ ቤቶችን ከ2ኛ አመልካች በአነስተኛ ዋጋ በመከራየት ምንም ዓይነት እሴት ሳይጨምሩ በንግድ መደብር ኪራይ ሽፋን ለሶስተኛ ወገኖች በማስተላለፍ ያልተገባ ጥቅም በማግኘት ላይ ያሉ ህገ ወጦችን ለመግታት በአዋጅ ቁጥር 555/2000 አንቀጽ 6 ንኡስ አንቀጽ 3 እና በመመሪያ ቁጥር 4/2004 አንቀጽ 7 ንኡስ አንቀጽ 1 መሰረት ከህገ ወጦች ጋር የነበረውን ውል በማቋረጥ የተከራይ ተከራይ ከሆኑትና በእርግጥ የንግድ ስራ እያከናወኑበት ከሚገኙ በርካታ ዜጎች ጋር የንግድ ቤት ኪራይ ውል በስፋት እየተደረገ ባለበት ሁኔታ 1ኛ አመልካች የዚሁ የመንግስት ፖሊሲ ተጠቃሚ እንዳይሆን በፍርድ ቤቱ አብላጫ ድምጽ የተሰጠው ውሳኔ የሕገ መንግስቱን አንቀጽ 25 የሚቃረን ሆኖ ተገኝቷል፡፡
5. በተጨማሪም ህግ አውጪው የመንግስትን ፖሊሲ ለማስፈጸም ያወጣው አዋጅ ቁጥር 555/2000 መኖሩን እያወቀ በ1952 ዓ.ም የወጣውን የንግድ ህግ ቁጥር 145 ንኡስ

ቁጥር 1 ህግን በመተርጎም ሰበብ ተፈጻሚ እንዳይን ማድረጉ ከውጤት አንጻር ከሕገ መንግስቱ አንቀጽ 50 ንኡስ አንቀጽ 3 ጋር የሚቃረን ሆኖ ተገኝቷል፡፡

6. በፍርድ ቤት አብላጫ ድምጽ የተሰጠው ውሳኔ ህግ አውጪው የንግድ ሕጉ ቁጥር 145 ንዑስ ቁጥር 1 መኖሩን እያወቀ በአዋጅ ቁጥር 555/2000 አንቀጽ 6 ንኡስ አንቀጽ 3 ግልጽ ድንጋጌ ለ2ኛው አመልካች የተሰጠውን ህጋዊ ስልጣን ባለመቀበል በ1952 ዓ.ም በወጣው የንግድ ህግ ሽፋን የሰጠው ውሳኔ የሕገ መንግስቱን አንቀጽ 79 ንኡስ አንቀጽ 3 ድንጋጌ የሚቃረን ሆኖ ተገኝቷል፡፡
7. በመጨረሻም የፍርድ ቤቱ አብላጫ ድምጽ ውሳኔ 2ኛው አመልካች የመንግስት ንብረት የሆኑትን የንግድ ቤቶች ለማስተዳደር የተሰጠውን ህጋዊ ስልጣን ከግምት ያላስገባ ወይም ያለመቀበል ውጤት ያለው በመሆኑ የሕገ መንግስቱን አንቀጽ 40 ንኡስ አንቀጽ 2 ድንጋጌ የሚቃረን ሆኖ ተገኝቷል፡፡

ስለዚህ ጉዳዩ ከዚህ በላይ በተጠቀሱት ምክንያቶች ሁሉ የሕገ መንግስት ትርጉም ያስፈልገዋል በማለት ጉባኤው በአብላጫ ድምጽ ተስማምቶ በሕገ መንግሥቱ አንቀጽ 84 ንኡስ አንቀጽ 3 ፊደል 'ለ' መሠረት የውሳኔ ሃሳቡ ለመጨረሻ ውሳኔ ወደ ፌዴሬሽን ምክር ቤት እንዲላክ በማለት ትዕዛዝ ሰጥቷል፡፡

እኛ ስማችን በተራ ቁጥር 2፣3፣4 እና 8 ላይ የተጠቀሰን የጉባዔው አባላት ከአብላጫው ድምጽ የተለየን ሲሆን የልዩነት ሃሳባችንን እንደሚከተለው አስፍረናል፡፡

ከአመልካቾች አቤቱታና አያይዘው ካቀረቧቸው ሰነዶች መረዳት እንደተቻለው ክርክር የተነሳው በመንግስት የንግድ ቤት ኪራይ ጉዳይ ላይ ነው፡፡ የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት በውሳኔው እንደገለጸው ተጠሪ ለአንደኛ አመልካች ያከራዩት ህንጻውን ሳይሆን የንግድ መደብሩን በመሆኑ የንግድ መደብር ለማከራየት የሚደረግ ውል በባህርይው፣በይዘቱና በህጋዊ ውጤቱ የንግድ ማከናወኛ ቤት ለማከራየት ከሚደረግ ውል የተለየ ነው፡፡ ችሎቱ በመዝገቡ ላይ ተጠሪ የንግድ መደብራቸውን ለአንደኛ አመልካች በማከራየታቸው ምክንያት ሁለተኛ አመልካች የኪራይ ውሉን የማቋረጥ መብት የለውም በማለት ወስኗል፡፡ እኛም የሰበር ችሎቱን አቋም ሙሉ በሙሉ የምንጋራው ነው፡፡

በአመልካቾችና በተጠሪ መካከል ክርክር ያስነሳው ጉዳይ የንግድ ህጉ አንቀጽ 145 በመንግስት የንግድ ቤቶች ላይ የሚኖረውን የተፈጻሚነት ወሰን የሚመለከት ነው፡፡ በመሆኑም የንግድ ህጉን አንቀጽ 145 እና የመንግስት ቤቶች ኤጀንሲ ማቋቋሚያ አዋጅ ቁጥር 555/2000 በንጽጽር ማየቱ ተገቢ ነው፡፡ የንግድ ህጉ አንቀጽ 145 እንደሚከተለው ይደነግጋል *"የማይንቀሳቀስ ንብረት ተከራይ የንግድ መደብሩን ለገዛው ሰው የቤት ኪራይ ውሉን አያስተላልፍም ወይም የተከራይ ተከራይ አድርጎ አያከራይም ወይም የኪራይ ውሉን ለማስተላለፍ ወይም የተከራይ ተከራይ አድርጎ ለማከራየት የባለቤቱ ፈቃድ ያስፈልጋል የሚሉ የውል ቃሎች ሁሉ ፍርስና ዋጋ የሌላቸው ናቸው"፡፡*

በሌላ በኩል አዋጅ ቁጥር 555/2000 አንቀጽ 6(3) ኤጀንሲው በገቡት ውል መሠረት ግዴታቸውን የማይወጡ ተከራዮችን በራሱ ውሳኔ ለማስለቀቅ እንደሚችል ተደንግጓል፡፡

እዚህ ላይ የሚነሳው የሕግ ጥያቄ የኤጀንሲው መመሪያ የንግድ ሕጉን አንቀጽ 145 ንኡስ አንቀጽ 1 የመሻር ኃይል አለው ወይስ የለውም የሚለው ነው፡፡ የንግድ ሕጉ በግልና በመንግሥት የቤት ኪራይ ውሎች መካከል ልዩነት ሳያደርግ በንግድ መደብሮች ዙሪያ የሚደረጉ የማስተላለፍ ስምምነቶች የባለቤቱን እውቅና ሳያስፈልግ በነጻነትና በተቀላጠፈ አኳኋን እንዲከናወኑ ደንግጓል፡፡ አዋጅ ቁጥር 555/2000 ከንግድ ሕጉ ዓላማ ጋር የሚጋጭበትን ሁኔታ ልናገኝ አልቻልንም፡፡ ሁለቱም ሕጎች ተስማምተው የሚጓዙ ናቸው፡፡ ግጭት አለ ከተባለ የመንግስት ቤቶች ኤጀንሲ ባወጣው መመሪያና በንግድ ሕጉ መካከል ነው፡፡ መመሪያ ደግሞ ሕግን የመሽርሽር ኃይል አልተሰጠውም፡፡ በተጨማሪም ኤጀንሲው የተከራይ ተከራዮችን ማስወጣት እንደማይችል በቆየው የንግድ ሕግ ውስጥ በግልጽ ሰፍሮ እያለ ባወጣው መመሪያ መሠረት ውል አፍርሳችኋል በማለት በሕግ ያልተሰጠውን ስልጣን ሊፈጽም አይችልም፡፡

የአብዛኛው ድምጽ የውሳኔ ሃሳብ ጉዳዩ የሕገ መንግስት ትርጉም ያስነሳል በማለት ጉዳዩን ለምክር ቤቱ ቢያቀርብም ጉዳዩ የሕግ አተረጓጎምና አፈፃፀም እንጂ ሕገ መንግሥታዊ ትርጉም ሊያስነሳ የሚችል ነጥብ የለውም፡፡ በሰበር የተሰጠው ውሳኔም የቆየውን የጠቅላይ ፍ/ቤት ልምድ ተከትሎ የተደረገና አዲስ ነገር ባለመሆኑ የአብዛኛው የውሳኔ ሃሳብ ሊተች የሚገባ ነው፡፡

የብዙሃን የውሳኔ ሃሳብ ተከራዮች የንግድ መደብራቸው ኤጀንሲውን ሳያሳውቁ ለሶስተኛ ወገን ማስተላለፋቸው ሁል ጊዜም ያልተገባ ጥቅምን ለማግኘት አድርጎ መውሰዱም የተሳሳተ ነው፡፡ ጉዳዩን ከኪራይ ሰብሳቢነት ጋር አያይዞ ሕገ መንግስታዊ ትርጉም እንደሚያስፈልገው ጭብጥ አድርጎ ማቅረቡንም አልተቀበልነውም፡፡

ጉዳዩ ሕገ መንግስታዊ ትርጉም የሚያስነሳ ቢሆንም እንኳ ኤጀንሲው ሳያውቅ የንግድ መደብራቸውን ማስተላለፍ ማስቆም የሚቻለው በመመሪያ ሳይሆን የንግድ ሕጉን አንቀጽ 145 በአዋጅ በማሻሻል ነው፡፡ በአዋጅ ቁጥር 555/2000 ሥር የንግድ ሕጉን አንቀጽ 145 የሚያሻሽል ድንጋጌ የለም፡፡

በአብዛኛው ድምጽ ከተራ ቁጥር 1-7 የተዘረዘሩት ማብራሪያዎች የሕግ ክርክሮች እንጂ የነገሩን ሕገ መንግስታዊ ጭብጥነት የሚያመላክቱ አይደሉም፡፡ ሕጋዊ ክርክሮቹ ደግሞ በፍርድ ቤቶች ያለቁና ለአጣሪ ጉባዔው የይግባኝ ይግባኝ ሆነው ሊቀርቡ የማይችሉ መሆናቸው ይታወቃል፡፡

ስለሆነም እኛ ስማችን በተራ ቁ. 2፣3፣4 እና 8 ላይ የተዘረዘረው የጉባኤው አባላት አቤቱታው የሕገ መንግስታዊነት ትርጉም ጥያቄ የማያስነሳ ነው በማለት የልዩነት ሃሳባችንን አቅርበናል፡የሚል ነው

ምክርቤቱም የአጣሪ ጉባኤውን የውሳኔ ሀሳብ መሰረት በማድረግ በጉዳዩ ላይ የምክርቤቱ የሕገመንግስት ትርጉምና የማንነት ጉዳዮች ቋሚ ኮሚቴ ያቀረበውን የውሳኔ ሀሳብ ተመልክቷል፡፡ በዚህም መሰረት ምክርቤቱ እንደተረዳው የጠቅላይ ፍርድቤት ሰበር ችሎት በአብላጫ ድምፅ የሰጠው ውሳኔ መንግስት የንግድ ቤቶችን ከ2ኛ አመልካች በአነስተኛ ዋጋ በመከራየት ምንም ዓይነት እሴት ሳይጨምሩ በንግድ መደብር ኪራይ ሽፋን ለሶስተኛ ወገኖች በማስተላለፍ ያልተገባ ጥቅም በማግኘት ላይ ያሉ ህገ ወጦችን ለመግታት በአዋጅ ቁጥር 555/2000 አንቀጽ 6 ንኡስ አንቀጽ 3 እና በመመሪያ ቁጥር 4/2004 አንቀጽ 7 ንኡስ አንቀጽ 1 መሰረት ከህገ ወጦች ጋር የነበረውን ውል በማቋረጥ የተከራይ ተከራይ ከሆኑትና በእርግጥ የንግድ ስራ እያከናወኑበት ከሚገኙ በርካታ ዜጎች ጋር የንግድ ቤት ኪራይ ውል በስፋት እየተደረገ ባለበት ሁኔታ 1ኛ አመልካች የዚሁ የመንግስት ፖሊሲ

ተጠቃሚ እንዳይሆኑ የሚያደርግ በመሆኑ የሕገ መንግስቱን አንቀጽ 25 የሚቃረን ሆኖ ተገኝቷል፡፡

በተጨማሪም ፍርድቤቱ ህግ አውጪው የመንግስትን ፖሊሲ ለማስፈጸም ያወጣው አዋጅ ቁጥር 555/2000 መኖሩን እያወቀ በ1952 ዓ.ም የወጣውን የንግድ ህግ ቁጥር 145 ንኡስ ቁጥር 1 ህግን በመተርጎም ሰበብ በኃላ በወጣው በመንግስት ቤቶች ኤጀንሲ ማቋቋሚያ አዋጅ ለኤጀንሲው የተሰጠው ሥልጣን ተፈጻሚ እንዳይን ማድረጉ ከውጤት አንጻር ከሕገ መንግስቱ አንቀጽ 50 ንኡስ አንቀጽ 3 ጋር የሚቃረን መሆኑን መረዳት ይቻላል፡፡

በመጨረሻም ፍርድቤቱ የሰጠው ውሳኔ 2ኛው አመልካች የመንግስት ንብረት የሆኑትን የንግድ ቤቶች ለማስተዳደር የተሰጠውን ህጋዊ ስልጣን ከግምት ያላስገባ ወይም ያለመቀበል ውጤት ያለው መሆኑን ምክርቤቱ የተረዳ በመሆኑ ውሳኔው የሕገ መንግስቱን አንቀጽ 40 ንኡስ አንቀጽ 2 ድንጋጌ የሚቃረን ሆኖ አግኝቶታል፡፡

በመሆኑም ምክርቤቱ አጣሪ ጉባኤው በአብላጫ ድምጽ ጉዳዩ የሕገመንግስት ትርጉም ያስፈልገዋል በሚል ያቀረበውን የውሳኔ ሀሳብ ተቀብሎ የፌዴራሉ ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት በጉዳዩ ላይ በአብላጫ ድምጽ የሰጠው ውሳኔ ሕገ መንግስታዊ ጥሰት ያለበት በመሆኑ በሕገ መንግስቱ አንቀፅ 9 ንኡስ አንቀፅ 1 ድንጋጌ መሰረት ተፈፃሚነት ሊኖረው አይገባም በማለት በሙሉ ድምጽ ወስኗል።

<u>ትዕዛዝ</u>

የፌዴራሉ ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት በጉዳዩ ላይ በአብላጫ ድምጽ የሰጠው ውሳኔ ሕገ-መንግስቱን የሚቃረን በመሆኑ ተፈጻሚነት እንዳይኖረው የተደረገ መሆኑን እንዲያውቀው የውሳኔው ግልባጭ ለፌዴራሉ ጠቅላይ ፍርድቤት፣እንዲደርሰው ይደረግ።

የፌዴራሉ የሕገመንግስት ጉዳዮች አጣሪ ጉባኤ ያቀረበው የውሳኔ ሀሳብ ተቀባይነት ማግኘቱን እንዲያውቀው የዚህ ውሳኔ ግልባጭ ይላክለት።

የምክርቤቱ የውሳኔ ግልባጭ ለአመልካቾችም ይሰጥ።