Current Trends in the use of International Instruments in Ethiopian Court Decisions: Potential Lessons for Comparative Constitutional Law

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Abstract

Comparative law in general and comparative constitutional law in particular is a thriving field of legal scholarship in many states. The basic idea of investigating and studying the norms and institutions of other societies has been used to draw good practices and lessons that can assist in resolving contemporary political, social and legal problems in a particular society. While it is true that the use of comparative law in domestic jurisdictions should be socially and culturally grounded, it has been instrumental for developing optimal normative standards in many states. This includes an increasing academic interest to understand the normative and institutional challenges of different polities in order to entrench constitutional democracy and enhance the protection of fundamental rights. Nevertheless, there is also a significant misconception and overstated criticism on the use of comparative law by many scholars. This is all the more evident when it comes to the legal practice in Ethiopia. In this article, I analyze the different arguments presented for and against the use of the comparative method, and argue that there is a continued relevance of comparative constitutional law in Ethiopian legal practice. The fledgling jurisprudence and growing reliance of Ethiopian courts on international human rights law in some of their cases is testament to the continued relevance of international and comparative law in Ethiopia.

Keywords:

comparative law, comparative constitutional law, rights of the child, access to justice, Ethiopia

DOI http://dx.doi.org/10.4314/mlr.v18i1.2

Received: 18 September 2023 **Accepted**: 27 February 2023

Suggested citation:

Mesenbet Assefa (2024). "Current Trends in the use of International Instruments in Ethiopian Court Decisions: Potential Lessons for Comparative Constitutional Law", 18(1) *Mizan Law Review*: 41-64

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1. Introduction

Legal historians argue that one of the earliest engagements in comparative law took place in Ethiopia. The *Feteha Negest* (Law of the Kings), Ethiopia's enduring and foundational legal document that had a profound impact on the state of Ethiopia originated from Roman-Byzantine Law which dates back from the 5th to the 9th Centuries.[1] Peter Sand argues that "the transfer of this Roman-Byzantine torso law to the radically different social environment of Ethiopia [may be ranked as one of the earliest] systemic transplants in comparative legal history".[2] While the source of the *Fetha Negest* is believed to be of Roman-Byzantine origin, it had also its own Ethiopian content and identity that made it the subject of interest to many scholars. There were significant interests of foreign scholars in the *Fetha Negest* and a number of translations of the *Feteha Negest* were made into Italian, French and English versions. Moreover, as a country with a long literary tradition and one of the earliest civilizations in the world, Ethiopia has also provoked interest from American and European scholars to study its norms and institutions.[3]

However, little has been written and reported on the use of comparative law in Ethiopia. In fact, Ethiopia continues to be "a geographical blind spot –

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[1] Peter Sand (2020). 'Roman law in Ethiopia: Traces of a Seventeenth Century Transplant', 8 *Comparative Legal History* 116.

[2] Id., at134.

[3] *See* in this regard Donald Levine (1974), *Greater Ethiopia, the Evolution of Multi-Ethnic Society* (University of Chicago Press); Richard Pankhurst (1992), A Social History of Ethiopia: The Northern and Central Highlands from Early Medieval Times to the Rise of Emperor Tewodros II (Red Sea Press); Harold Marcus (1994), A History of Ethiopia (University of California Press); Paul B. Henze (2007), Layers of Time: A History of Ethiopia (Palgrave Macmillan).

'perhaps the most underrated extraordinary place of comparative law".[4] Linguistic barriers with ancient manuscripts and laws written in the Ethiopian Orthodox Church *Geez* language and later its official language Amharic, international scholars and comparativists were unable to study the laws and institutions of Ethiopia. This has also affected comparative legal scholarship in Ethiopia with very limited interest on the subject by Ethiopian legal scholars. Moreover, very few references to foreign law and jurisprudence are seen by Ethiopian courts that continue to constrain the discussion on the subject. However, this is changing to some extent in recent times. The scepticism and caution on the use of comparative law in the context of Ethiopia are further complemented by the general perception that legal transplantations and the use of foreign law will have significant challenges in states that have huge economic and socio-cultural differences.

In recent times, however, the binding statutory interpretation of the Cassation Bench of the Federal Supreme Court, which is the apex court in the country shows an increasing reference to international and comparative law. This is a welcome development for providing the much-needed legal basis for studying these comparative normative developments in Ethiopia. The article will reflect on the developing cassation statutory interpretation binding on Ethiopian courts in relation to the use of comparative and international law that could provide the basis to the study of comparative law in Ethiopia for comparative legal scholars.

There is increasing academic interest to understand the normative and institutional challenges of different polities in order to entrench constitutional democracy in their political order as well as a desire to study the protection of fundamental rights.[5] As it is used by comparatists, the term comparative law refers to the use of laws and judicial decisions from foreign jurisdiction; whereas the reference to international law refers to laws, judicial and quasi-judicial decisions of international bodies. It should be clear from the outset that the use of international and comparative law can refer to many legal

[4] Sand, *supra* note 1, at 134*; See* also Hailegabriel G Feyissa (2017), The Ethiopian Civil Code Project: Reading a 'Landmark' Legal Transfer Case Differently (PhD thesis, Melbourne Law School) 63; Pierre Legrand and Roderick Munday (eds) Comparative Legal Studies: Traditions and Transitions (Cambridge University Press 2003) 467.

[5] EJ Eberle (2009). The Method and Role of Comparative Law, *8 Washington University Global Studies Law Review* 451.

issues. Yet, the focus of this article is more on the use of international and comparative law in the field of human rights.

2. The Historical Roots of Comparative Law

The constitutional experiment of comparing different polities and the norms and social orderings associated with these polities has ancient roots. Philosophers including Aristotle and political scientists such as James Madison looked into different systems of government in order to determine how best to organize polities.[6] Heinze notes that in the early 19th Century, Kantian idealism and Napoleonic codifications were used to draw some universal principles of law from other societies in an effort to eradicate backward customary norms [that undermine various rights] with more progressive legal regimes.[7] This does not, however, mean that all customary norms should be set aside in the guise of adopting comparative law. It is to be noted that customary norms constitute among the core elements of a society's normative system.

Montesquieu's empiricism in *The Spirit of the Laws,* [8] which is considered as a 'defining moment in the history of comparative public law', has also been used to draw normative conclusions by making historical comparisons and thereby laying down the foundation for the development of modern comparative constitutional law.[9] More recently, comparative constitutional law began to develop ideas of using comparative methods to study the operation of government, its institutional design, the substantive content and scope of fundamental human rights, and systems of judicial review.[10] The fundamental assumption of such intellectual endeavor was rooted in the belief that legal problems and social orderings –associated with the relations

[6] Michel Rosenfeld and Andras Sajo (2012). Oxford Handbook on Comparative Constitutional Law (Oxford University Press) 3.

[7] Eric Heinze (2016). *Hate Speech and Democratic Citizenship* (Oxford University Press) 197.

[8] C-L de Secondat, B de Montesquieu (1748). De l'esprit des lois (*The Spirit of the Laws*), Cambridge University Press (1989).

[9] Ran Hirschel (2014). *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 127; See also A Robilant, A Symposium on Ran Hirschel's Comparative Matters : the Renaissance of Comparative Constitutional Law Big Questions Comparative Law (1992) *96 Boston University Law Review* 1325.

[10] Mark Tushnet, *Comparative Constitutional Law*, in Mathius Reimann and Rienhard Zimmermann (Ed), *Oxford Handbook on Comparative Law* (Oxford University Press, 2012). 1227-28.

between citizens and governments– are confronted by all societies and they help to enlighten other States to learn from similar experiences.[11]

The basic premise of this article is also based on the significance and utility of international and comparative law in resolving contemporary legal problems associated with a particular society.[12] It should be pointed out from the outset that despite the various methodological questions that continue to be raised in comparative law study, it continues to be a thriving field of legal scholarship in many countries.[13] This is particularly true also in many states in the Global South where there is an increasing interest in understanding the normative and institutional challenges of different polities to entrench constitutional democracy in their political order as well as a desire to study the protection of human rights in other societies.[14]

3. Criticisms on the Use of Comparative Law

Comparative law including in the area of the application of human rights norms has often triggered the debate between universalism and cultural relativism.[15] In the context of international and comparative law, similar arguments have been raised between those who advocated for a universal

[11] Ibid.

[12] One notes that while comparative constitutional law is a more recent field, comparative law in the area of private law has commenced much earlier, beginning from the First World Congress on Comparative Law in 1900, See in this regard C Donahue, Comparative Law Before the Code Napoleon, in Mathias Reimann and Reinhard Zimmermann, *supra* note 10.

[13] Mark Tushnet (1999), The Possibilities of Comparative Constitutional Law, *108 Yale Law Journal* 1225; See also Mark Tushnet (2009), The Inevitable Globalization of Constitutional Law *49 Virginia Journal of International Law* 985; For more recent discussions on the role of comparative law in general see M Tushnet (2017), The Boundaries of Comparative Law, *13 European Constitutional Law Review* 13.

[14] EJ Eberle (2009). 'The Method and Role of Comparative Law', 8 *Washington University Global Studies Law Review* 451.

[15] With regard to the major proponents of universalism, *See* J Donnelly (1984), 'Cultural Relativism and Universal Human Rights' 6 *Human Rights Quarterly* 400; A Sen (1997), *Human Rights and Asian Values Sixteenth Annual Morgenthau Memorial Lecture on Ethics and Foreign Policy* (25 May 1997) where he staunchly objects to the claim of cultural relativism of human rights and argues that there is 'no grand dichotomy' between Western and Non Western cultures with respect to human rights; Cf DL Donoho (1991), 'Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards' 27 *Stanford Journal of International Law* 345; See also B Ibhawoh (2000), 'Between Culture and Constitutions: Evaluating the Cultural Legitimacy of Human Rights in the African State' 22 *Human Rights Quarterly* 838.

theory of rights and others who argue on the importance of looking into national settings and the unique features of a given legal system.[16] From the perspective of cultural relativists, comparative law has been criticized as 'naive universalism' that ignores significant historical factors and cultural contingencies of different societies.[17] They argue that 'no theory develops in a vacuum but is conceived and brought to fruition in a definite cultural and social environment. To ignore this is to distort the theory itself.'[18] Similarly, Lawrence Beer notes that the approach taken in traditional comparative studies has been their 'cultural insularism'.[19] They tend to focus on elaborate laws and legal institutions without looking at the historical, political and socio-legal factors which have a significant impact on how certain norms are understood in a particular society.[20] Other Scholars similarly argue that to understand the application of international and comparative law in a particular society, it is important to study the underlying 'invisible powers' that shape the development of the law.[21]

This argument which comes under the rubric of 'historical and cultural determinism' poses a continuing methodological challenge to comparative study.[22] These skeptics of comparative law have criticized comparative usage since early libertarian and enlightenment thought that sought to apply universal liberal principles of justice, equality and freedom.[23] Historicist

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[16] Early proponents for a universal theory of rights include G Jellinek (1882), *The Theory of the Unifications of States*; G Jellinek (1990), *General Theory of the State*; and most notably G Jellinek (1895), *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History*.

More recent proponent of the universalist approach include A Watson (1974), *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press.

On the literature for cultural relativist approaches that argue against the universalist thesis see, P Legrand (1999), *Fragments on Law-as-Culture* (Kluwer) 27; P Legrand (1996), 'European Legal Systems Are Not Converging' 45 *International and Comparative Law Quarterly* 52-81; See also the discussion in Hirschel, Comparative Matters (*supra* note 9) 156 et seq.

[17] Heinze, *supra* note 7, at 196.

[18] Malcolm N. Shaw (2008). *International Law* (Cambridge University Press).

[19] Lawrence Beer (1984). *Freedom of Expression in Japan: A Study of Law, Politics and Society* (Kodansha Int'l, Ltd.) 21-23.

[20] Ibid.

[21] Bernhard Grossfeld and Edward J. Eberle (2003), Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers, *38 Texas International Law Journal* 29; See also EJ Eberle (2011), The Methodology of Comparative Law, *16 Roger Williams University Law Review* 52.

[22] Hirschel, Comparative Matters (note 9).

[23] Ibid.

thinkers such as Savigny criticized universalist approaches noting that customary norms are the result of a complex historical process and changing needs of different societies. Because of this, they argue that applying universal legal rules will be a misfit to the particularities of a certain society.[24] Montesquieu himself also cautioned against the use of comparative law and emphasized that national contexts should be carefully looked into since the laws of one State may not suit the laws of another.[25]

Moreover, scholars from the Global South such as Upendra Baxi argue that much of the scholarship in comparative constitutional law has been predominated by Western liberal discourse. [26] They argue that reference to non-Western constitutional law jurisprudential developments and legal traditions is marginal if not nonexistent. Similarly, Christine Schwöbel argues that there is a significant omission of non-Western societies and their constitutional law experiences in international law theory and global constitutionalism.[27] This is evident even when there are novel and important constitutional experiences in non-Western societies. For example, although the principle that administrative courts should provide a reason for their decisions was first developed by the Supreme Courts of India and Botswana, constitutional law scholars usually cite the *Baker* case[28] decided by the Supreme Court of Canada.[29] In this regard, the study of the application of

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[24] Heinze, *supra* note 7, at197.

[25] For a good discussion on Montesquieu's skepticism to legal transplantation and use of comparative law, See O Kahn-Freund, On Uses and Misuses of Comparative Law (1974) *37 The Modern Law Review* 1.

[26] Upendra Baxi, The Colonial Heritage, in P Legrand and R Munday (eds) *Comparative Legal Studies: Traditions and Transition* (Cambridge University Press, 2003), Cited in Hirschel, Comparative Matters, *supra* note 9 at 205. Hirschel also notes that this criticism also comes from third world scholars and critics of international law who argue that the rules of international law are shaped by the historical inequalities shaped by colonialism and imperialism, See in this regard A Anghie (2004), *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press,); A Orford (ed*) International Law and its Others* (Cambridge University Press, 2006); B Fassbender and A Peters (eds),*The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), Cited in Hirschel, Comparative Matters, *supra* note 9, at 208.

[27] Chrstine Schwöbel (2010). Organic Global Constitutionalism, 23 *Leiden Journal of International Law* 529.

[28] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[29] Upendra Baxi (2012), *The Future of Human Rights* (Oxford University Press; See also C Saunders (2009), 'Towards a Global Constitutional Gene Pool' 4 *National Taiwan University Law* Review 3; J Tully (1995), *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press,); MK Addo (2010), 'Practice of

international and comparative law in underrepresented states such as Ethiopia will be a major contribution to comparative constitutional law and global constitutionalism.

4. Challenges to the Use of Comparative Law in Ethiopia

Apart from the generic criticisms against the use of comparative law, the application of comparative law in the context of Ethiopia has also raised several legal, institutional, and cultural issues that continue to constrain its application. While some of these issues may conflate with the generic factors outlined hereinabove, it would be useful to briefly look at the particular issues that are related to the challenges in the application of comparative law in Ethiopia.

One of the few works that analyzes the challenges faced by Ethiopian judges and lawyers in making legal transplants from other countries is Beckstrom.[30] In one of the earliest articles on the subject, Backstrom contends that most of the laws of Ethiopia that were adopted from European states in the 1960s had difficulties in implementation because of the significant socio-economic differences. The codification of Ethiopian laws took shape with the adoption of the Penal Code in 1957, the Civil Code and the Maritime Code in 1960, the Criminal Procedure Code in 1961, and the Civil Procedure Code in 1965. Apart from the Criminal Code which was revised in 2004, all the other codes which are still effective were adopted from European (and other foreign) laws to a radically different socio-economic and political context of Ethiopia that created several problems that undermined the effectiveness of the laws.

This view was reinforced by many Ethiopian legal scholars who were cautious and skeptical about legal transplantation and the use of comparative law where there are differences in socio-economic and political development of states.[31] Moreover, the fact that Ethiopia is a least developed country with significant socio-economic differences when compared with more advanced Western countries makes the subject of legal transplants or application of comparative law extremely complex and methodologically challenging. Because of this, there is a dominant perception that imported norms may not

United Nations human rights treaty bodies in the reconciliation of cultural diversity with universal respect for human rights', 32 *Human Rights Quarterly* 601.

[30] John H. Beckstrom (1973). 'Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia', 21 *American Journal of Comparative Law* 557.

[31] Ibid.

be effectively implemented in Ethiopia. The relatively unique history of Ethiopia and its isolation for a significant period of its history as the only non-colonized country with little or no significant social and cultural influence has made the subject of legal transplants and comparative law more problematic.

In articulating why legal transplantation and the use of comparative law, in general, could have implementation challenges at the domestic level, Backstrom provides the issue of proof of paternity under Ethiopian law as a good example. In the pre-Code era of Ethiopia's legal understanding and practice, paternity can be established by the mere fact that the parent orally acknowledges paternity. After the introduction of the Civil Code, the claim for paternity can only be established by presenting witnesses to the oral prenatal acknowledgment of a child. But there is inconsistency as another provision of the Civil Code provides that parental acknowledgement can only be made by writing and cannot be proved by witnesses.[32]

Another challenge that Beckstrom raises is the language problem. Since the *lingua franca* of Ethiopia is the Amharic language, often translations of legal texts to Amharic also cause difficulties in giving effect to the meaning of legal terms. Similarly, the fact that Ethiopian laws, decisions, as well as most of its historical writings were in the *Geez* script reference to Ethiopian laws and institutions became problematic to comparative law scholars. Often some of the legal provisions also erroneously presuppose the existence of adequate infrastructure and institutions that support the application of the imported laws.

As Beckstrom notes, while criminal law, for example, provides that young offenders should immediately appear before a court of law, the lack of adequate judicial infrastructure may not make this feasible.[33] One can also raise the issue of correctional issues in relation to juveniles where the law clearly provides that they should be kept in a separate correctional facility, often this is not possible as the state does not have the resources to provide separate correctional facilities. Similar problems can be seen in relation to the obligation to keep books of account under the Commercial Code but there is difficulty in implementing that as the business culture and context in Ethiopia does not have such framework. Judges and legal scholars have also limited

[32] If one looks at the provisions of Articles 746, 747 and 748, one can clearly see the contradictory nature of the provisions on paternal acknowledgment. The Revised Family Code seems to have addressed this by only requiring that paternal acknowledgment should be made by will or in writing in front of an officer of civil status; *see* Articles 131 and 33 of the Civil Code

[33] Ibid.

access to international and comparative law materials which constrains the understanding about these norms and the application of these laws in Ethiopia.

However, Beckstrom also notes that in some states where cultural and socio-economic differences are visible, legal transplants could work if the necessary conditions are met. For example, despite its cultural differences from mainland Western Europe, Turkey's importation of Western European laws was effectively implemented because the required legal training of judges and legal professionals preceded the actual importation of these laws.[34] Another such example is India, which took much of its main body of law from England. But he argues that Ethiopia's experience of legal transplant has much more significant divergence from the legal regime that is transplanted than any other experience of legal transplants.

Although Beckstrom's arguments may be valid, the basic idea that the use of international and comparative law can offer important insights to judges, lawyers and legal scholars cannot be understated. Acknowledging the utility and significance of comparative inquiry, while at the same time understanding the limits of universalism and the demands of contextualism, will be a more helpful way of approaching legal transplantation as well as the use of international and comparative law in Ethiopia.

In terms of judicial reference to international and comparative law, Ethiopian courts have long been reluctant to apply it owing to various factors. The lack of clear laws that allow courts to make use of international and comparative law, the skeptical attitude and approach towards foreign law in general, and the lack of clear understanding of the issue have impeded reference to international and comparative law. Yet, there is some constitutional basis for allowing Ethiopian courts to international law. Article 13(2) provides that: "The fundamental rights and freedoms specified in [the constitution] 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."

Article 13(2) of the Constitution indicates that the application of the human rights provisions in the Constitution should be interpreted in line with international human rights instruments. This gives some legal basis for Ethiopian courts to apply international human rights norms and principles. But there is also a lack of legal clarity if this also implies whether Ethiopian courts can apply decisions of international human rights supervisory bodies, general comments and a number of other sources of international human rights law.

[34] Beckstrom, *supra* note 30 at *582.*

With regard to reference to comparative law including decisions of foreign courts, there is no clear legal basis for Ethiopian courts to apply foreign law. Moreover, the lack of legal experience in the application of international and comparative law, limited understanding of judges and lawyers have made the application of international and comparative law very limited. However, as will be discussed below, there are some encouraging developments in the Cassation Bench of the Federal Supreme Court where courts have made a number of references to international and comparative law.

5. The Continued Relevance and Utility of Comparative Law

Despite the above challenges, Comparative law study continues to serve as a significant methodological tool in resolving regulatory challenges associated with different societies.[35] Acknowledging its caveats and limits would help to carefully craft and apply the methodological tools for the study of comparative law but does not rule out its methodological significance altogether. Therefore, a more realistic approach lies somewhere between the two extreme positions.[36]

Early libertarians such as Hegel and Kant, and contemporary comparative constitutional law scholars including Ran Hirschel, Mark Tushnet and Eric Heinze argue that liberalism as a political thought and universalist legal rules can be applied 'within some historically and culturally grounded context'.[37] In particular, in the context of rights discourse, judicial reference to decisions of international courts and foreign judgments is more common and a more suited area of comparative constitutional law than in other areas such as the study of separation of powers, mechanisms of judicial review and other areas of constitutional law which are considered organic and where national contexts are more apparent.[38]

In terms of its functional aspect, comparative law has been used to resolve legal and institutional challenges that have grappled different societies, by drawing from the experience of other societies. From early engagements in comparative law to modern scholars including Bernhard Grosfeld, Alan Watson, and many other scholars have used comparative law as a method of seeking a 'just solution to a given constitutional challenge their polity has been struggling with' and the belief that 'constitutional practice in a given polity

[35] *See* Tushnet, The Possibilities of Comparative Constitutional Law, *supra* note 13.
[36] *See* Hirschel, Comparative Matters, *supra* note 9).
[37] Heinze, *supra* note 7, at 197.
[38] Hirschel, Comparative Matters, *supra* note 9, at 21.

may be improved by emulating constitutional mechanisms employed elsewhere'.[39] As Rosalyn Dixon notes, this reliance on comparative law is particularly apparent in the areas of rights discourse where courts increasingly rely on comparative jurisprudence to resolve legal problems associated with the protection of fundamental rights and seeking the 'best' or 'most suitable rule across cultures'.[40]

The fact that States are dealing with similar legal, security and public order challenges in an increasingly interconnected world demands the need to look into constitutional and legal developments in other countries. Ultimately, such comparative study will be significant in the quest for formulating a theory of public good that helps in establishing the right political order, or more properly an optimal way of regulation.[41] Although there is a fine line between the competing values of order and liberty, comparative constitutional law helps to provide methods of resolving the dilemma between security and order on one hand and liberty on the other, thereby maintaining an 'ordered liberty' within a political community across cultures.[42] It helps to contribute to the deliberative process of exploring specific normative and socio-political challenges that are faced by different societies.[43]

In the specific context of emerging and transitional democracies, Ginsburg and Huntington also reiterate the importance of turning to the study of democratization and constitutionalism in these polities. They argue that the conventional study of democracy as the conducting of periodic elections is inadequate to explain the legal and political dynamics of emerging democracies.[44]

Huntington contends that many electoral democracies in the world do not protect civil and political liberties and argues that the focus should be on looking closely at the constitutional experience of these States in relation to

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[39] Ran Hirschel, 'The Question of Case Selection in Comparative Constitutional Law' (2005) *53 American Journal of Comparative Law* 127 citing Tushnet (note 13), The Possibilities of Comparative Law; *See* also B Grossfeld (2005), Core Questions of Comparative Law (Carolina Academic Press).

[40] Hirschel, Comparative Matters, *supra* note 9, at 235.

[41] U Belavusau (2013). *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies* (Routledge) 90.

[42] DP Kommers (1976). 'The Value of Comparative Constitutional Law', 9 *John Marshall Journal of Practice and Procedure* 692.

[43] Sandra Fredman (2015). 'Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law', *64 International and Comparative Law Quarterly* 631.

[44] Tom Ginsburg (2003). *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press,) 295.

specific rights.[45] Because of these factors, there has been a growing need to analyze constitutionalism and the application of human rights and fundamental freedoms in transitional and non-liberal democracies.[46] In this regard, the study of the use of international and comparative law in Ethiopian courts will contribute to the field of comparative constitutional law and global constitutionalism immensely.

Moreover, comparative study provides the opportunity to study the possibilities of normative convergence and areas of consensus emerging in many areas of law. Even where there are differences in approach, comparative study helps to illuminate as a source of reflection why there are differences in approach and develop an optimal regulatory framework suited to the specific context of a particular state. In recent times, scholars including Adriane Stone, Ashutosh Bhagwat, Michele Rosenfeld, Timothy Zick and Uladzislau Belavusau have not only demonstrated the importance of comparative study in rights discourse but also more importantly, articulated the continued significance of comparative constitutional law in resolving problems associated with transitional democracies and the overall significance of looking into constitutionalism in emerging and transitional democracies.[47] Accordingly, the use of the comparative method in Ethiopia is not only required by the pragmatic necessity of resolving legal problems confronted by courts but also backed by contemporary trends in comparative constitutional law that increasingly relies on comparative inquiry and the resulting normative convergence that continues to thrive in the field of global constitutionalism.

In looking at the comparative constitutional law experience of other States, the objective should be to develop an optimal model of normative constitutional theories and principles of law.[48] This approach is based on the belief that even if each state's constitutional discourse is a reflection of its national identity with its particularities, there are many areas of normative convergences that help to illuminate important lessons to other states.

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[45] *See* Samuel Huntington (1996). *The Clash of Civilizations and the Remaking of World Order* (Simon and Schister).

[46] *See* Ginsburg, *Judicial Review in New Democracies*, *supra* note 44.

[47] Adrian Stone (2010). The Comparative Constitutional Law of Freedom of Expression, University of Melbourne Legal Studies Research Paper, 476. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633231> ; *See* also: A Bhagwat, Free Speech without Democracy (2015) *49 University of California Davis Law Review* 59; T Zick, *The Cosmopolitan First Amendment, Protecting Trans-border and Expressive and Religious Liberties* (Cambridge University Press, 2014).

[48] Belavusau, *supra* note 41, at 4.

One should also be cognizant of the limits of International law in articulating the cultural and historical contingencies as well as broader issues of national identity which significantly influence the normative conception of rights in States.[49] International law cannot adequately explain the deeper normative, institutional, socio-political and historical factors which are intricately related to law and society.[50] Comparative law provides additional normative insight and methodological tool complementing the normative framework of international law by combining both how legal rules and high politics operate in specific societies.[51]

Beyond the general methodological significance that is associated with comparative inquiry, the importance of comparative study in Ethiopia is required by the following pragmatic factors. *First*, the lack of literature coupled with the dearth of domestic jurisprudence demands a comparative law engagement that aims to resolve complex legal problems. *Second*, the constitutional framework of Ethiopia provides that the fundamental rights and freedoms provided in the Constitution should be interpreted in accordance with international human rights instruments and conventions ratified by Ethiopia.[52] As will be discussed herein below, the recourse to comparative law sources is not only confined to international human rights norms but also legal developments in comparative jurisdictions. The constitutional framework and the emerging jurisprudence of the Cassation Division of the Supreme Court of Ethiopia clearly supports the use of international instruments, particularly in the area of the protection of human rights and fundamental freedoms.

Thirdly, the increasing migration of constitutional norms has added the impetus for the use of international and comparative law across different states. Because of this, the nature of national constitutions has been increasingly influenced by the collective security and public order challenges of states such as terrorism, and the increasing universalism of human rights norms through global constitutionalism. This demystifies the cultural and

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[49] Adam A. Dodek (2009). 'A Tale of Two Maps : The Limits of Universalism in Comparative Judicial Review', 47 *Osgoode Hall Law Journal* 287.

[50] Eric Barendt, 'Freedom of Expression', in Rosenfeld and Sajo, *supra* note 6, at 892-893.

[51] Vicky Jackson & Mark Tushnet (2014). *Comparative Constitutional Law* (Foundation Press) 1229.

[52] Art 13(2) of the Constitution of Ethiopia provides: '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'.

historical determinism that is usually associated with detractors of the use of comparative law.

It should also be noted that even when states purport to challenge the use of comparative law or choose to adopt the experience of a particular country, they are driven by political factors rather than the weight and strength of the legal reason or the functional relevance and significance of the question at hand. This is consistent with the current pragmatic approach of comparative law study that conceives comparativism as a deliberative process of legal reasoning aimed at solving practical normative problems in different societies.[53]

Even in states such as the United States (US), where use of comparative law is not encouraged, there have been some instances where the US Supreme Court relied on comparative cases.[54] In *Roper v Simons*, which concerned about the constitutionality and legality of the imposition of the death penalty on juveniles, the US Supreme Court relied on the emerging consensus in comparative jurisdictions that convinced the court to ban the death penalty for juveniles in the United States

6. The Use of International and Comparative Law in Ethiopia: Current Trends

A closer look at the binding statutory interpretations of the Cassation decisions of the Federal Supreme Court (in three categories of cases) provides interesting normative developments that have significant relevance for comparative constitutional law scholarship in Ethiopia. The first category relates to *the rights of children* whereby a series of decisions of the Cassation Bench of the Federal Supreme Court made frequent reference to the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) in expanding the protection afforded to children.

The second sphere of judicial reference to international and comparative law relates to due process and expanding the meaning of access to justice and fair trial in criminal proceedings.[55] The Cassation Bench of the Federal

[53] *See* Fredman, *supra* note 43; *See* also, Bernhard Grossfeld (2004), Core Questions of Comparative Law, (Carolina Academic Press) arguing that the primary purpose of comparative inquiry should be to draw best practices in addressing a particular legal problem.

[54] *Roper v. Simmons*, 543 U.S. 551(2005) [United States].

[55] This is in line with current developments in comparative constitutional law where normative convergence of human rights norms has been more apparent in the area of

Supreme Court in a series of its decisions made reference to the ICCPR in interpreting the meaning of access to justice, due process and fair trial. The third category of judicial reference of the Cassation Bench of the Federal Supreme Court relates to areas where there is little guidance from domestic law, and the court solely relied on comparative and international law to resolve disputes.

6.1 Rights of the child

In the first category of cases, the Cassation Bench of the Federal Supreme Court made a number of references to the Convention on the CRC, ACRWC, the International Covenant on Civil and Political Rights (ICCPR) as well as other intentional human rights instruments in order to reinforce the decisions it makes by relying on these international human rights norms. In *Tsedale Demisse v Kifle Demisse*, the case was initiated at the Bonga Wereda Court in the Southern Nations, Nationalities and Peoples (SNNP) Region of Ethiopia over a custodial right of a child, Benyam Kifle.[56] The Bonga Wereda Court cited the regional family code, Proclamation No. 75/96 Article 235(1) and decided that in case of the death of one parent the surviving parent becomes the legal guardian and takes custody of the child, and such the surviving father was allowed to take custody of the child. Accordingly, the current respondent who is the father of the child was allowed to take custody of the child and his legal guardianship.

The applicant, Ms. Tsedale Demisse who is the aunt of the child challenged the decision of the Wereda Court by appealing to the Kefa Zone High Court but the High Court affirmed the decision of the Wereda Court and rejected her appeal. The Cassation Bench of the SNNP Supreme Court also rejected her petition noting that there was no error of law in the lower court decisions.

The applicant submitted her case to the Federal Supreme Court Cassation Division by arguing that the applicant had a better track record of handling and nurturing the child well. She argued that she raised the child for the past

due process. *See*, for example, Ruti Teitel (2004),' Comparative Constitutional Law in a Global Age', 117 *Harvard Law Review* 2593. She argues: "From this realm of threshold human rights, comparative constitutionalism is now extending its quest for conformity into the sphere of due process."

[56] *Tsedale Lema Demese and Kifle Demese*, File No. 23632, Decisions of the Cassation Bench of the Federal Supreme Vol 5 (2009). It is a seminal case in which the Supreme Court applied and interpreted the constitutional principle of the best interest of the Child provided in Art 36 (2) by relying on the CRC and eventually repealed a regional family law which contradicted with the principle of primary consideration for the best interest of the child in disputes involving children.

12 years in his best interest and should be the one who should have the right to take custody of the child and be the legal guardian. The applicant also stated that the father's only motive in applying for the guardianship of the child is property interest because of the death of the mother.

The Cassation Division of the Federal Supreme Court stated that it is customary to assign parents as default legal guardians, and indicated that the comparative experience of other countries also shows a similar pattern. Yet, the Cassation Bench noted the need to give primacy to the *interest of the child*. Thus, it reversed the decision of the lower courts and it gave the custody right of the child to the applicant. As the basis of its decision, the Cassation Division cited the principle of *the best interest of the child* under Article 36(2) of the Constitution which provides that "in all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interests of the child."[57] In its decision, the Court also relied on Article 3(1) of the Convention on the Rights of the Child (CRC) which provides the principle of the best interest of the child as an important guiding principle in deciding cases involving children.[58]

The case is important for two reasons. First, this is the first major case that made reference to international human rights norms in their decisions, breaking the old-age barrier and caution to the use of international and comparative law. Second, it also seems that in making a major decision that sets aside the literal reading of a domestic law, it can encourage courts to make reference to international human rights norms and principles. This case is also important as it also left open the door to refer to international and comparative laws.

In another case, *FDRE House of Federation and Tesfaye Getahun v Priest Mamo Yetaferu*, the Cassation Bench of the Federal Supreme Court relied on the CRC to overturn the decision of the lower courts that was rendered based on a legal provision that excludes compensation for child victims in tort case where the owner of a car was not getting any financial benefit during the incident.[59] The case was about a compensation claim due to the death of the child of the respondent while the second applicant –who was the driver for the first applicant– was transporting him around *Yeka* area in Addis Ababa. The main claim of the applicants was that Article 2089(1) of the Civil Code

[57] *See* Constitution of the Federal Democratic Republic of Ethiopia (1995) Art. 36(2).
[58] *See Tsedale Demisse v Kifle Demisse.*
[59] *FDRE House of Federation and Tesfaye Getahun v Priest Mamo Yetaferu,* File No. 92020, Decisions of the Cassation Bench of the Federal Supreme Court Vol. 15 (2014).

provides that a claim for extra-contractual liability cannot be invoked by a person who at the time of the damage was making use of the animal or object without the owner or keeper deriving benefit from the use of the animal or object.[60]

The Cassation Division of the Supreme Court in affirming the decision of the lower courts made a similar reference to the CRC noting that the standard of care that should be given to children in accordance with the Constitution Article 36 (2) on the rights of children, Article 13 (right to life), and Article 25 (right to equality) as well as international human rights treaties that Ethiopia ratified –including Articles 3 and 6 of CRC and Articles 4(1) and 5(1) of ACRWC– reiterate the importance of ensuring the right to life and physical integrity.[61] Thus, it decided that the applicants should pay the compensation to the father of the deceased child and confirmed the decision of the lower courts.

It is interesting to note that the court used international instruments to expand the meaning of what standard of care is required in cases involving children. It noted that the highest standard of care should be made and hence the meaning of Article 2089(2) of the Civil Code (which states that a person may, however, be liable, if he commits an offence) was interpreted more widely when it comes to issues involving children. Here again, the cassation decision and the decisions of lower courts seem to have been strengthened by the fact that international human rights norms impose a heightened obligation regarding the standard of care of children including in cases involving tort laws.

Reliance on international and comparative law can also be seen by the fact that in some instances, international human rights instruments are used to overrule and set aside proclamations that seem contrary to the rights of children. In the more recent inter-country adoption case of *Wondwessen Tadesse*, the parents wanted to transfer the custody of their child to their aunt who is a foreign national living abroad.[62] The lower courts rejected the inter-country adoption citing that Proclamation No. 1070/2010 prohibits any kind of inter-country adoption.

However, the Supreme Court reversed the lower court decisions noting that the very intention of the law was to ensure that the interests of children are well ensured. In the particular case at hand, since their aunt, while being a

[60] *See* the Civil Code of Ethiopia (1960) Art 2089.
[61] *FDRE House of Federation and Tesfaye Getahun v Priest Mamo Yetaferu.*
[62] Wondwessen Tadesse *et al*, File No 189201, Decisions of the Cassation Bench of the Federal Supreme Court Vol. 24 (2021)

foreign national has an Ethiopian origin, it is in the best interest of the child to allow the inter-country adoption. It also noted that the aunt was previously involved in assisting the child, and in light of Articles 20, 21, 21(C) and (d) of the CRC, and Articles 24(b) and 24(f) of the ACRWC the inter-country addition should be granted as it is in line with the principle of the best interest of the child.[63]

In another similar decision of the Cassation Division of the Federal Supreme Court, *Franswis Pastor v Dukeman Veno and Barbot Letitiy*a, which involved inter-country adoption, the Court revoked an adoption agreement noting that the best interests of the child were not ensured by the adopting parents.[64] This decision was made even though Article 195(1) of the Federal Revised Family Code does not allow for the revocation of adoption agreements. In expanding the exceptions in Article 195(2) in which adoption agreements may be revoked, the Court relied on the CRC to annul the adoption agreement noting that it does not protect the best interest of the child. The court noted:

> International, regional and national legal instruments contain basic principles regarding the right of the child. One of these principles is the principle which declares that in all actions concerning children, the primary consideration should be the best interest of the child. The FDRE Constitution, not only declares that international conventions ratified by Ethiopia are integral parts of the law of the land, but has also incorporated a number of human right provisions which should be interpreted in light of international human right conventions to which the country is a party.[65]

6.2 Access to justice

In the second category of cases, Ethiopian courts expanded the meaning of due process by making frequent reference to the ICCPR in their decisions. In *Woldetsadik Deme et al v Agency for Government Houses* the Cassation Bench of the Federal Supreme Court overruled the decision of administrative agencies noting that the obligation to observe due process and the right to be heard is a fundamental principle enshrined in Article 37 of the Constitution and international human rights treaties to which Ethiopia is a party.[66] In this

[63] Ibid.

[64] *Franswis Pastor v Dukeman Veno and Barbot Letitiy*a (File No. 44101), Decisions of the Cassation Bench of the Federal Supreme Court Vol. 10 (2011.

[65] Ibid.

[66] *Woldetsadik Deme v Agency for Government Houses*, File No. 43511, Decisions of the Cassation Bench of the Federal Supreme Court Vol. 14 (2014

regard, the Court emphasized that other procedural rules should not contravene Article 37 of the Constitution on *access to justice* and should not "erode the basic foundation of the right to access justice and the right to be heard that are enshrined in international Conventions to which Ethiopia is signatory to".[67] Accordingly, it overruled the decision of the Agency for Government Houses as it failed to observe the fundamental principles of due process and the right to be heard of the applicant in the administrative decision given by the Agency.

Similarly, in the case of *Adamu Zeleke et al v Amhara National Regional Prosecution Office* (File No. 95875, 2006), the Cassation Bench of the Federal Supreme Court expanded the meaning of fair trial in criminal proceedings by relying on the ICCPR.[68] The case was about the prosecution and conviction of the applicants in *absentia* for murder. They applied to set aside the decision which was not successful at the lower courts. The reason provided by the lower courts was that the applicants failed to file the suit within 30 days after the decision was given by the trial court based on Article 198 of the Criminal Procedure Code. The Cassation Bench ruled that Article 20 of the Constitution and Article 14 of the ICCPR provide a wide range of protections including "the right to be tried in his presence and a wide range of other protections".[69]

Accordingly, the court set aside the decision of the lower courts even if the Criminal Procedure Code barred applications to set aside judgment submitted after the lapse of the required 30 days. The Supreme Court noted that the right to a fair trial and to be tried in one's presence should be more expansively interpreted in favor of convicted persons. The reliance on international human rights norms seems to encourage the Court to set aside the decision of the lower court and provide a more expansive meaning to the principle of due process and fair trial.

6.3 Immunity of international organizations

In the third scenario in which Ethiopian courts used comparative and international law, international law was the main source of law for resolving disputes. *Alemayehu Olana v United Nations Development Program (UNDP)* involved an employment dispute in which the applicant filed a case against UNDP claiming payments for unlawful termination.[70] The lower courts

[67] Ibid.

[68] Adamu Zeleke et al v *v Amhara National Regional Prosecution Office,* Cassation File No. 95875, Decisions of the Federal Supreme Court (2015) Vol. 16, *File No.* 95875

[69] Ibid.

[70] Alemayehu Olana v UNDP, Cassation File No. 98541, Decisions of the Federal Supreme Court (2016) Vol. 17.

suspended the proceedings of the case because of the immunity that UN agencies enjoy under international law. In affirming the decision of the lower courts and dismissing the application, the Cassation Bench relied on Article 105 of the UN Charter (which provides UN agencies immunity from legal action) and Article 2(2) and Article 3 of the Convention on the Privileges and Immunities of the United Nations.

In another similar case, the case of *Alemayehu Mekonen v The Desert Locust Control Organization for East Africa*, the Cassation Bench of the Federal Supreme relied on "international and comparative practices" to reject a legal claim against an organization that was given immunity from legal suit by a host state agreement. The legal question was whether an employee could file legal action against the organization which is entitled to immunity from any civil suit in Ethiopia.

In rejecting the legal action of the employee for payments related to his contractual relationship with the employer, the Cassation Bench noted that host states have the responsibility to respect the Vienna Convention on the Law of Treaties and the standard practice in this regard.[71] It should be noted here again that the court's decision did not just rely on the Vienna Convention on Law of Treaties, but on comparative practices that agreements of international organizations with host states need to be respected, including in cases where they give immunity from litigation. As indicated in the preceding cases, here again, Ethiopian courts seem to be open to considering the standard comparative practice.

Although more research needs to analyze the use of international and comparative law in Ethiopia, the cases highlighted above demonstrate that Ethiopian courts have begun to be open to the use and application of international and comparative law. The decisions indicate trends towards reference to international and comparative law in certain areas.

7. Conclusion

A realistic account of comparative constitutional law engagement requires developing a normative constitutional theory and principles of law that are suited to emerging and transitional polities such as Ethiopia. Often the arguments that emerge from the theory of cultural determinism seem to overstate the role of culture and understate the functional significance that

[71] *Alemayehu Mekonen v The Desert Locust Control Organization for East Africa*, File No. 117390, Decisions of Cassation Bench of the Federal Supreme Court (2016) Vol. 19.

comparative law offers in resolving practical legal problems confronted by courts and the effective dispensation of cases that can often be complex and problematic.

Whatever the political posture and characterization of a particular state might be, there is a significant utility of international and comparative law which can offer important insights to any state in articulating its normative constitutional theory and principles of law as well as consolidating its democratic trajectory. As Ran Hirschel observes: "With the exception of uber-totalitarian North Korea and a small handful of other outlier polities, there is copious similarity alongside sufficient degrees of difference in the world of new constitutionalism to allow for some productive comparison, at least in theory".[72]

In this regard, international and comparative law can provide an important method of comparative inquiry in resolving practical legal problems confronted by different states, including Ethiopia. These factors demonstrate, contrary to the detractors of comparative law study, the continued relevance of comparative study in legal discourse. The increasing convergence of norms both from international and comparative law, requires some level of engagement with international and comparative law. In this broader context, international and comparative law can also serve as an important source of wisdom in resolving practical problems associated with the regulation of a certain subject matter or the resolution of a dispute in a just manner.

In a similar vein, the fledgling jurisprudence of Ethiopian courts can provide important insights into the already underrepresented constitutional discourse of the global south in the discourse of global constitutionalism and comparative constitutional law. One of the dominant and growing normative convergence in comparative constitutional law relates to expanding the protection for due process guarantees in criminal proceedings. The experience of Ethiopian courts can offer interesting insights in this regard and it reinforces the current trends in the emerging normative convergence that is becoming more apparent in the field of comparative constitutional law and global constitutionalism. ■

[72] Hirschel, Comparative Matters, *supra* note 9, at 205.

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