


RECENT DEVELOPMENTS

Prohibiting Political Party Membership as a Condition for Receiving Political Service Retirement Benefits under Ethiopian Law: A Comparison with Kenya and Tanzania

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Abstract

This article questions the justification for restricting political party membership as a condition for receiving political service retirement benefits in Ethiopia (a restriction first imposed through the Administration of the President of the Federal Democratic Republic of Ethiopia Proclamation and endorsed in the Rights and Benefits of Outgoing Heads of State and Government, Senior Government Officials, Members of Parliament and Judges Proclamation). After reviewing relevant law, literature and comparative experience from Kenya and Tanzania, the article argues that prohibiting political party membership without a pressing need for non-partisan service is an unjust restriction on the right to freedom of political party membership. Benefits for retiring high-ranking government officials are part of the right to social security and should not be disallowed based on political party membership.

Keywords: political party membership; political service retirement benefits; limitations on human rights

Introduction

Association protects individuals from the vulnerability of isolation and enables them to achieve common purposes they might not dare to pursue alone.¹ The rights to association, assembly and petition are not only rights, but vehicles for exercising other civil, political, economic and social rights.² Despite this, because collective actions were distrusted as factional, early human rights developments (such as the French Declaration on the Rights of Man and the US Bill of Rights) did not clearly incorporate the right to association.³ It was recognized only after World War II when suspicions against associations vanished.⁴ In Ethiopia, while the reign of Emperor Haile Selassie did not allow political parties, during the military regime that followed, the Workers

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1 N Jayawickrama *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (2002, Cambridge University Press) at 738–39 and 742.

2 UK Preuß “Associative rights (the rights to the freedoms of petition, assembly, and association)” in M Rosenfeld and A Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012, Oxford University Press) 948 at 949; M Kiai *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association* (21 May 2012, UN General Assembly) at 5.

3 Preuß, id at 953–55.

4 M Sawyer and A Gauja “Party rules: Promises and pitfalls” in A Gauja and M Sawyer (eds) *Party Rules? Dilemmas of Political Party Regulation in Australia* (2016, Australian National University Press) 1 at 3.

Party of Ethiopia was the only political party to be recognized constitutionally.⁵ After the downfall of the military regime, the 1991 Transitional Government Charter of Ethiopia recognized the right to unrestricted political participation and the right to organize political parties.⁶

This article examines whether prohibiting political party membership as a condition for receiving political service retirement benefits is a justifiable limitation. The prohibition was first introduced through the Administration of the President of the Federal Democratic Republic of Ethiopia Proclamation⁷ and has been endorsed in the Rights and Benefits of Outgoing Heads of State and Government, Senior Government Officials, Members of Parliament and Judges Proclamation.⁸ The article first examines the legal basis for and possible limitations on the right to political party membership. It then assesses political service retirement benefits and analyses the justness of prohibiting political party membership as a condition for receiving political service retirement benefits. Lastly, it examines a decision by the Council of Constitutional Inquiry (CCI) and the House of Federation (HOF) on former Ethiopian President Dr Negasso Gidada's petition.⁹

A comparison is made with Kenya and Tanzania. While both have laws on political service retirement benefits, the first attaches non-partisanship to any political party as a condition to be entitled to receipt of the benefits, but the second does not. From this, the author argues that, to resolve the conflict between constitutionally recognizing freedom of political party membership on the one hand and restricting it as a condition to receiving political service retirement benefits on the other, the Tanzanian experience is more commendable than the Kenyan one. In this connection, although two decades have passed since the Ethiopian law that makes political service retirement benefits for a retired president conditional on the absence of political party membership was enacted, the fact that this restriction has been endorsed in the latest law (Proclamation No 653/2009) means the issue remains topical. More importantly, the introduction of political service retirement benefits as a separate scheme, for example in Kenya, has been debatable.¹⁰ In this context, this article intends to rekindle a debate on the issue in Ethiopia, especially questioning the legitimacy of restricting the freedom of political party membership as a precondition for the benefits and to elevate the debate to an Africa-wide level.

Legal basis for the right to political party membership

International human rights instruments have recognized the right to political party membership as part of the right to association. In this regard, article 20(1) and (2) respectively of the Universal Declaration of Human Rights provides that “[e]veryone has the right to freedom of ... association” and “[n]o one may be compelled to belong to an association”. Similarly, article 22(1) of the International Covenant on Civil and Political Rights (ICCPR) recognizes that “[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions”. In its General Comment No 25/1996 on Article 25 of the ICCPR, the UN Human Rights Committee linked the right to form and join political parties to the right to take part in the conduct of public affairs, as well as the right to vote and to be elected.

Regionally, at the level of the Americas, article 22 of the American Declaration of the Rights and Duties of Man and article 16(1) of the American Convention on Human Rights provide that

5 K Berhanu “Party politics and political culture in Ethiopia” in M Salih (ed) *African Political Parties: Evolution, Institutionalisation and Governance* (2003, Pluto Press) 115 at 117; The Constitution of the People's Democratic Republic of Ethiopia Proc No 1 of 1987, art 6(1).

6 Transitional Government Charter, art 1(b).

7 Proc No 255/2001.

8 Proc No 653/2009 (as amended by Proc No 1003/2017).

9 *Former Ethiopian President Dr Negasso Gidada's Case* (January 2018, House of Federation) 2 *Constitutional Decisions Journal* 30.

10 For an argument that political service retirements are unconstitutional in Kenya, see *Golden Handshakes: The Retirement Benefits of Senior State Officers in Kenya* (May 2015, Africa Centre for Open Governance).

everyone has the right to associate with others to exercise his political, economic, religious, social, cultural, professional and labour interests. At the European level, the right to association is recognized in article 11(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 12(1) of the Charter of Fundamental Rights of the European Union. At the African level, article 10 of the African Charter on Human and Peoples' Rights provides that everyone has the right to lawful association. As political associations,¹¹ political parties aggregate societal demands into policy objectives, negotiate between the public and the government, and organize and lead governments in representative democracy.¹² Political party membership is a manifestation of citizens' freedom to associate politically.¹³ Regional instruments also recognize the formation of political parties and political pluralism. Article 12(2) of the Charter of Fundamental Rights of the European Union recognizes the role of political parties in the expression of the political will of citizens. Similarly, article 3(11) of the African Charter on Democracy, Elections and Governance requires signatory states to strengthen political pluralism by recognizing the role, rights and responsibilities of political parties and by giving opposition political parties legal status under their national laws.

In respect of national laws, modern constitutions recognize and regulate political parties and their membership. For example, article 21(1) of the German Basic Law provides that "[p]olitical parties shall participate in the formation of the political will of the people. They may be freely established". Similarly, while section 36 of the 2010 Kenyan Constitution guarantees freedom of association, section 38 recognizes citizens' right to political party membership. The constitutions in Tanzania and Ethiopia include the right to political party membership with the right to association, while empowering their respective Parliaments to enact a separate law to regulate the details of political party membership and functioning.¹⁴ The Ethiopian Constitution, in addition to its provisions for freedom of association, also recognizes the right to political party membership as part of the right to vote and be elected.¹⁵ The Kenyan Constitution, unlike those of Ethiopia and Tanzania, includes provisions that show the scope of the right. It provides that the right to freedom of political party membership includes the right to form or participate in the formation of a political party, the right to participate in the affairs of a political party and recruit members, and to campaign for a political party's cause.¹⁶ It also requires political parties to have national character and a democratically elected leadership, to practise intraparty democracy including regular and free elections and to promote political participation of minorities and marginalized groups.¹⁷

Limitations on the right to freedom of political party membership

Limitations are exceptions to the principle that human rights are protected and are boundaries set to provide a balance between competing individual rights or between individual rights and the public or national interest.¹⁸ For limitations to be justified they must be legal, necessary and proportional. Legality means that limitations must have a basis in domestic laws of general application enacted

11 Jayawickrama *The Judicial Application*, above at note 1 at 757–58; Kiai *Report of the Special Rapporteur*, above at note 2 at 14; A Koppelman and TB Wolff *A Right to Discriminate? How the Case of Boy Scouts of America v James Dale Warped the Law of Free Association* (2009, Yale University Press) at 23.

12 P Norris *Political Parties and Democracy in Theoretical and Practical Perspectives: Developments in Party Communications* (2005, National Democratic Institute for International Affairs) at 3–4.

13 Kiai *Report of the Special Rapporteur*, above at note 2 at 13; *Guidelines on Political Party Regulation* (2011, Office for Democratic Institutions and Human Rights) at 20.

14 Constitution of the United Republic of Tanzania 1977, art 20; Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) Proc No 1/1995, arts 31 and 51(15).

15 FDRE Constitution, art 38(2).

16 Kenyan Constitution, sec 38(1)(a)–(c).

17 *Id.*, sec 91(1)(a)–(h).

18 Jayawickrama *The Judicial Application*, above at note 1 at 182 and 184; R Pati "Rights and their limits: The constitution for Europe in international and comparative legal perspective" (2005) 23 *Berkeley Journal of International Law* 223 at 237.

with sufficient precision, comprehensibility and accessibility.¹⁹ For some, “law” in this context denotes only legislation enacted by elected representatives of the people working in Parliament;²⁰ for others, “law” includes unwritten laws, such as common or customary laws, case law and rules of professional conduct.²¹ Constitutional limitations on human rights may be imposed either as limitation clauses or as qualified definitions.²² Similarly, limitation clauses may be general, right-specific or both.²³

Necessity means that a limitation shall have a legitimate purpose, it must be capable of contributing to realizing the purpose and the purpose must not be attainable by other less restrictive means.²⁴ The purposes may be to protect the rights of others, public health or morals, or national security or public order.²⁵ Proportionality means that a limitation should not cause more harm than good; the detriment to the right limited should be balanced with the benefit of achieving the purpose behind limiting that right.²⁶

Within these parameters, the right to political party membership may be limited. Article 22(2) of the ICCPR and article 11(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provide that the right to freedom of association may be limited to protect the rights of others, national security, public order, morals and health. Specific restrictions may also be imposed against the freedom of association of members of the armed forces, police and state administration. Similarly, article 27(2) of the African Charter on Human and Peoples’ Rights requires individual rights to be exercised “with due regard to the rights of others, collective security, morality and common interest” and article 29(3) imposes on individuals a duty not to compromise the national security of the state of their nationality or residence.

Ethiopia’s Constitution did not incorporate a general limitation clause. It has, however, provided some right specific limitations. The restriction it imposed on the right to political party membership is the prohibition in article 31 against associations formed in violation of relevant law or against the constitutional order. The Ethiopian party law also precludes judges, public prosecutors, defence and police force members, and National Electoral Board officials and employees from political party membership²⁷ to ensure their non-partisan service.

Compared to those of Ethiopia, the constitutions in Kenya and Tanzania have detailed provisions on limitations on human rights. The Kenyan Constitution provides that fundamental rights may be only limited by law and to the extent necessary in an open and democratic society. In particular, limitations should only be imposed in consideration of the nature of the right, the importance of the purpose, the nature and extent of the limitation, the need to protect the rights of others, and the existence of less restrictive means to achieve the purpose.²⁸ A law imposing limitations is not valid and cannot be construed as a limitation unless it expressly indicates the intention to limit (including the nature and extent of the limitation) and the core content of the right cannot be

19 Jayawickrama, id at 189–90; PD Clavaud et al *Freedom of Expression and Public Order: Training Manual* (2015, UNESCO) at 22–23; Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, UN doc E/CN.4/1984/4 (1984), sec I(B)(i)(15) and (17).

20 Clavaud et al, id at 22.

21 Jayawickrama *The Judicial Application*, above at note 1 at 191; A Barak “Proportionality” in Rosenfeld and Sajó (eds) *The Oxford Handbook*, above at note 2, 738 at 740.

22 D Ahmed and E Bulmer “Limitation clauses” (International Institute for Democracy and Electoral Assistance Constitution-Building Primer 11, 2017) at 8.

23 Barak “Proportionality”, above at note 21 at 740.

24 Id at 743–44; R Alexy “Rights and liberties as concepts” in Rosenfeld and Sajó (eds) *The Oxford Handbook*, above at note 2, 283 at 292; B Schlink “Proportionality” in Rosenfeld and Sajó, id, 718 at 722–24.

25 Ahmed and Bulmer “Limitation clauses”, above at note 22 at 9–10.

26 Clavaud et al *Freedom of Expression*, above at note 19 at 24; Alexy “Rights and liberties as concepts”, above at note 24 at 294; Barak “Proportionality”, above at note 21 at 745.

27 Ethiopian Electoral, Political Parties Registration and Election’s Code of Conduct Proc No 1162/2019, art 63(3)(a)–(e).

28 Kenyan Constitution, sec 24(1)(a)–(e).

limited.²⁹ The constitution also authorizes the enactment of a law limiting Kenyan defence force and national police force members' rights to privacy, association, assembly, demonstration and petition, labour rights, economic and social rights, and rights of arrested persons.³⁰ Article 30(1) of the Tanzanian Constitution provides that human rights may not be exercised to the detriment of the rights of other people and the public interest. Further, the constitution does not preclude laws and decisions based on laws that may limit rights to protect: the rights and freedoms of others; public safety, peace, morality and health; urban and rural development; the utilization of minerals or development of property for public benefit; execution of court judgments; and the privacy of litigants and independence of courts.³¹

The constitutions in Kenya and Tanzania have restrictions on the formation of certain political parties. Section 91(2)(a) of the Kenyan Constitution prohibits religious, linguistic, racial, ethnic, gender based or regional political parties. Similarly, the Tanzanian Constitution prohibits the formation of political parties to promote the interest of any religious, tribal or racial group, place of origin, gender or a particular area.³² The prohibitions in the constitutions of Kenya and Tanzania seem to aim to prevent the politicization of identity. In Ethiopia, peoples' right to self-determination and self-administration has been accorded constitutional recognition, and political parties can be formed to work nationwide or for the interests of a specific region or national group.³³

Political service retirement benefits as social security

A social security scheme providing a combined income from state-funded social security, employer-provided pension incomes and personal savings helps to prevent economic insecurity during old age, illness and unemployment.³⁴ Because of this, article 25(1) of the Universal Declaration of Human Rights and article 9 of the International Covenant on Economic, Social and Cultural Rights recognize the right to social security, including a pension in times of illness, old age, disability and unemployment. At regional level, the right to social security is recognized in article 26 of the American Declaration of the Rights and Duties of Man, article 34(1) of the Charter of Fundamental Rights of the European Union and article 18(4) of the African Charter on Human and Peoples' Rights. At national level, the Ethiopian Constitution recognizes the right to social security when providing the right to equal access to publicly funded social services in art 41(3) and (4) and art 90(1). Section 43(1)(e) of the Kenyan Constitution recognizes the right to social security within economic and social rights. Although not in the part dealing with human rights, the Tanzanian Constitution provides for the right to a pension and gratuity in article 142(2), which deals with the Republic's consolidated fund and finance.

Apart from the pension system, however, retiring high-ranking government officials in Ethiopia are given special benefits. These benefits were first introduced in 2001 through the Administration of the President of the Federal Democratic Republic of Ethiopia Proclamation. That law provided benefits for an outgoing president, except for a president removed by legal action. The benefits included: a residence; a monthly maintenance allowance of ETB 5,000 (approximately GBP 70) with an incremental increase possible by parliamentary decision as per the increase in cost of living,

²⁹ *Id.*, sec 24(2)(a)–(c).

³⁰ *Id.*, sec 24(5)(a)–(f).

³¹ Tanzanian Constitution, art 30(2)(a)–(f).

³² *Id.*, art 20(2)(a)(i)–(iii).

³³ FDRE Constitution, art 39(1) and (2); Proc No 1162/2019, arts 64 and 65.

³⁴ WA Achenbaum *Social Security: Visions and Revisions; A Twentieth Century Fund Study* (1986, Cambridge University Press) at 13; B Mattil *Pension Systems: Sustainability and Distributional Effects in Germany and the United Kingdom* (2006, Physica-Verlag) at 9; J Peng *State and Local Pension Fund Management* (2009, CRC Press) at 2.

and transferable to his or her surviving spouse and minor children upon his or her death; private security service; and medical service, including for his or her family.³⁵

Since 2009, these benefits have been enhanced and extended to the prime minister, deputy prime minister, ministers, members of Parliament and judges.³⁶ Accordingly, a retired president, prime minister and deputy prime minister continue to receive his or her monthly salary and allowance, adjusted according to the salary and allowance of the respective serving president, prime minister or deputy prime minister.³⁷ The outgoing president, prime minister and deputy prime minister with his or her family are also entitled to a four-to-five bedroom residence, medical service, security services, protocol services, three high standard transport vehicles, two fixed phonelines for the residence and a personal mobile telephone, and furnished office service if s/he wishes to be involved in public service activities.³⁸ When s/he dies, his or her salary and allowance are paid to his or her spouse or, upon the spouse's death, to his or her children under 21 years of age, together with the residence, medical and security services.³⁹ The Federal Supreme Court president and deputy president have similar benefits.⁴⁰ The law also provides that an outgoing minister, state minister or deputy minister who served for at least one election term receives a retirement pension for life if s/he attains the age of 50 years or an invalidity pension for life if s/he retires for medical reasons; if s/he dies while in service, his or her survivors receive a pension.⁴¹ In case s/he retires having served less than one election term, s/he receives a retirement gratuity if s/he has not attained the age of 50 years or an invalidity gratuity if s/he retires for medical reasons.⁴² The amount of the pension or gratuity is determined according to the relevant pension law.⁴³ The law also provides for a severance payment, maintenance, housing, vehicle and medication allowances, and security service for outgoing ministers, state ministers, deputy ministers, members of Parliament and judges.⁴⁴

The experience in Kenya and Tanzania has been similar. In Kenya, the first law of this kind was introduced in 2003 to entitle a retired president to: a lump sum retirement payment (equal to one year's salary for each service term); a monthly pension equal to 80 per cent of the current monthly salary; entertainment, housing, vehicles, fuel, medication, water, electricity and telephone allowances; a furnished office service; and a pension payable to the surviving spouse and children in case of the beneficiary's death.⁴⁵ In 2015 these benefits were extended to the deputy president, chief justice and deputy chief justice and their surviving spouse and children.⁴⁶ Tanzania's Constitution provides that a retired president receives pensions and gratuities as determined by the National Assembly unless s/he is removed from office due to charges against him or her.⁴⁷ The Tanzanian National Assembly has enacted the Political Service Retirement Benefits Act. This provides that a retired president is entitled to a monthly pension equal to 80 per cent of his or her salary, a gratuity equal to 50 per cent of the total salary received while in office as president, and a winding-up allowance equal to what he would receive over 24 months. A retired president also receives benefits including: a diplomatic passport; domestic health insurance; two motor vehicles; a four-bedroom furnished residence, including a furnished office and servants' quarters; necessary security; and a

35 Proc No 255/2001, art 13(1) and (2).

36 Proc No 653/2009.

37 *Id.*, art 3(1) and (2).

38 *Id.*, arts 4–10.

39 *Id.*, art 11(1)–(3).

40 *Id.*, arts 33–41.

41 *Id.*, arts 2(3) and 12(1)(a)–(c).

42 *Id.*, art 12(2)(a)–(b).

43 *Id.*, art 12(3).

44 *Id.*, arts 13–50.

45 Presidential Retirement Benefits Act No 11 of 2003, secs 3(a)–(c), 5, 7 and 7A.

46 Retirement Benefits (Deputy President and Designated State Officers) Act No 8 of 2015.

47 Tanzanian Constitution, arts 43(1) and 46A(11).

personal assistant, personal secretary and two drivers.⁴⁸ The law also provides benefits for retired vice-presidents, prime ministers, ministers and deputy ministers, speakers and deputy speakers of Parliament, members of Parliament, regional and district commissioners, and their survivors.⁴⁹

These retirement benefits for high-ranking government officials may be challenged because they are different from the general social security system.⁵⁰ However, while incorporating them into the pension system may be an issue that has to be considered, they are part of the right to social security in times of old age, illness and unemployment, and arguments to abolish them seem unsound.

Prohibiting political party membership as a condition for receiving political service retirement benefits

In Ethiopia, one of the grounds for terminating political service retirement benefits is an ex-president's political party membership.⁵¹ Unlike in Tanzania, in Kenya cessation from holding office or active involvement in a political party is also a precondition for entitlement to political service retirement benefits; non-observance leads to disqualification.⁵² For the author, prohibiting political party membership as a condition for receiving political service retirement benefits is an unjustifiable limitation on the right to freedom of political party membership.

In Ethiopia, Proclamation No 653/2009, which prohibits an ex-president from political party membership, did not provide for an ex-president to be assigned to any duties that might demand non-partisan service, nor did it make reference to any other similar law. Similarly, the Ethiopian Constitution did not provide that a presidential candidate or president must not be a member of any political party. The president, who is the head of state, is nominated by the House of Peoples' Representatives (HOPR) and appointed by a two-thirds majority of the joint session of the HOPR and HOF for a renewable six-year term. Upon appointment, s/he vacates his or her seat if s/he was a member of either house and takes an oath to serve faithfully.⁵³ The president's powers and functions include opening a joint session of the HOPR and HOF at the beginning of annual sessions and signing parliamentary laws to be published in *Negarit Gazeta*, but with no power to veto laws. Receiving the credentials of foreign ambassadors and envoys, appointing ambassadors, granting military titles upon recommendation by the prime minister, granting pardons, and awarding medals, prizes and gifts according to conditions and procedures established by law also fall under the president's mandate.⁵⁴ These functions do not require the president not to be a member of any political party. However, the president's role at times of government dissolution does seem to require him or her not to be a member of any political party. Where the government is dissolved due to a loss of its parliamentary majority, the president has the power to invite political parties to form a coalition government within a week.⁵⁵ In such times of political deadlock, it may be argued, for the president to be able to convene political parties with different policy interests to compromise to form a coalition government, s/he must act impartially and be accepted as impartial by all political parties who might participate in the expected coalition negotiation.⁵⁶ However, the constitution has no provision regarding an ex-president's non-partisanship or any duty that may require it.

48 Tanzanian Political Service Retirement Benefits Act No 3 of 1999, art 9.

49 *Id.*, arts 12–23.

50 For an argument that these are unconstitutional in Kenya, see *Golden Handshakes*, above at note 10.

51 Proc No 653 /2009, art 55(1)(b).

52 Presidential Retirement Benefits Act, secs 4(b)(ii) and 6(1); Retirement Benefits (Deputy President and Designated State Officers) Act, sec 4(1)(d); *Golden Handshakes*, above at note 10 at 1.

53 FDRE Constitution, arts 69 and 70(1)–(5).

54 *Id.*, art 71(1)–(7).

55 *Id.*, art 60(2).

56 Interestingly, when appointed as the first president of the FDRE, the late Dr Negasso Gidada was a member of the Oromo Peoples' Democratic Organization, one of the member parties of the former ruling coalition, the Ethiopian Peoples' Revolutionary Democratic Front that ruled Ethiopia from 1991–2018. See "Federal Democratic Republic of Ethiopia",

Under Kenyan law, the beneficiaries of political service retirement benefits are “expected to play a consultative and advisory role to the Government and the people of Kenya,” and they can be assigned to specific official functions subject to their concurrence with the payment of a reasonable allowance in respect of the official service.⁵⁷ These provisions seem overly general to justify a limitation on the right to political party membership. The grounds on which they are to advise the government and “people”, what posts they may be assigned and the connection between the possible advice and possible official function with the prohibition from political party membership are unclear.

Therefore, the prohibition from political party membership of the retired president in Ethiopia and the beneficiaries in Kenya amount to an unjust limitation on the right to freedom of political party membership. In this connection, while political service retirement benefits for high-ranking government officials are part of the right to social security in times of old age, illness and unemployment, disallowing them due to political party membership is an undue denial of the right to social security. Hence, political service retirement benefits have to be provided (either as a separate scheme or as part of the public servants’ social security scheme) without making them conditional on non-membership of any political party, as is the case in Tanzania. One expects the Ethiopian Parliament to revise (or amend) the Rights and Benefits of Outgoing Heads of State and Government, Senior Government Officials, Members of Parliament and Judges Proclamation in a way that recognizes political service retirement benefits as part of the right to social security and removes the requirement of non-membership of a political party as a condition for receiving the benefits.

Case study: Former President Dr Negasso Gidada

As noted above, when Proclamation No 255/2001 was enacted in Ethiopia, it did not only introduce benefits for a retired president. It also introduced a prohibition on presidential candidates and the president, both during and after the time of his or her presidency, being affiliated to any political party.⁵⁸ It also provided for the ex-president to remain part of the presidential institution and to be loyal to it throughout his or her lifetime.⁵⁹ The late Dr Negasso Gidada (petitioner), former president of the Federal Democratic Republic of Ethiopia, challenged the constitutionality of these provisions.⁶⁰

Institutionally, the power to decide issues of constitutional review in Ethiopia lies with the HOF.⁶¹ The HOF is one of the federal houses and it is where every Ethiopian nation, nationality and people is represented by at least one representative, with one additional representative for every additional one million people.⁶² Article 62(3) of Ethiopia’s Constitution empowers the respective state councils (the legislative houses of the federated states) to elect members of the HOF either from within their members or directly through popular vote. In practice, the state councils have chosen the first approach.⁶³ Because of this, the HOF is considered to be a political, not judicial, body.⁶⁴ To bridge the possible legal professional gap in the HOF, the CCI was set up to

available at: <<https://www.britannica.com/place/Ethiopia/Federal-Democratic-Republic-of-Ethiopia>> (last accessed 9 February 2024).

57 Presidential Retirement Benefits Act, sec 6(2) and (3); Retirement Benefits (Deputy President and Designated State Officers) Act, sec 8(1) and (2).

58 Proc No 255/2001, arts 6 and 7.

59 *Id*, arts 10 and 11.

60 *Dr Negasso Gidada’s Case*, above at note 9.

61 FDRE Constitution, arts 62(1) and 83(1).

62 *Id*, art 61(1) and (2).

63 A Fiseha *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (2nd rev ed, 2010, Eclipse Printing Press) at 132.

64 *Id* at 139; TS Bulto “Judicial referral of constitutional disputes in Ethiopia: From practice to theory” (2011) 19/1 *African Journal of International and Comparative Law* 99 at 101.

assist the HOF technically.⁶⁵ As stipulated in article 82(2) of the constitution, the CCI is composed of the president and vice-president of the Federal Supreme Court, who serve as its president and vice president respectively, six competent legal professionals with high moral standing appointed by the president of the Republic upon recommendation by the HOPR, and three members of the HOF, who are not required to be legal professionals. Procedurally, cases of constitutional interpretation may be submitted to the CCI by either any interested party or any court that faces cases involving an issue of constitutional interpretation. In such cases, the CCI investigates the matter and, if it finds issues for constitutional interpretation, submits its recommendation to the HOF for a final decision. In cases where it finds no issues of constitutional interpretation it remands the case to the concerned court or to the interested party. Any party dissatisfied by the CCI's decision may appeal to the HOF.⁶⁶ An important point here is that, if cases of constitutional interpretation are submitted directly to the HOF, the HOF forwards the case to the CCI for consideration.⁶⁷ In effect, the HOF is there not to investigate cases of constitutional review and give decisions by itself, but to "make the final decision upon draft proposal of constitutional interpretation submitted to it by the [CCI]".⁶⁸

Following this path, Negasso petitioned the CCI and challenged the constitutionality of the prohibition of political party membership as contravening the constitutionally acknowledged rights to freedom of thought, opinion and expression, assembly, demonstration and petition, freedom of association and to vote and to be elected.⁶⁹ The CCI decided against him. It reasoned that the rights and benefits provided under Proclamation No 255/2001 were provided by the proclamation, not by the constitution. Hence, in order to be entitled to those rights and benefits, obedience to the requirements provided in the proclamation is mandatory. The petitioner, the CCI added, could exercise his constitutional right to political party membership by waiving the rights and benefits the proclamation provided. The petitioner appealed to the HOF, which confirmed the CCI's decision. In addition to what the CCI said, the HOF reasoned that the president, not only as an individual but as a constitutional institution, represents and serves all the peoples of the country free from any political partiality. If he does not want to serve the country and the people impartially, as during the time of his presidency, with all his rights and benefits respected, he can waive the benefits provided to him and participate in partisan political movements, like all citizens, either individually or as political party members, and exercise his right to vote and be elected.

Two comments can be made on this decision. First, as already noted, an ex-president has no constitutionally or legally known duty to serve that may require his or her non-partisanship to justify his or her prohibition from political party membership. This decision has no purpose, except to keep the ex-president politically mute. Secondly, neither the CCI nor the HOF was able to see the constitutional basis for retirement benefits to be part of the right to social security in times of old age, illness and unemployment. They acted as if the benefits that the proclamation provided were simply given at a parliamentary whim with no constitutional watchdog. It is critical that, because the HOF's final decisions are applicable to similar future cases⁷⁰ and there is no clarity as to whether the HOF can change its precedents, this decision will be binding on similar future cases. Furthermore, as noted above, the requirement for a retired president to waive his or her freedom of political party membership as a condition for receiving political service retirement benefits has been endorsed in the new law, ie Proclamation No 653/2009. This makes the issue a living concern that needs scholarly attention and legislative remedy.

65 FDRE Constitution, art 82(1).

66 *Id.*, art 84(1)–(3).

67 Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation No 251/2001, art 6.

68 *Id.*, art 5(1).

69 *Dr Negasso Gidada's Case*, above at note 9 at 30–34.

70 Proc No 251/2001, art 11(1).

Conclusion

Both the right to political party membership and the right to social security in times of old age, illness and unemployment are recognized in international, regional and national human rights instruments. Separate from the pension system, however, there are laws entitling high-ranking government officials in Ethiopia, Kenya and Tanzania to particular retirement benefits. Unlike those of Tanzania, Ethiopian and Kenyan laws have prohibited political party membership as a condition for receiving retirement benefits. In Ethiopia, a retired president's benefits are terminated if s/he joins a political party. In cases where the government is dissolved for want of a parliamentary majority, the Ethiopian Constitution empowers the president to convene political parties to negotiate a coalition government. This may require that the president is not a member of any political party, in order to be accepted by negotiating political parties as impartial. There is not, however, any constitutional or legal ground to require a retired president to remain aloof from membership of any political party, for a retired president has no duty or power that may require his or her non-partisan service. Hence, prohibiting political party membership as a condition for receiving retirement benefits is an unjust restriction on the right to freedom of political party membership. Similarly, disallowing retirement benefits based on political party membership is an undue denial of the right to social security.

Competing interests. None