# Assessing the Ethiopian House of Federation in light of the Exhaustion of Local Remedies Rule under the African Charter

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## Abstract

*Human rights monitoring bodies at regional and global levels are typically accessible to individual complainants. However, for petitions to be considered there is a usual condition that domestic remedies be exhausted first, among others. This requirement, however, is qualified in all systems, so that it would not frustrate the very purpose of availing people with international protection. For instance, under the African Charter for Human and Peoples' Rights, for local remedies to be exhausted as a condition for admissibility, they need to be available, effective and sufficient in the first place. The actual content of these qualities, however, is not easy to pin down. Moreover, ascertaining these qualities in actual cases requires a closer look at the operations of the organ under review and the prevailing context within which it works. The purpose of this chapter is to highlight how these qualifications are being applied in the growing jurisprudence of the African Commission on Human and Peoples' Rights. It does so by taking a recent decision from the Commission, where the Ethiopian House of Federation (HoF) and its constitutional review mandate was scrutinized vis-à-vis the stated qualities of the local remedies rule. The chapter dwelt on the issue whether the HoF qualifies as an organ that offers remedies worthy of exhaustion for the purpose of admissibility before the Commission. The chapter identified that the Commission has left out important considerations of the rule from its own jurisprudence, which if they were duly considered, might arguably have changed its final ruling that found the complaint inadmissible. It is argued that the House, or the remedies that it provides to be precise, would fall short of qualifying through the requirements if proper and holistic assessment was made.*

*Key words: African Commission on Human and Peoples' Rights, House of Federations, exhaustion of local remedies rule, charities and civil societies law, Ethiopia*

## 1. Introduction

Addressing the researches requires a three-tiered analysis. First, the content, or more precisely indicators, of the qualities of the rule need to be established. Then should follow a scrutiny on the extent to which the Commission applied these tests to the case mentioned. This is, in a way, a question of consistency. The third and more nuanced investigation would focus on the Commission's characterization of the House and the Council of Constitutional Inquiry (CCI) to the extent it informed the decision ultimately made. The discussion below is, therefore, structured in such a way it addresses these issues in their order.

### *1.1. General Essence and Rationale of the Rule*

Traditionally understood as a norm that a '[s]tate should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question,'[1] the rule is now provided for in virtually all international and regional human rights instruments as a condition for admissibility.[2] The rule is said to have originated in the context of the diplomatic protection of aliens, where the host state was allowed to settle the matter internally before international mechanisms were invoked.[3] Particularly since the 1950s, it crept into the human rights realm, as well.[4] Yet, the different nature of human rights, which focuses on the protection of individuals rather than the reputation of states means that a realistic approach of exhaustion of local remedies, marked by absence of mechanical or rigid application is to be followed.[5]

The African Charter, like other human rights instruments, provides for the exhaustion of local remedies as one of the conditions for communications to be considered by the Commission. The rule applies for both inter-state as well as the individual complaint system, which has dominated the works of the Commission.[6] Given the differences in the nature of the communications, the forums and manners with which the remedies are to be exhausted also differ as clearly noted in the Commission's Rules of Procedure.[7] Focusing on the individual complaint system under the Charter for our purpose, it is to be noted that the exhaustion rule is only one of the seven cumulative admissibility requirements under Art.56 of the Charter.[8]

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[1] Cancado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge, 1983) 1.

[2] Frans Viljoen, 'Communications under the African Charter: Procedure and Admissibility' in Malcolm Evans and Rachel Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2nd edition, 2008, Cambridge University Press) 111; See also, Ebenezer Durojaye, 'An assessment of the Decision of the Committee of Experts of the African Children's Charter in the *Nubian Children* Communication', (2012) 12 *African Human Rights Law Journal* 570.

[3] Ibid Viljoen, 111 citing C. F. Amerasinghe, *Local Remedies in International* Law (2nd edition, Cambridge: Cambridge University Press, 2004).

[4] Silvia D'Ascoli; Kathrin Maria Scherr, 'Rule of Prior Exhaustion of Local Remedies in the Context of Human Rights Protection', 16 [2006] (117: 138) *Italian Y.B. Int'l L.* 127.

[5] Trindade (n.1) 49.

[6] See, African Charter on Human and Peoples' Rights (1981), Art. 50 and 56(5), respectively.

[7] For the interstate communications, see Rule 87 (2(b)), and for 'other communications', see Art 56(5) of the Charter and Rules 93(2, i), and 106 of the Rules of Procedure (2010).

[8] The other six are: providing full author information, compatibility with the Charter (complaints only against state parties and the need to show a *prima facie* violation); use of decent language in writing a complaint; application not

The Commission has frequently expressed that the rule is the most important condition for admissibility and one '….that in almost all the cases, the first requirement looked at by both the Commission and the states concerned.'[9] Indeed, the Commission considers the rule as '… the cornerstone of the Commission's adjudicatory function.'[10] This might have emanated from, at least, a couple of reasons. For once, it is heavily used by states and the Commission has to deal with it in almost every communication that it seizes.[11] The other possible explanation is that it is a condition that closely relates to the very purpose of having an international/regional system in that it is one way of monitoring if member states have put in place a system that enables them implement the Charter rights. This is so as the rule 'entails state's duty to maintain the legal basis for the domestic protection of treaty-based rights as well as to provide effective and sufficient remedies in case of their violation.'[12]

Closely related to this, the rule is usually discussed in relation to the right to fair trial or right to effective remedy, when this is provided. For instance, the Commission held that Article 56(5) 'must be applied concomitantly with Article 7, which establishes and protects the right to fair trial.'[13] Further, in its Fair Trial Guidelines, the Commission notes that the right to an effective remedy includes access to justice, reparation for the harm suffered and access to the factual information concerning the violations.[14] It is submitted that the Charter does not provide the right to effective remedy, as a free-standing right.[15] However, three provisions in the Charter would establish the right indirectly.[16] First, it is argued that the right is a constituent element of the general obligation that requires state parties to give effect to the norms of the Charter.[17] In addition, the duty 'to guarantee the independence of the Courts and … allow the establishment and

being exclusively based on media reports (the need to corroborate allegations); that a complaint is brought within reasonable time to the Commission; and that it is not settled or is under consideration in other forums.

[9] Communications 147/95 and 149/96, *Sir Dawda K Jawara v The Gambia*, para. 30.

[10] Communication no. 477/2014 - *Crawford Lindsay von Abo v The Republic of Zimbabwe,* para. 66.

[11]Takele Soboka Bulto, 'Exception as Norm: Local Remedies Rule in the Context of Socio-Economic Rights in the African Human Rights, System', [2012] (16:4) *The International Journal of Human Rights,* 560.

[12] Ibid., 561.

[13] Consolidated communications 48/90, 50/91, 89/93 Amnesty International [et] al./Sudan, para. 31.

[14] See African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Part C(b), Available at <http:// www.justiceinitiative.org/db/ resource2?res_id=101409> (All web addresses used in this material are last accessed on May 5, 2018)

[15] For this it has been criticized. See, for instance, Godfrey M Musila, 'The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights, (2006) 6 *African Human Rights Law Journal*, 447.

[16] See Nsonguruaj Udomban, 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights', (2003) 1 Am. J. Int'l L. 9-10.

[17] African Charter, Art.1.

improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter'[18] signifies a core of the right to effective remedy. As hinted above, the right to fair trial, as enshrined under Art.7 of the Charter is the other normative basis for effective remedy.

As to its rationale, different reasons are offered, explaining the application of the rule in human rights monitoring bodies. The Commission, in its decisions has highlighted a number of them. These reasons seem to be crafted in such a way that they address the interests of the state concerned, the Commission, and complainants. From the perspective of a state that is accused of violating a Charter right(s), the rule emanates from the need to give it a notice of human rights violation and thereby an 'opportunity to remedy matters through its own local system.'[19] Such an opportunity is supposed to help an accused state 'save its reputation' by acting before an allegation reaches the external world.[20] To Viljoen, '[i]t is only fair that a State must be afforded full opportunity to give effect to its international law obligations, something it has consented to do.'[21] In line with this, the Commission has considered some communications admissible in cases where the states' awareness of the violations was obvious or is proven. For instance, in earlier, joined cases that involved the then Zaire, the Commission explained that 'the government had ample notice of the violations' in considering the complaint admissible despite the fact that domestic remedies were not exhausted.[22] Similarly, in a more recent case, the Commission had to say the following in rejecting the government's admissibility defense based on Art. 56(5):

> In the instant case, the international community in general and the African Commission paid particular attention to the events that took place in the run up to the referendum in Zimbabwe in February 2000 right up to the end of and after the Parliamentary elections of June 2002. The Respondent State was *sufficiently informed and aware of the worrying human rights situation* prevailing at the time.[23] (Emphasis supplied)

Apart from the issue of fairness to the respondent state, it is also observed that the requirement of exhaustion of local remedies conforms with the principle that international law is subsidiary to

[18] Ibid Art. 26.
[19] See for instance, Jawara case (n.9) para. 31. Related to this, the Commission's Rules of Procedure dictates that complaints should include, among others, information regarding 'any public authority that has taken cognizance of the fact or situation alleged.' See, Rule, 92(2(f)).
[20] Communication 299/05 – *Anuak Justice Council v Ethiopia,* para. 47.
[21] Viljoen (n. 2) 111.
[22] Communication Nos. 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group and others v Zaire*, para. 36.
[23] Communication 245/02: *Zimbabwe Human Rights NGO Forum v Zimbabwe*, para. 69.

national law,[24] meaning rights are supposed to be enforced at national level, and the international procedures would set in only if the former is not up to the task. To this state-centric justification of the rule, one can add that the rule also gives national institutions the chance to be challenged and thus to practice ways of safeguarding rights.

From the standpoint of the Commission, the exhaustion of local remedies rule spares it from becoming a court of first instance, which is not tenable as a matter of realism and principle. In the words of the Commission, the application of the rule enables it to 'avoid playing the role of a court of first instance, a role that it cannot under any circumstances arrogate to itself.'[25] Lastly, the rule has also been approached from the perspective of complainants. In this regard, the Commission would argue that local remedies are 'normally quicker, cheaper, and more effective' than international ones.'[26] Explaining the relative advantage of domestic procedures over international mechanisms, the Commission reasoned out that in the domestic arena, 'an appellate court can reverse the decision of a lower court, whereas the decision of an international organ does not have that effect, although it will engage the international responsibility of the state concerned.'[27] In a way, the message is that the rule is in place not only in reverence to state parties' reputation, but also in consonance with complaints' interests.

### *1.2.The Scope of the Rule: Available, Effective and Sufficient*

Having introduced the essence of rule in general, let us now turn to briefly sketch its content under the Charter, as developed in the jurisprudence of the Commission. To begin with the relevant provision, it reads that communications shall be considered if they 'are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged:'[28] This tells little about the nature of the remedy that needs to be exhausted to satisfy the admissibility requirement, it has been described as 'well established but inadequately defined.'[29] What is clear is that complainants should exhaust procedures that are not unduly prolonged and inefficient. It is

[24] Viloen (n. 2) 111. The Commission also opined that the rule reinforces 'the subsidiarity and complementarity relationship of the international system to that of internal protection. See, the *Anuak Council Case*, (n. 20) para. 48.
[25] Communications 54/91, 61/91, 98/93, 164-196/97 and 210/98, *Malawi African Association and Others v Mauritania*, para. 80.
[26] *Anuak Council Case* (n.20) para. 48.
[27] Ibid.
[28] African Charter, Art. 56(5).
[29] Silvia and Scherr (n. 4) 118, citing, Jessup, *A Modern Law of Nations* (Cambridge, 1956) 104.

important to pause a question as to what other substantive characteristics should a remedy possess in order for it to serve as an admissibility requirement under Art.56(5) of the Charter?

The leading case, where the Commission set out these characteristics for the purpose of the rule is the *Sir Dawda* case.[30] Accordingly, for a remedy envisaged under Art. 56(5) to warrant exhaustion, it must be 'available, effective and sufficient.' Further, '[a] remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.'[31] These three characteristics have been further analyzed by the Commission in subsequent communications.

It appears that it suffices for a complainant to show that either of the features is missing to get away with the requirement. That said, making a distinction among them has been difficult, including in the jurisprudence of the Commission. According to Viljoen, 'they are often entangled and not usefully separable.'[32] Furthermore, the Commission in one case stated that the 'likelihood of the complainant succeeding in obtaining a remedy that would redress the situation complained of in this matter is so minimal as to render it unavailable and therefore ineffective,'[33] stressing how connected the features are. In short, the three elements and the reasonable time requirement have been considered as constitutive elements of effective remedy.[34]

Furthermore, the Commission highlighted some indicative instances on what these requirements separately mean in real cases. To begin with availability of a remedy, which is also implied with the use of 'if any' under Art. 56(5), it generally implies that the remedy at hand is readily accessible as a matter of practical reality.[35] Challenging the constitutionality of laws for complainants from poor economic background was, for instance, considered as inaccessible, and thus a remedy unavailable to them.[36] Procedures that may otherwise redress violations are also adjudged as unavailable to people who flee their countries out of genuine fear of persecution.[37] Other instances that the Commission found remedies as not being available include situations where the

[30] Jawara case (n. 9).
[31] Dawda (n. 9) para 31 and 32.
[32] Viljoen (n. 2) 117. Similarly, it is noted that the similarity between effectiveness and sufficiency go 'sometimes even to such an extent that it [is] virtually impossible to make a distinction between the two.' See Udomban (n. 16) 32.
[33] Communication *251/02 - Lawyers of Human Rights v Swaziland*, para. 27.
[34] Musila (n. 15) 446.
[35] Viljoen (n. 2) 117, citing cases the Commission disposed of.
[36] Communication 241/01 - *Purohit and Moore v Gambia (The)*
[37] See the Dawda case (n. 9).

jurisdiction of courts is ousted in such a way that it would have no means of checking the executive[38] and when a potential finding of violation by the Commission would potentially add nothing or little to the applicant, such as the execution of an applicant amidst the consideration of a complaint by the Commission.[39] In such cases, the idea of exhausting remedies becomes illogical, according to the Commission. Notwithstanding these indicative elements of the 'availability' requirement, however, it needs to be noted that a mere (subjective) doubt by complainants about the availability of a remedy, as such, is not sufficient.[40] This means that if there are some avenues that might render justice despite limitations, complainants are supposed to attempt bringing their complaint to such avenues before they approach the Commission.

Turning back to effectiveness, a remedy is considered as being not effective, for instance, when complainants are asked to challenge a ruling on clemency[41] and government has discretionary power to deport aliens.[42] Further, the fact that a remedy is not of a judicial nature, such as a plea for pardon that cannot be vindicated as a right, is ruled as ineffective and thus need not be exhausted.[43] Remedies that give way for the executive branch of a government to influence the result have also been particularly scrutinized by the Commission as being remedies of non-judicial nature and thus ineffective.[44] However, the mere fact that a remedy is inconvenient or unattractive or that it did not produce a result favoured by an applicant does not render it ineffective.[45]

The Commission also had set sufficiency as a standalone test. Generally, sufficiency is understood as a capacity of a remedy to redress a complaint.[46] The expectation is that the type and magnitude of a redress should be, to the extent possible, proportionate to a violation at hand. Additionally,

[38] See, for instance, Communication 87/93, *Constitutional Rights Project (in respect of Zamani Lakwot and six others)* v *Nigeria.* It is noted, in this regard that the Commission found violations of Art. 7 and 26 of the Charter in those cases, where the jurisdiction of courts has been ousted, strengthening the link between the requirement and substantive rights of the Charter. See, Henry Onoria, 'The African Commission on Human and Peoples' Rights and the Exhaustion of Local Remedies under the African Charter' (2003) 4 *Afr. Hum. Rts. L.J. 1*, 10.
[39] See for instance, Communication, 137/94-139/94-154/96-161/97 - *International PEN, Constitutional Rights Project, Civil Liberties Organization and Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria*, where the military regime in Nigeria executed the complainants despite a provisional measure from the Commission for a stay of the same.
[40] Viljoen (n. 2) 118.
[41] 245/02 - *Zimbabwe Human Rights NGO Forum v Zimbabwe*, para. 67.
[42] 313/05 - *Kenneth Good / Republic of Botswana*, para. 89.
[43] Onoria (n. 38) 6.
[44] Ibid 7.
[45] Communication 308/05 - *Michael Majuru v Zimbabwe* (Majuru Case) (2008) ACHPR para 102.
[46] Udomban (n. 16) 32.

the Commission in a certain case has considered a remedy that only 'meets parts of a claim as understood by the Respondent State' as being not sufficient.[47] It is also observed that the Commission obviates the requirement in cases where massive violation can be established *prima facie*.[48] This is premised on the understanding that the state in such circumstances must have had an ample opportunity to rectify violations and that it is unreasonable to demand the exhaustion of local remedies in the face of massive violations. This, therefore, renders the remedy impractical or undesirable.[49] It is also implicit that in such cases, the remedy that domestic procedures can offer is only limited and thus should not bar an international protection.

Regarding the procedure, the Commission has developed a three-step test.[50] Accordingly, the initial onus of proof rests with the complainant. As such, the complainant needs to set out what s/he or it has done to exhaust local remedies.[51] If the complainant contends that the remedy is unavailable/ineffective, s/he should prove it.[52] If this is satisfied, the responsibility then shifts to the respondent state. If it claims that there is untried remedy which is effective and adequate to redress the violation alleged, it needs to prove it.[53] If this is so proven, the claimant would get a chance to reply. This being the standard procedure as can be seen from many communications, at times claimants or respondent states fail to respond or adduce additional information that the Commission requests in the course of ruling on admissibility. In these cases, the Commission rules against the party who fails to respond.[54] At last, it is worth noting that under the Rules of Procedure[55] and the jurisprudence of the Commission, there is a possibility of resubmitting a communication to the Commission, after it was initially ruled inadmissible, provided that new evidence is adduced, including the exhaustion of remedies that were not tried before filing the complaint to the Commission.

[47] Communication 477/14 - *Crawford Lindsay von Abo v the Republic of Zimbabwe*, para. 87.
[48] See, for instance, Communication 318/06 – *Open Society Justice Initiative v Côte d'Ivoire*
[49] Udomban *(*n. 16) 24.
[50] Viljoen (n. 2) 113.
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] See, Udomban (n. 16) 18.
[55] Rules of Procedure (n. 7) Rule 107(4).

## 2. Communication 445/13 – Human Rights Council and Others *v* Ethiopia

Reviewing a recent case decided by the Commission will help us investigate how the House of Federation of Ethiopia performs against the indicators of 'available, efficient and sufficient' remedies. To this end, it is imperative to provide a summary of the case that the Commission decided, first. I will then venture on to mainly examine some aspects of the decision that I believe needed more investigation and which might have changed the final ruling of the Commission. In so doing, the jurisprudence of the Commission on exhaustion of local remedies will be used as a framework. In addition, the functions and context within which the House works will be examined, as it has played a crucial role in the decision of the Commission in the case at hand. The recent current of reform attempts and its promises will also be taken into account in the analysis. It should be noted that this particular Communication is only one of the handful but growing complaints against Ethiopia before the Commission.[56]

### *2.1. Background*

The complaint, Communication 445/13- *Human Rights Council and Others v Ethiopia*, was filed to the Secretariat of the Commission on April 13, 2013 by the Ethiopian Human Rights Council (the Council) against the Federal Democratic Republic of Ethiopia, a state party to the Charter since June 15, 1998.[57] Along the way, the Council was supported by other four non-governmental organizations.[58] At the center of the contention was an alleged violation of various Charter rights

[56] Well before Ethiopia became signatory to the Charter on June 15, 1998, seven communications were lodged to the Commission against it. As they were duly considered as not receivable, they were simply dismissed, and no public information is available about the cases. Since then, five communications have been disposed on which information is provided on the Commission's website, namely: *Interights v Ethiopia* and *Interights v Eritrea* (1999), which was postponed as the matter was seized in another international forum; *Anuak Justice Council v Ethiopia* (ruled inadmissible on account of local remedy rule); *Interights v Ethiopia* (2009) (also inadmissible for the same reason); *Heregewein and IHRDA v Ethiopia* (decided on merit and the Commission found Ethiopia in violation of various aspects of the right to fair trial during the Red Terror Trials); and *Human Rights Council v Ethiopia* (inadmissible on account of the local remedies rule).There are also more cases that, for some reason, do not appear in the website. The following are the ones that the author traced from the Annual Activity Reports of the Commission, but with no details: 507/15 *Andargachew Tsege and and Yemsrach Hailemariam (Represented by Reprieve and REDRESS) v Ethiopia*; *461/13 – Eskinder Nega Fenta and Reyoot Alemu v Ethiopia*; *599/16 - Ethiopian Human Rights Project v Ethiopia*; 455/13 – *Abubaker Ahmed Mohamed & 28 Others (represented by X and Y) v Ethiopia*; *341/07- Equality Now and EWLA v Ethiopia*; *419/12 - The Indigenous Peoples of the Lower Omo v Ethiopia;* and 397/11 – *Omo Valley and Lake Turkana Communities v Ethiopia*. From the Reports on which these communications are featured, it can be seen that many of them are seized and some even went past the admissibility stage. Unfortunately, no information is provided on these communications. Repeated email requests for clarification were not unfortunately responded to by the Secretariat of the Commission.

[57] See the Ratification Status of the Charter here.

[58] Communication 445/13, *Human Rights Council and Others v Ethiopia* (Human Rights Council case) para. 1

by the respondent state through a decision made based on laws that regulate charities and Civil Society Organizations (CSOs) in Ethiopia.

Accordingly, the CSO Agency, which is established under Charities and Societies Proclamation No.621/2009, without notice and court warrant, froze the assets of the Council, including a bank account in the sum of USD 566,000. The funds were acquired from both domestic and foreign sources since 2002.[59] The basis of the measure was premised on the allegation that the Council, by diverting funds that it had acquired from foreign sources to its new status as a domestic human rights organizations, following the enactment of the law in 2009, contravenes the law, as the latter puts the allowable limit that such organizations can acquire from outside sources to 10%.[60] Following the action, the Council challenged the legality and timeliness of the measure, contending that the laws does not give the Agency the right to freeze accounts and that the decision indiscriminately affected funds acquired from outside sources before the legal effective date, among others.[61] The legal challenge was first taken to a Board (established by the same law) and then to the High Court with no success. On the basis of provisions of the Proclamation and other subsidiary laws (a regulation and a circular), which were enacted subsequent to it, the Board and the High Court ruled that the Agency has the power to act as it did under the circumstances just described. At last, the Council took the case to the Cassation Division of the Federal Supreme Court, which likewise upheld the decisions rendered hitherto.[62] It was following these procedures that the case was lodged before the Commission, where the right to fair trial (Art.7), freedom of expression (Art.9), freedom of association (Art.10) and the right to property (Art.14) are allegedly violated.[63] It needs to be stressed that at the domestic forums, it was the legality of the Agency's

[59] Ibid para. 6.
[60] See, Proclamation No. 621/09, Art. 88(1). In fact, the Agency has allowed the first Complainant to draw an amount equal to 10% of the latter's annual budget every year. The Agency intends to allow this until the entire fund is used, even if it claimed that it is empowered to transfer seized assets to another society or charity with similar objectives. (See, Ibid para 39). Currently, the Council is not using this 10% allowance as it has other ways of acquiring this modest amount from other sources and is hoping that the Agency/government would eventually release the fund in its totality considering the important role that the Council is playing in advancing human rights in Ethiopia. Phone interview with Ato Betseate Tereffe, Executive Director, Human Rights Council, on September 26, 2017. That said, the law is one of the few pieces of legislation that is prioritized for amendment following the reform agenda of the Abiy administration. Accordingly, a draft amendment of the law is prepared by the Justice and Legal Affairs Advisory Council and submitted to the Office of the General Attorney for further consideration. See Bamlak Tadesse, '*Charities, Societies Law Amendment Comes to First Draft'* (November 2, 2018, Afro Afro 105.4 FM), available here
[61] Human Rights Council case (n. 58) paragraphs 8-9.
[62] Ibid paragraphs 9-1.1
[63] Ibid parag. 16.

decision that the Council attempted to challenge without invoking a constitutional issue or right, whereas in the communication lodged to the Commission, Charter rights allegedly violated through the decision of the Agency featured out, expectedly.[64]

### *2.2. Admissibility Issues – Central theme of Contention for the Commission*

In line with the relevant laws and jurisprudence of the Commission, the complainants explained how the application complies with the admissibility requirements. Regarding the exhaustion of local remedies rule, which came out as the single most important issue of contention, they averred that the steps taken, as outlined above, comply with the Charter requirements. The respondent state expectedly took issues with this. In this regard, it argued that the rights implicated in the application are guaranteed under the FDRE Constitution directly or through the application of Art. 9(4) of the same that makes international treaties ratified by the country become part of its domestic law.[65] It then went on to explain that in the constitutional arrangement of the country 'courts of law have no power to interpret the Constitution,' and that this power is in the exclusive province of the House of Federations (HoF), as assisted by the Council of Constitutional Inquiry (CCI).[66] Besides, to prove that the remedy that the respondent state claims should have been exhausted is effective and sufficient, the State presented the case of Mr. Melaku Fenta.[67] In that case, the House has, indeed, found a provision that provided for a first instance jurisdiction of the Federal Supreme Court for higher federal officials to be unconstitutional based on the right to appeal and equality rights of the accused.[68] The argument of the state, thus, appears to be that since the rights that the complainants alleged as violated are to be found in the FDRE Constitution, the relevant CSOs laws and their interpretation by the Board and the courts should have been challenged for their unconstitutionality, failing which would mean non-compliance with the exhaustion of local remedies rule.

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[64] This is clear from the decision of the Cassation Division. See *Human Rights Council v Charities and Societies Agency*, file no. 74039 (Volume 14, pp. 299-305, Decided September 13, 2012). This is also visible in the communication. See particularly para. 53. As stated above, one of the admissibility requirements under the Charter is compatibility of applications with the Charter, which is understood, among others, as requiring the establishment of a *prima facie* violation of provision(s) of the African Charter. See, for instance, Communication 313/05 - *Kenneth Good v Republic of Botswana*, para. 86.
[65] Human Rights Council case (n. 58) para. 32.
[66] Ibid para. 33.
[67] Ibid para. 35-40.
[68] See HoF, (2017) 2 *Constitutional Decisions Journal*, 7-30.

To this, the complainants proffered three-tiered alternate replies. First, they argued that a constitutional review was not necessary as the grievance did not necessitate constitutional interpretation and that it was not requested, nor deemed necessary by the relevant courts.[69] Second, the HoF and CCI are not courts of judicial nature in the context of Art. 56(5) of the Charter and thus are not to be exhausted.[70] Their composition is relied upon as a primary reason for this. The complainants also mentioned *Alfred B. Cudjoe v Ghana*, where the Commission stated that 'the internal remedy to which Art. 56(5) refers entails a remedy sought from courts of a judicial nature[71] in support of their argument. Third, the constitutional review would still be ineffective and insufficient, they contended. To this end, the complainants alleged that the HoF would not operate impartially and has no obligation to decide requests according to legal principles.[72] Accordingly, the Commission framed three issues, along the lines of these three points of reply.

### *2.3. Commission's Analysis and Decision*

In relation to whether constitutional review was necessary, the Commission noted some variance between the points of the claim in the domestic procedures and the ones presented to it. It has, thus, correctly noted that while the challenge at the domestic forums was on the interpretation of the relevant laws as allowing the Agency to freeze assets and the timelines of the measure taken, as well as the fact that it was made to affect funds acquired prior to the effective date, the complaint before the Commission challenges aspects of the laws as being against Charter rights. In the words of the Commission, the complainants 'neither pleaded the case that the measures complained of violated any of the fundamental rights guaranteed under the Respondent State's Constitution, nor the case that certain provisions of the CSO Proclamation are inconsistent with the fundamental rights' at home.[73] It has further chided the complainants' argument as follows:

[69] Human Rights Council case (n.58) para. 41. The complainants are presumably referring to the fact that a court seizing a case needs to defer it for constitutional interpretation to the CCI "when it believes that the interpretation of the constitution is necessary to decide the case.' See the Proclamation to Re-enact for the Strengthening and Specifying the Powers and the Duties of the CCI, Proclamation No. 798/2013, Art. 4(3). For details of deferral, see Takele Soboka Bulto, 'Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory (2011) 19 Afr. J. Int'l & Comp. L. 99.

[70] 445/13, para. 42

[71] Communication 221/98 - *Alfred B. Cudjoe v Ghana*, (1999), para. 9

[72] Human Rights Council case (n. 58) para. 43. Despite attempts, the actual application sent to the Commission was not accessible either from the Commission or the Council itself. I would hope that it might have expounded these and other arguments a lot better.

[73] Ibid para 54.

> The Complainants are content to have the complaint examined under the lenses of fundamental rights guaranteed under the Charter as a proper means of redressing the grievance. Inexplicably, they deemed a similar procedure irrelevant at domestic level.[74]

This means, argues the Commission, that it would

> undertake the same exercise as the one that would have been undertaken by the relevant domestic body: interpreting the rights guaranteed under the Charter alleged to have been violated and assessing whether the impugned provisions of domestic law and the measures taken under them are consistent with the rights so interpreted.[75]

The conclusion was premised on the assumption that the competence of constitutional review in Ethiopia 'is exclusively vested in the House of Federation assisted by the Council of Constitutional Inquiry.'[76] That said, the failure is also said to have denied the respondent state 'the very opportunity Art. 56(5) is designed to afford.'[77] Accordingly, the Commission overruled the defense. On the argument that the courts did not refer the case for constitutional interpretation, the Commission ruled that it was the duty of the complainants to lodge the application for constitutional review.[78]

On the issue of whether the HoF/CCI are not judicial organs, the Commission stated that the ruling in the *Cudjoe* case has been restated, as it did not supply reasons for limiting local remedies to 'courts of judicial nature.'[79] What matters is not the nomenclature by which the national organ is called, the Commission reasoned, but 'its demonstrable effectiveness in redressing a particular violation.'[80] It added that the remedy, for the sake of Art. 56(5) should 'operate in strict observance of the procedural guarantees of a fair hearing by a competent, independent and impartial organ' and that it should be based on enforceable law, as opposed to being merely discretionary.[81] In light of these standards, the Commission noted the following as bases to draw a conclusion: that the House settles constitutional disputes (FDRE Art. 84(2) and that this is part of a justiciable matter, as envisaged under Art. 37 of the same; that the House is assisted by an expert body, the CCI; and that both the CCI and the HoF have an obligation to follow certain procedures in carrying out their

[74] Ibid para. 57.
[75] Ibid para 54.
[76] Ibid paragraphs. 51 and 52.
[77] Ibid para. 58.
[78] Ibid para. 57.
[79] Ibid para. 59.
[80] Ibid paragraphs. 59 and 60.
[81] Ibid para. 59.

mandates.[82] Accordingly, it observed that the HoF is a *sui generis* body on constitutional matters and concluded that '[t]he fact that the House of Federation is not a court of law does not obviate its suitability to handle constitutional review as a remedy.'[83]

On the third point, by accepting the respondent state's submission that the *Melaku Fenta* case demonstrates that the House delivers effective remedies, the Commission found the case to be comparable to the present case in that a law is being challenged as violating certain fundamental rights[84] and thus the constitutional review system should have been undertaken. Further, the contention of impartiality was addressed in light of the fact that the HoF '… does not take part in the law-making process' and thus, 'to the extent that the House of Federation does not participate in law-making, it could not be in a position of conflict of interest when it sits to review the Constitutionality of laws passed by the House of Peoples' Representatives.'[85] It, thus, ruled the communication inadmissible for want of the exhaustion of local remedy rule.

### 3. Assessment of the Decision

In the subsequent sections, the reasoning and final decision of the Commission in the case are analyzed. The section mainly focuses on two main issues. First, the writer will examine if the constitutional interpretation by the House was needed as a requirement for admissibility. Then, he will proceed to scrutinize the extent to which the House and the CCI would provide effective remedy of a judicial nature. The parameters utilized in the assessment include the jurisprudence of the Commission as well as legal and factual realities surrounding the HoF/CCI. To this end, relevant case law of the Commission is used, as also partly introduced above. At this juncture, it needs to be mentioned that the Commission has a demonstrable history of fidelity to its jurisprudence, as one can notice from almost all of its case decisions. After all, consistency is a virtue to be had. That said, relevant laws regulating the HoF/CCI, decisions passed by these organs, as well as expert opinions regarding the HoF/CCI and attendant issues will be put into use. This approach is also in line with the approach taken by the Commission, as it takes into consideration

[82] Ibid para. 64-67.
[83] Ibid para. 68.
[84] Ibid para. 71, 73.
[85] Ibid para. 68, footnote 54.

"the circumstances of each case, including the general context in which the formal remedies operate in its decisions.'[86]

### *3.1. Is constitutional review (by the HoF) a remedy to be exhausted?*

Art. 56(5) only talks of available (if any) local remedies. One of the issues that needs a consideration would be if what is required under the provision is for complainants to exhaust all available remedies or that there is a different way of doing it. In this regard, the majority of decisions from the Commission tend to address the issue in the affirmative. In this regard, a domestic remedy has been defined as 'any domestic legal action that may lead to the resolution of the complaint at the local or national level.'[87] Frequently, the Commission has demanded all remedies, if effective and sufficient, be exhausted. For instance, in Communication 308/05, the Commission noted that Art. 56(5) is satisfied only after all local remedies have been exhausted.[88] The same conclusion is reached in the *Anuak* case.[89] In a different case that also involved Ethiopia, the government claimed that Art. 56(5) refers to 'all local remedies' with which the Commission seems to agree.[90] Of more relevance to our discussion is a decision in the *Purohit* case,[91] where the Commission impliedly accepted that local remedy includes challenging the constitutionality of a law in dispute. The Commission's Communication Procedure also affirms this.[92] The stance of the Commission was even clearer in *Njoku v Egypt*, where it underscored that 'all local remedies provided by Egyptian law, including the possibility of having the case reviewed' had been exhausted by the complainant.[93]

On the other hand, the Commission, in other cases has been considerate. For instance, in one case, the Commission opined as follows:

> The exhaustion of local remedies requirement under Article 56.5 of the African Charter should *be interpreted liberally* so as not to close the door on those who have made at least

[86] The Anuak case (n. 20) para. 49.
[87] Viljoen (n. 2) 83/84.
[88] Majurru case (n. 45) para. 76. On this point, it is pointed out that the 'interpretation of the local remedies criteria can … not be understood without some knowledge of that general context.' Udomban (n. 16) 15.
1997–1998, Annex II, para. 57.
[89] Anuak case (n. 20) para. 50.
[90] See, Communication 372/09 - *GTK Interight (on Behlaf of Gizaw Kebede and Kebede Tadesse) v Ethiopia*, (Gizaw case), para.44.
[91] Communication 241/01: *Purohit and Moore v Gambia (The)*
[92] ACHPR, Information Sheet 3: Communication Procedure (undated) 6.
[93] Communication 40/90 - *Njoku v Egypt*, para 57.

> a *modest attempt* to exhaust local remedies. Under this Article, all the African Commission wishes to hear from the Complainant is that it has approached either local or national judicial bodies.[94] (Emphasis added).

This position is specifically pronounced in cases where there are multiple procedures that can deliver comparable remedies. To this end, the Commission asserted that 'when a remedy has been attempted, use of another remedy which has essentially the same objective is not required.'[95] Most importantly, in situations where a non-judicial body can provide a remedy comparable to that of courts, the Commission has clearly preferred courts to other mechanisms.[96] In a final analysis, so far as the nature of the remedy is such that it is capable of redressing a violation alleged, the trend has been to demand that all such remedies be attempted, regardless of the name of the organ. This is so, as Brownlie would have it, 'since remedies may be available whatever the constitutional status of the agency taking the measure concerned. The test remains that of the reasonable possibility of an effective remedy.'[97] In light of this, therefore, the insistence of the Commission in the case at hand that a constitutional review, as such, be sought seems to be in line with the dominant approach.

Yet, the characterization that any legal issue that might somehow implicate a constitutional provision is a constitutional dispute and thus involves the HoF is questionable. To begin with, it can be argued that almost any transgression of a law results in the violation of some human right, somehow. Thus, the fact that the petitioner's legal challenge could have been framed as a rights issue does not necessarily mean that there was a need for constitutional interpretation. The approach of the Commission in this regard is arguably dangerous as it gives the impression that any legal issue would necessitate constitutional interpretation and thus should be lodged up until the House as a condition for Ethiopians to access the Commission. Thus, there seems an agreement that in Ethiopia constitutional interpretation is only warranted when 'there is a real and important disagreement between two or more constructions of a constitutional rule…each of which is forcefully persuasive.'[98] This is not demonstrated in the decision.

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[94] Communication 260/02 - *Bakweri Land Claims Committee v Cameroon*, para. 55.
[95] Communication 313/05 - Kenneth Good / Republic of Botswana, para. 55
[96] Gizaw case (n. 90) para. 71.
[97] Udomban (n. 16) 27, citing Ian Brownlie, *Principles of Public International Law* (5th Ed. 1998) 500.
[98] Getachew Assefa, 'All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation, [2011] (24:2) *Journal of Ethiopian Laws*, 156.

Besides, even if a constitutional construction was needed in the case, the conclusion that the HoF is exclusively mandated to entertain constitutional disputes is rather a rushed one. In this regard, it needs to be stated that the respective role of the House and ordinary courts regarding the interpretation of the Constitution is one of the most divisive areas in Ethiopian constitutional discourse. Accordingly, three set of arguments can be discerned. On the one extreme, some argue that constitutional interpretation is part of a judicial power, which is constitutionally and inherently vested in the courts,[99] and thus courts can go to the extent of invalidating laws as unconstitutional as part of their inherent power.[100] On the other extreme, some including Getachew Assefa, based on the intention of the makers of the Constitution, argue that any scenario that invites the interpretation of the Constitution needs to be referred to the CCI and then maybe the HoF.[101] In between these extreme positions are a range of positions that, one way or the other, advance arguments that Ethiopian courts are not devoid of the mandate to interpret the Constitution. Among them, Assefa extensively argues that courts, as a result of their constitutional duty to respect and enforce the constitution, among others, can review the constitutionality of laws that the executive branch enacts.[102] For Yonatan, the interpretational remit of courts is rather limited to applying constitutional provisions that are clear and plain.[103] For others, empowering the HoF/CCI to interpret the Constitution does not mean an automatic exclusion of ordinary courts to engage in the business of interpretation, as well.[104] Probably, the following stand would sum up those positions that consider the role as being distributed between the courts and the HoF.

> Where the House of Federation finds the law or conduct to be inconsistent with the Bill of Rights, it will declare the law or conduct constitutionally invalid. Such kind of constitutional remedy is only available in the case of direct application of the Bill of Rights and not in the case of indirect application. However, whenever the Bill of Rights merely applies indirectly to a dispute, ordinary

[99] FDRE Constitution, Art.79(1).
[100] Tsegaye Regassa, 'Courts and Human Rights Norm in Ethiopia' in *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitutions* (Addis Ababa, May 19-20, 2000) 114-120.
[101] Getachew Assefa (n. 98) particularly page 165; Takele (n. 69), presents a strong argument against constitutional referral being mandatory. See, page 112. Incidentally, the Commission's observation that it is the duty of complainants to exhaust remedies sounds logical. Indeed, courts in Ethiopia do not seem to have an obligation to refer a case to the CCI.
[102] See for instance, Assefa Fisseha, 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF)', (2007) 1 *Mizan L Rev* 32.
[103] Yonatan Tesfaye Fessha, 'Whose Power is it Anyway: The Courts and Constitutional Interpretation in Ethiopia, [2008] (22:1) *Journal of Ethiopian Laws*, particularly, pages 138-139.
[104] Leonard F.M. Besselink, 'The Protection of Human Rights in Federal Systems – The Case of Ethiopia' in *Proceedings of the 14th International Conference of Ethiopian Studies* (Nov 6-11, Addis Ababa), Vol. 3, as cited in Getachew (n. 98).

> courts and not the House of Federation is primarily responsible for the application and interpretation of the Bill of Rights (of the Constitution).[105]

What is more, a look at the experience of the CCI/HoF and that of courts mirror such diversity. For instance, in one of the earliest cases presented to the CCI,[106] the later rejected the case as not requiring constitutional interpretation since the law contended did not hail from the legislative bodies and it is left for the courts to decide the legality or constitutionality of subsidiary laws. In a recent case, on the other hand, the House entertained a constitutional protest against a decision of a school head and found it unconstitutional based on the right to access to justice.[107]

In more recent cases, the HoF has further echoed conflicting messages. For instance, in a case that involved a (disguised) sale of rural land in the form of mortgage acquisition, the HoF provided that, the relevant courts should have set aside these transactions in line with their obligation to respect and enforce the constitution under Art. 9(2) and 13(1) of the Constitution.[108] Further, the HoF, in another case, went to say that courts should have, on their own initiative, rendered as unlawful and unconstitutional a contract that would ultimately deprive farmers of their land under various disguises.[109] On the other hand, it has rejected to entertain cases that arguably need an authoritative interpretation. For instance, in a paternity related case,[110] where the courts ordered a DNA test to ascertain the paternity of the applicant against the objection of the defendant based on right to bodily integrity, the CCI and the House considered it as not warranting constitutional interpretation even if competing rights that directly flow from the Constitution were engaged. In other cases, the House went to a great length to weigh evidentiary matters on issues of common property in marriage, issues that can arguably be settled with the relevant ordinary laws.[111]

Some decisions of the Cassation Division of the Federal Supreme Court also reveal that it is expounding constitutional provisions in settling cases. For instance, the way the Division uses the

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[105] Rakeb Meselle, 'Enforcement of Human Rights in Ethiopia', (APAP, 2002) 21. See Getachew (n. 98) 141-152, for a review of more authors on the issue.
[106] *Ethiopian Blind Persons Association v Oromia Education Bureau and Jimma College of Teachers Education*, File No. 4/94 (Decided on November 2003, unpublished).
[107] See *Tariku Mekonnen v Education Bureau of Addis Ababa, Yeka Sub-Sity* (HoF File no. 018/15; September 2016, unpublished. Unpublished decisions of the House that are referred to in this work are all on file with the author)
[108] *Hasay v Tensa'A Kutale and others* (HoF, decided on March 2016, unpublished)
[109] See *Kelebie Tesfu v Ayelign Derbew* (HoF, decided on June 2015, unpublished)
[110] *Tsegaye Abebe v Biruk Asfaw* (HoF, August 2017, unpublished)
[111] See for instance, *Azeb Tufa v Alemayehu Menghistu* (HoF File no. 015/15, September 2017, unpublished) and *Werku Nikedimos v Seblewengel Werku and Mamite Werare*, (HoF File no. 022/15, September 2017, unpublished)

constitutional right to property in file number 69291[112] is strikingly similar with the decision of the House on similar cases.[113] Both the Court and House first analyzed the relevant constitutional provision and then proceeded to other legislation to invalidate a contract.

In relation to the issue at hand, the Commission further commented that by not taking the case to the HoF before it was lodged to it, the country was not given a notice of the alleged violation. As many cases entertained by the Commission show, it takes prevailing situations of countries into account in its analysis and adjudication of cases.[114] In light of this, the piece of legislation that triggered the legal action is one of the most publicized and harshly criticized laws in the country.[115] The Commission has, actually, in its Concluding Observation, both in 2010[116] and 2015,[117] identified the Charities and Societies Proclamation as an area of concern. It is submitted, thus, that the Commission should have taken judicial notice of this fact, as is common in its other decisions.

In light of the forgoing, therefore, the decision of the Commission that runs on the assumption that it is only the House of Federation that can entertain constitutional disputes, which is a very contested issue, and without due notice of the controversies surrounding the piece of legislation at the center of the case, is weak, to say the least.

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[112] *Jemal Aman v Tewabech Ferede* (Federal Supreme Court, Cassation Division, File. No. 6929, 1November 2011, in Vol. 13) 423-4425)

[113] For instance, see *Alemitu Gebre v Chane Desalegn* (HoF, Decided on February 2016, unpublished)

[114] Ibid (n 18 and 19).

[115] See, for instance, the following documents attesting to the magnitude of the publicity. Amnesty International, 'Ethiopia: The 2009 Charities and Societies Proclamation as a serious obstacle to the promotion and protection of human rights in Ethiopia', Amnesty International's written statement to the 20th Session of the UN Human Rights Council (18 June – 6 July 2012), Available here; Human Rights Watch, 'Ethiopia: New Law Ratchets up Repression', (2009), Available here; Save the Children Sweden, 'The New Charities and Societies Proclamation and its Impact on the Operation of Save the Children Sweden –Ethiopia.' (December 2009), Available here; The International Center For Not-for-Profit Law, 'Civil Freedom Monitor: Ethiopia', Available here; EU, 'EU Presidency Declaration on Ethiopia's adoption of Charities and Societies Proclamation' Available here; Sisay Alemayehu, 'CSO Law in Ethiopia: Considering its Constraints and Consequences', [2012] (8:4) *Journal of Civil Society*, 369-384.

[116] See Concluding Observations and Recommendations on the 1st -4th 6th Periodic Report of the Federal Democratic Republic of Ethiopia, (12 – 26 May 2010, Banjul, The Gambia). The Commission was particularly wary of the 10% limit and its potential negative repercussion on the works of civil societies and recommended that the state reviews it. (See paragraphs 45 and 72)

[117] See the Concluding Observations and Recommendations on the 5th and 6th Periodic Report of the Federal Democratic Republic of Ethiopia, (21 April to 7 May 2015, Banjul, The Gambia), para. 26 and 30. The Commission criticized that the State did not respond to the recommendation made in the previous round of its Observation.

### 3.*2. Remedies of Judicial Nature – Effective Remedy – How the HoF/CCI fares?*

To the extent that the Commission did not necessarily go by the nomenclature in determining whether a certain organ can deliver a remedy of judicial nature or not is well received.[118] It is also in line with its established jurisprudence of the Commission on the subject matter. Accordingly, the key features that the Commission developed as determining factors for an organ and its remedies are to be of judicial nature and thus should be exhausted are: that it works in strict observance of procedural guarantees of fair hearing; its independence and impartiality; and that the remedy it provides is non-discretionary.[119] It is thus clear that the naming as such is less important in this regard. Related to this, the Commission in one of its decisions clearly stipulated that '[a]dministrative or quasi-judicial remedies which do not operate impartially are considered as inadequate and ineffective.'[120]

Applying these standards against the CCI and HoF, the Commission was drawn to the facts that the House is assisted by an expert body (the CCI); that both organs have an obligation to adhere to certain procedures to ensure a fair hearing, and that the House does not have a law-making role and is thus impartial, among others. Based on these observations, it qualified the House as being capable of delivering effective remedies of judicial nature. Let us now turn to briefly examine the veracity of the observations and conclusion in light of the nature and context within which the House/CCI works, as is warranted by the works of the Commission.

The CCI, as stipulated under Art.82 of the Constitution and Art. 15 of Proclamation No. 798/2013, is composed of the President and Vice President of the Federal Supreme Court, six legal experts and three individuals to be designated by the House. It investigates constitutional disputes and forwards its recommendations to the House if it finds it necessary to interpret the Constitution. According to this mandate, the CCI has, as of the end of October 2018, disposed more than 2040 cases.[121] Of these, while 70 have been adjudged as needing constitutional interpretation, and are

[118] See Musila (n. 15) 450 ff on why it is not only the judiciary that can provide an effective remedy.
[119] See Ibid (n 81 and 82).
[120] Communication 294/04 - *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe*, para. 51
[121] According to a news briefing resealed on November 14, 2018 *via* the official Facebook account of the Supreme Court, the CCI has thus far entertained 3,724 cases of which 2040 cases are decided. It is only 65 of the cases decided where the CCI found unconstitutionality.

accordingly forwarded to the House for final decision, around 355 cases have been brought to the House in a form of appeal, challenging the recommendation of the CCI.[122]

Indeed, the CCI and the House have an obligation to entertain cases that directly come from complainants or courts.[123] The decisions of the House also reveal that it considers itself as an enforcer of the rights enshrined in the Constitution. A clear indication of such an understanding is readable from the few decisions it has rendered. [124] Yet, the fact that in a great number of cases the CCI would simply reject a case as not warranting constitutional interpretation, and so without reasoned justification, compromises the sense of duty to entertain a case. The writer has seen many few liner 'decisions' from the CCI, where it does not explain why the application does not warrant a constitutional interpretation. This is against a legal stipulation that '[t]he decision or recommendation of the Council shall clearly show the detailed description of the case, the reason it believes there is a need or no need for constitutional interpretation and its conclusion.'[125] Accordingly, the observation of the Commission to the effect that the House follows certain procedures to satisfy the fair hearing guarantees that it has set and that it is impartial is also questionable.

Related to this, the Constitution mandates both the House and the CCI to adopt their respective rules of procedures[126] and enforce the same. However, there are no procedures that can help them ensure a fair hearing in the process of constitutional interpretation, yet. Admittedly, the House recently adopted a Directive on rules of procedure[127] while the CCI does not have such rules in place. Yet, the document mainly focuses on facilitating the daily functioning of the House and the different committees thereunder and has very little to contribute in terms of ensuring a fair hearing for complainants. To begin with, the objectives of the Directive are to make the process of

[122] Information from the Registrar of the House of Federation (Phone conversation with head registrar, November 15, 2018)

[123] See for instance, FDRE Constitution, Art. 83(1), 84(2-3); Proclamation No. 251/2001, Art. 4(1) and 13; and Proclamation No. 798/13, Art.3. The officers at both the CCI and the House also work with such an understanding. Interview with Desalegn Weyosa, General Secretary of the CCI Office, Addis Ababa (28/09/2017) and Ato Muluye Welaley, Director, Directorate of the Constitutional Interpretation and Self Determination Affairs, Under the HoF, Addis Ababa (25/09/2017)

[124] A brief look at the decisions that the House (11 cases published in two volumes of the Journal of Constitutional Decisions and other 16 unpublished decisions), the great majority of them are individual cases and are related to the human rights part of the Constitution.

[125] Proclamation No.798, Art. 12(2)

[126] See, FDRE Constitution, Art. 62(11) and 84(4).

[127] House of Federation, Directive for the Reception and Handling of Constitutional Interpretation and Self Determination (Identity) Related Complaints, Directive No. 2/2018 (January 2018, on file with the author)

receiving and handling cases more efficient and speedier and the House more accessible.[128] It does not talk of impartiality or fairness of the process. The reading of Art. 31 of the Directive also suggests that the CCI is only expected to provide a reasoning in cases where it concludes that there is a need for constitutional interpretation, against the stipulation in the proclamation mentioned above. In other words, when it only undertakes an interpretation if it is of the opinion that the law, decision or conduct complained of is unconstitutional.

Thus far, complaints are only allowed through an elaborated writing.[129] Therefore, other than the initial written submission, there is no mechanism that allows complainants to be heard or defend a counter argument from the other side, usually the state.[130] This falls short of the right to be heard, including the right to defense.[131] Besides, the CCI and House are handling complaints behind closed doors, despite an indication that '[t]he Council may hear cases in a public transparent manner according to Article 12(1) of the Constitution, the details of which is to be regulated by a directive that the Council may adopt.'[132] At this juncture, it should be mentioned that the Council can 'call upon pertinent institutions or professionals, to appear before it and give opinions' and 'may require the presentation of any evidence or professional and examine same' if it deems necessary.[133] According to an official at the CCI, the CCI does carry out investigations, including by visiting relevant places and meeting parties concerned. Similarly, the House, before it passes a final decision may 'call upon pertinent institutions, professionals and contending parties to give their opinion.'[134] The Director of the Constitutional Interpretation and Identity Matters at the House also expressed that they do investigations on the field and gather information, when necessary. This practice, however, does not alleviate the challenge with regard to the right to be heard. Admittedly, with a view to making the House more accessible, the Directive enables

[128] Ibid Art. 3. Art. 17 of the Directive also provides time ceiling within which various types of cases shall be decided.
[129] Also hinted under Art. 3(1) of Proclamation no. 798/13 and Art. 11 of the Directive.
[130] Ato Desalegn (above) argues that this is only logical since the CCI is not and cannot serve as another level of appeal.
[131] African Charter, Art. 7(1(c). The Commission has articulated the rights, among others, in Communication 231/99: Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) / Burundi.
[132] Proclamation no. 798/13, Art. 10(4).
[133] Proclamation 798/13, Art. 9(1- 2).
[134] Proclamation no. 251, Art. 10.

petitioners to post their complaints by mail or fax numbers and for free, and it allows complaints to be lodged through representation.[135]

What transpires from the relevant legal provisions and interviews made with the relevant officers is that complainants cannot, as of right, demand to present their cases in person, nor examine the evidence presented by a contending party, usually a governmental office. As an 'adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence' is one of the core elements of fair hearing,[136] it is clear that the House does not have this in place. To borrow Takele's expression, 'the House does not have an in-built system to ensure the right to be heard for a private party contesting the law's or decision's constitutionality.'[137] In the absence of this crucial element of fair hearing, the Commission's ruling in this regard is not tenable. One can also add that the CCI and House tend to take clarification letters that they seek from governmental entities for granted without complainants having a chance to access and refute such letters.[138] As the researcher investigated the practice, representatives of governmental entities have better access to explain their cases and thereby influence the opinion and decisions of the different organs in the CCI and House. This puts complainants in a disadvantaged position, which goes against the essence of fair hearing.

Coming to the issue of impartiality, the Commission in its assessment of the House, mainly focused on the understanding that the later does not have a law-making role and thus concluded that it is impartial. To begin with, the factual assumption is questionable. Among others, the House is mandated to determine all civil matters necessary to establish and sustain one economic community on which the House of Peoples' Representatives can act.[139] This goes to the extent of preparing and submitting draft bills to the House of Peoples' Representatives.[140] This is technically part of law-making. Further and most importantly, this might put the House in a difficult situation, as there is every possibility that the constitutionality of a law that it has initiated, in accordance

[135] The Directive, Arts. 8, 9, and 12. As of mid-November 2018, no complaint has been lodged to the House through fax or postal service, according to the registrar of the House.
[136] The Guidelines (n. 14) Part A(2(e).
[137] Takele (n. 69) 121.
[138] See for example *Ato Andenet Kebede v Justice Bureau of Regional State of Afar*, (HoF/Office of the House Speaker/5/266, decided on Meskerem 30, 2010 E.C, unpublished); *Regasa Seyoum and others v Mustofa Keder and others* (HoF/Office of the House Speaker/5/267, decided on September 30, 2010 E.C, unpublished).
[139] FDRE, Article 62(8) and 55(6).
[140] Proclamation no. 251/01, Art.34(3).

with this mandate, can be challenged. One can think of, for instance, a situation where constituent states, in the future, challenging such laws as encroaching the federal-state power sharing arrangement, and it ending up with the same House that initiated the law for a final determination.

Most importantly, the fact that the House does not have a visible role in the law-making process does not necessarily make it impartial. Impartiality has much to do with independence and the ability to withstand influence. Among others, the members of an impartial institution need to serve independently without any improper influence.[141] As a result, therefore, the composition and how they conduct their adjudicative mandate, both in actual terms and in the public eye, matters. In one of the earliest cases that the Commission decided, it had to state the following:

> Jurisdiction has thus been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of government … whose members do not necessarily possess any legal expertise. Article 7.1.d of the African Charters requires the court or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality. It thus violates Article 7.1. d.[142]

The HoF greatly resembles the situation discussed in the case partly quoted. The HoF is composed of representatives of nations, nationalities and peoples of Ethiopia.[143] As such, the composition gives the House "the profile of a political organ than a judicial one."[144] As Yonatan would bluntly put it 'The House is obviously a political body.'[145] Moreover, many of the members work either in the executive or legislative branches of the regional governments and some even hold a higher office at the federal level.[146] As a matter of fact, the office of the Speaker of the House was for a considerable time held by a minister.[147] Further, the regional governors and the speakers of the regional councils are also *de facto* members of the House.[148] That said, '…there is nothing in the

[141] Yonatan Tesfaye Fesseha, 'Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review', (2006) 53 *Afr. J. Int'l & Comp L* 77.
[142] Communication 60/91 - *Constitutional Rights Project v Nigeria*, para. 14.
[143] FDRE, Art. 61; Proclamation No. 251/01, Art. 47.
[144] Assefa (n. 102) 31.
[145] Yonatan (n. 144) 73.
[146] Ibid 78.
[147] The appointment in April 30, 2018 of H.E. W/ro Keriya Ibrahim, one of TPLF's nine Executive Bureau members, which stands at the apex of the party line, as a speaker of the House also strengthens the observation. Moreover, the way she was elected to the House by the regional council (of Tigray) reveals even more. During the Council deliberations, the candidate's long time service in and understanding of the executive body in the region was advanced as a major reason that won her a unanimous vote.
[148] Assefa Fiseha, 'Constitutional Adjudication through Second Chamber in Ethiopia', [2017] (16: 3) *Ethnopolitics* 295, 297.

rules of procedure of the House or other relevant laws that require a member to abstain from participating in a discussion that concerns the constitutionality of a law which he or she enacted as a minister or member of the federal or state government's executive branch.'[149] That said, a recent interview with the House Speaker in relation to identity related controversy[150] clearly reveals how political the organ is. Clarifying how a committee, which is meant to investigate identify related controversies in relation to Welqait and Raya areas, was established, the Speaker mentioned that even if the complaints that led to its establishment were not lodged following the laws, its establishment was politically decided in a meeting, where the speakers of both houses, the Minister of Peace, the Prime Minister, and his deputy convened. One wonders how these various organs got involved in the case that the House should have dealt with, as per the laws and procedures.

Besides, the composition of the CCI on which the Commission relied heavily in characterizing the House as being capable of rendering remedies of judicial nature, raises some issues in light of the forgoing considerations. For once, the fact that the President and Vice-President of the Federal Supreme Court are respectively the chairperson and deputy chairperson of the CCI[151] might trigger unwarranted conflict of interest in the sense that they may consider a case twice or more.[152] There does not seem to exist any bar against such incidents. In one of the cases that the House decided in its September 2017 meeting,[153] a former Shari'a court judge tried to challenge the constitutionality of a disciplinary action taken against him, complaining that the President of the Federal Supreme Court had the chance to decide/sit on his case three times, namely (1) on a complaint that he lodged against a decision of a court administrator in his capacity as an administer of the Supreme Court to which judges of the sharia courts belong;[154] (2) as a chairperson of the Federal Judicial Administration Council[155] to which an appeal was lodged;[156] and then (3) as a

[149] Yonatan (n. 144) 78.
[150] Keriya Ibrahim, House Speaker of the HoF (Interview with Tigray Tv, November 2018) available here
[151] FDRE Constitution, Art.82(a-b); Proclamation no. 798/13, Art. 15 (a-b).
[152] Tsegaye Beru, An Outline for the Study of Ethiopian Constitutional Law, 43 Int'l J. Legal Info. 234, 312 (2015), 246-247; See also Assefa (n. 151) 306.
[153] *Adem Abdela v Federal Judicial Administration Council*, HoF File no. 120/2015.
[154] This seems to be pursuant to Proclamation no. 188/99, Federal Courts of Sharia Consolidation Proclamation, Art. 20(2).
[155] See, Proclamation no. 684/2010, Amended Federal Judicial Administration Council Establishment Proclamation, Art. 5(1(a))
[156] For a comprehensive appraisal of the Sharia Courts Administration, See, Mohammed Abdo, 'Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia', [2011] (5:1) *Mizan L Rev*

chairperson of the CCI.[157] Deciding the case, the House simply stated that the Constitution has mandated it, citing Art. 82(2) of the same.[158]

It is, therefore, maintained that without a bar on such a practice this, at least in the eyes of the public, sounds to compromise the impartiality of the CCI, and it does not fulfill the test of the Commission's own jurisprudence on impartiality of tribunals. According to the Guideline on Fair Trial that the Commission adopted, impartiality of a tribunal is compromised if 'a judicial official sits as member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body.'[159] However, the Commission in the case at hand opted to remain completely oblivious of these facts.

Moreover, the fact that the members of the CCI can be removed with simplicity weakens the stature of the CCI to stand the test of independence of tribunals, including tenure, as developed by the Commission.[160] Accordingly, with the exception of the chairperson and the deputy, the other nine members of the CCI can be removed by various bodies. The relevant rule reads that these members 'may be removed from membership by the designating or appointing organ before the end of his term' and provides commission of disciplinary offences or incompetence as grounds for dismissal.[161] This would mean that the six experts might be removed by the House of Peoples' Representatives or the President of the state.[162] For the remaining three members that hail from the House, they can be removed either by the House or their respective regional councils since it is these councils that are merely appointing individuals to represent the state in the House, even if the Constitution provides a possibility of having them elected by the people.[163]

Lastly, the admissibility ruling of the Commission on the case can also be evaluated in light of a different case brought against Ethiopia before the Commission that somehow also discussed the

[157] Personal Interview with the Shiek Adem Abdela, 27/09/2017, Addis Ababa. He is not knowledgeable if the President has sat in the case before the CCI, as the decision does not contain information regarding the members that voted in the decision. The decision is actually a three liner, where it is only stated that the CCI did not find the complaint as warranting constitutional interpretation with no justification for it.
[158] *Adem Abdela* v *Federal Judicial Administration* (n. 151).
[159] The Guideline (n. 14) Part A.5(D.iv).
[160] See, for instance, the Guideline, Part A (4).
[161] Proclamation no 798/13, Art. 19.
[162] Ibid Art. 15(c).
[163] FDRE Constitution, Art. 61(3); There has not been any election thus far, See, Yonatan (n. 140 ) 72; Temesgen Sisay Beyene, 'The Question of Independent and Impartial Constitutional Adjudicator in Ethiopia: A Comparative Study with Germany and South Africa', 3 (2012) *Bahir Dar UJL* 67, 109

standing of the CCI. The case[164] revolves around a revocation of a license to produce river washed sand by a regional governmental body based on a directive issued by a federal Ministry. The complainants challenged the decision in *Wereda* and high courts of the regional state and in both courts the decision was in favour of the complainant. However, the decision could not be enforced. Accordingly, the complainants took the case to other governmental organs including the CCI, where it was considered as not warranting a constitutional interpretation.[165] Following the attempts, the case ended up with the Commission. One of the defenses that the respondent state (Ethiopia) put forward as a defense against admissibility in that case is relevant here. Accordingly, the state argued that the issue at stake, a right to conduct a mining operation is accorded by a proclamation and not the Charter and thus the communication should be rejected for want of Art. 56(2).[166] The Commission rejected the line of argument and thought that the invocation of such rights as the rights to property (Art.14) and fair trial (Art.7) would satisfy the condition under Art.56 (2). Comparing such a decision to the one in the Human Rights Council case under review, two problems can be pinpointed. From the side of the Commission, whereas in the earlier case, it did not take issues with the fact that at domestic courts the complaint was not articulated as an issue of right (even if that was possible), it went in a diametrically opposite direction in the Human Rights Council case, and so without a convincing reason, when it insisted that constitutional issues must have been framed and taken to the House. From the perspective of the respondent state, while it considered a revocation of work license as not triggering Constitution/Charter issue, it, somehow, did staunchly argued in the recent case before the Commission (Human Rights Council) that freezing of assets triggers a constitutional issue. It is submitted that the Commission, in handling the Human Rights Council case, should have taken the defendant state at its word from an earlier case, or at least attempt to exhibit some consistency.

In the same case, the Commission, sticking to a narrower understanding of local remedies as 'the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice' noted that

[164] Communication 372/09 - *GTK Interight (on Behlaf of Gizaw Kebede and Kebede Tadesse v Ethiopia*
[165] Ibid para. 36. It is also noted that the complainants took the case to other institutions, including some Federal ministries, the Human Rights Commission, Office of the Ombudsman, and the Ethics and Anti-Corruption Commission. See, Ibid para. 71.
[166] Human Rights Council case (n. 58) para. 62.

> the time the Applicants took to seek their grievances through non judicial remedies such as lodging a petition with the Ethiopian Federal Government, the Parliament, the Ethiopian Human Rights Commission, the Public Ombudsman, the *Council of Constitutional Inquiry* and the Ethical and Anti-Corruption Commission, they could have used that time attempting to exhaust the ordinary remedies of a judicial nature in Ethiopia.[167] (Emphasis mine)

At this juncture, the Commission clearly characterized remedies of the CCI as non-judicial. Given the emphasis that the Commission placed on the CCI while assessing the House in the Human Rights Council case,[168] it clearly shows that it took quite different positions in the two cases without an explanation.

It should also be noted that the CCI only assists and does not replace the House. The CCI is merely an advisory body to the HoF and cannot pass a binding decision.[169] Accordingly, the House has disregarded the CCI's recommendations on some cases.[170] Thus, even if the CCI was in such a good position as portrayed by the Commission in terms of helping the House deliver an effective remedy of judicial nature, it would be a farfetched inference to take that virtue for the benefit of the House.

At last, a brief reflection on how the ongoing reform initiatives in the country and its promises may help in addressing the limitations identified is in order. As things stand, there has not been specific discussion pertaining to the House. Moreover, since the reform initiatives and plans of the new administration are not documented, there is nothing concrete to be said with regard to the House. However, the general impression that one develops from the various statements the authorities gave suggest that there might be attempts to de-politicize public institutions. If this is to be followed through, the House is likely to benefit, if its critical offices are staffed by competent professionals and its functioning grounded on detailed laws. Other than this, the composition of the House is likely to stay intact, as it is entrenched in the Constitution and any change in this regard necessitates constitutional amendment, an issue that not being publicly discussed.

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[167] Ibid para. 71.
[168] Human Rights Council case (n. 58) para. 70.
[169] Assefa (n. 102) 14.
[170] These include, the Banishangul-Gumuz Case, March 2003 (Journal of Constitutional Decisions, Vol. 1, July 2008) 1-34. In a recent case that involved the issue of access to justice the course of re-acquiring an urban house that was illegally taken, the House clearly took a different position and set aside the recommendation of the CCI. See *The Wife and Successors of Wassihun (10 people) v Housing Agency*, HoF, Decided on May 2012, Journal of Constitutional Decisions, Vol. 2 (March 2017) 35. The same reversal also took place in a recent case that dwells with complex issues of employment and access to justice. See *HezkeAl Mara v SNNP Roads Authority*, HoF/Office of Speaker of the House/5/262, decided on September 30, 2010 E.C, (unpublished).

### *Conclusions and recommendations*

It appears that the African Commission is slowly garnering the reverence that is sets to establish and that states are progressively taking it more seriously. This is visible, for instance, in the rising attention that member states are lending to complaints before the Commission. That said, the number of communications/cases against Ethiopia before the Commission is growing. In light of this, the Commission's characterization of the HoF in the case reviewed will arguably remain relevant for some time, given the Commission's trend of cross referencing to its earlier factual and legal analyses, even if this was not, unfortunately, the case with the case under review. It is, therefore, imperative to reflect on issues regarding institutions of paramount importance such as the House, so as to inform the Commission and potential complainants, among others. It is also hoped that pointing out some of the limitations of the House/CCI in light of the standards developed under the African Charter can help in their improvement.

The chapter demonstrates some issues on which the Commission's analysis and thereby decision can be questioned. Among others, it is shown that the Commission did not go through testing the standards that it has identified against the factual realities of the House/CCI. For instance, having identified independence, impartiality and observance of procedures to ensure fair hearing as the major criteria for remedies to qualify as being of judicial nature and thus effective, it did not properly apply them on the House and the CCI. It rather considered few rather superficial aspects, including the fact that there are some procedures and that the House is not involved in law-making as important factors in its decisions. It is argued that had the Commission went deeper into the actual composition and functioning of the House/CCI, it was likely that it would have reached a different conclusion. If not, it would have certainly raised far interesting issues around the House/CCI. It is, of course, submitted that the complainants might not have raised many of the issues in their application and replies that might have compelled the Commission to go further.

That said, as the Commission sometimes invites for the resubmission of complaints after local remedies have been properly exhausted,[171] doing the same in this case might have encouraged the complainants to follow through. At any rate, there was a possibility for the complainant to bring

[171] Viljoen (n. 2) 92. The Commission has, accordingly, reconsidered some communications that were initially ruled inadmissible. For instance, See Communication 235/2000 - *Dr. Curtis Francis Doebbler v Sudan*, (a case involving Ethiopian refugees residing in the Sudan), where the inadmissibility rule was reversed.

the case to the House and in case of unsatisfactory result lodge it back to the Commission. However, it appears that the law that cuts the funding source of civil organization in Ethiopia has achieved exactly what the complaint was all about. In this regard, the Executive Director of the Council explained that their shrinking finances and mundane daily tasks prevented them from pursuing the case through following the Commission's 2015 decision.[172]

In general, the HoF and the CCI are found as not capable of providing effective remedies as assessed against the admissibility requirements under the African Charter. The fact that the composition of the House vitiates semblance of impartiality of judicial or semi-judicial organs and that there is no mechanism for the House to guarantee procedural fairness stand out as the major shortcomings in this regard. Considering this and in order for the House to qualify as an organ that can provide an effective remedy and thus worthy of exhausting before one proceeds to the Commission for remedy, the following interventions would be necessary.

Firstly, the way 'constitutional interpretation' is currently understood in the works of the CCI and HoF needs to be reexamined. So far, constitutional interpretation is taken as synonymous with a finding of unconstitutionality. A such, an issue that strongly bears a constitutional right and requires due deliberation and analysis without necessarily leading to a finding of unconstitutionality is not standing a chance for expounding. If the CCI somehow reaches a conclusion that a law, practice or decision contested does not violate the constitution, it does not explain how such a decision is reached and simply concludes that there is no need for constitutional interpretation. This might have emanated from the fact that no principles or clear guide of how and when constitutional interpretation is warranted is developed. Constitutional interpretation in the sense of explaining and expounding a constitutional right or principles shall therefore be undertaken when the issue at hand raises a clear dispute with a strong constitutional importance regardless of the final outcome.

Besides, putting in place mechanisms that ensure procedural fairness in the proceedings of the House will be necessary. Admittedly, undertaking the formal procedures of ordinary court is not tenable. However, there needs to be someway of balancing when it comes to accessing the CCI and House or their respective committees. As things stand, while complainants have almost no

[172] Interview with Ato Betseate Terefer (n. 60).

possibility of explaining their cases in person, government agencies whose laws or decisions are being contested have a better access. Closely related to fairness and quality of decisions, it is recommended that unless a matter, for a strong reason, warrants a closed session, meetings and discussions of the House should also be open to the public. That way, quality of decisions and fairness of considerations can be improved.

Most importantly, the CCI needs to provide reasoned justifications for its positions, including when it holds that there are no constitutional violations. Given the fact that this is a hallmark of organs with adjudicatory role, the CCI needs to embrace it. Even on those cases where violation is established, utilizing such tools as constitutional principles, relevant human rights jurisprudences, and conventional interpretation principles and considerations is rare and needs to be improved.

When it comes to the composition of the CCI and House, there are interventions that can improve their standing as organs of a judicial nature within the framework of the constitution, so far as no amendment of the Constitution is introduced. Among others, it is imperative to ensure that no member of the CCI and House seats or votes on an issue s/he has previously participated in deciding. And the limitation needs to be enshrined in the relevant laws. With regard to the House, avoiding high ranking executive members from serving in the House would be a way that deserve a seriously consideration if political influence is to be minimized.