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Articles:

Comments:

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Sharing Thoughts

Quote:

“**A bad system will beat a good person every time.**”

W. Edwards Deming, 1993

Reflections:

“…[W]hat was Dr. Deming trying to convey with this quote? It wasn’t an attempt to get people to give up trying because failure was certain. It was an attempt to get people to understand the importance of the system and the futility of trying to focus on blaming people for failures.

John Hunter (February 26, 2015)

“[This quote] is more of relevance or true only “when the good person operates within a bad system.” However, if a good person works together [or] operates with other good person/s, [they] eventually will beat the bad system.”

Vasishta Bhargava (October 28, 2015)

“So if a bad system will beat a good person every time, what can you do? You have to focus not on trying harder within the current system but on changing the system so that success is built into the system.” John Hunter, (October 28, 2015)

Quote (John F. Kennedy, 13 March, 1962):

“… [T]hose who possess wealth and power in poor nations must accept their own responsibilities, they must lead the fight for those basic reforms which alone can preserve the fabric of their societies. Those who make peaceful revolution impossible will make violent revolution inevitable.”

Quote:

“**Out of 21 notable civilizations, 19 perished not by [external] conquest ..., but by moral decay from within**.”

Arnold J. Toynbee

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CONTENTS

ARTICLES (PEER REVIEWED)

COMMENTS:

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Declaration of Principles on the Grand Ethiopian Renaissance Dam: Some Issues of Concern

Dereje Zeleke Mekonnen [♣]

Abstract

The Nile Basin has long been noted as a potential flashpoint for resource conflict on account of the prevalence of inequitable water utilization and acrimonious inter-riparian relations. The basin's proneness to conflict has been exacerbated by the absence of an inclusive legal and institutional framework governing the utilization and management of its meager water resources. Unilateralism and incompatible riparian claims negating the fundamentals of international water law still continue to be the defining features of the basin. Launched in such a setting, the Grand Ethiopian Renaissance Dam (GERD) constitutes a significant counter-hegemonic measure capable of inducing a positive transformation in the basin's inequitable status quo. A lasting solution which would ensure the equitable and sustainable utilization of the Nile waters for the benefit of all is, however, still elusive as the signing of the Declaration of Principles (DoP) poses challenges which might arguably neutralize the transformative impact of the GERD and entail institutionalization of the status quo.

Key terms

GERD · Declaration of Principles · International Water Law · Equitable Utilization · Nile Basin

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Introduction

Cooperative development and utilization of transboundary watercourses carries enormous potential economic benefits for riparian states. In the absence of

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cooperation where competition and unilateral actions often constitute the *modus operandi*, trans-boundary watercourses pose huge risk of being cause for conflict. The enormity of the potential benefits and the seriousness of the risk are, arguably, more evident in the Nile basin than in other major international basins.

According to Sadoff and Grey, cooperation offers riparian states a wide spectrum of benefits of an economic, environmental and political nature.[1] In the Nile basin, the economic value of cooperation involving limited infrastructure development in the Blue Nile sub-basin has been estimated to be between USD 1.15 billion and 1.97 billion.[2] Utilization of Nile water for irrigation and hydroelectric power generation has been estimated to generate an annual gross economic benefit to the tune of USD 11 billion.[3]

Tapping the enormous potential benefits of the Nile waters through cooperative development and equitable utilization requires overcoming the many challenges which not only make realization of these benefits extremely difficult but also aggravate the basin's proneness to conflict. The difficult hydrologic environment of the basin,[4] especially the relatively small discharge,[5] the hegemonic hydro-political configuration prevalent in the basin,[6] the

[1] C. Sadoff & D. Grey (2002), "Beyond the River: The Benefits of Cooperation on International Rivers", 4 *Water Policy*, pp. 389-403. The authors point out four major benefits of cooperation: benefits to the river, benefits from the river, reducing costs because of the river, and benefits beyond the river.

[2] D. Whittington, X. Wu & C. Sadoff (2005), "Water Resources Management in the Nile Basin: The Economic Value of Cooperation", 7*Water Policy*, p. 249.

[3] *Ibid.*

[4] D. Grey & C. Sadoff (2007), "Sink or Swim? Water Security for Growth and Development", 9 *Water Policy*, p. 548. The hydrologic environment of a basin which refers to "the absolute level of water resource availability, its inter- and intra-annual variability and its spatial distribution" is said to be difficult "where rainfall is markedly seasonal – a short season of torrential rain followed by a long dry season [which] requires the storage of water; or where there is high inter-annual climate variability, where extremes of flood and drought create unpredictable risks to individuals and communities and to nations and regions and require over-year water storage." *Ibid*., p. 549.

[5] N. Kliot (1994), *Water Resources and Conflict in the Middle East*, (London, Rutledge), p. 13. The 84 billion cubic metres annual flow of the Nile is the lowest discharge of comparable large rivers. R. Collins (2002), *The Nile* (New Haven & London: Yale University Press), p. 11, gives a figurative description of the small flow of the Nile which constitutes only "a mere cup (2 per cent) of the Amazon, perhaps a glass (15 per cent) of the Mississippi, or at best a pitcher (20 per cent) of the Mekong."

[6] M. Woodhouse & M. Zeitoun (2008), "Hydro-hegemony and International Water Law: Grappling with the Gaps of Power and Law", 10 *Water Policy* Supplement 2, p. 113. The authors describe Egypt's hegemonic position in the Nile basin as a malign form of hydro-hegemony maintained in utter disregard of the principles of international water law.

comparatively poor and rancorous inter-riparian relationship,[7] and the absence of an inclusive legal framework are some of the major hurdles[8] which have forced many observers to make ominous predictions of conflict over the Nile waters.[9]

Although the basin embarked on a new era of unprecedented cooperation and optimism following the launching, in February 1999, of the Nile Basin Initiative (NBI), hard-won rapprochement began to give way to acrimonious dispute following rejection of the Cooperative Framework Agreement (CFA) by Egypt and Sudan. At the heart of the problem lies the fate, vis-à-vis the CFA, of "existing treaties", i.e., the 1929 and 1959 treaties on the basis of which Egypt and Sudan claim historical rights over the entire flow of the Nile. In common legal parlance, the problem pertains to disagreement over a proposed amendment to Article 14(b) of the CFA on water security. In reality though, it signifies an about-face on the shared vision of the NBI[10] which affirms the determination of Egypt and Sudan to deny upstream riparian countries of their right to any consumptive utilization of the Nile waters.

This article argues that the launching of the GERD at a critical moment in the history of Nile riparian cooperation offers a unique opportunity for change as it represents a potent counter-hegemonic measure the recalcitrant downstream riparian states cannot afford to be indifferent about. The first real opportunity for change towards cooperative development and equitable utilization, it will be argued, is however threatened by unfolding developments which might neutralize the impact of the GERD and institutionalize the untenable status quo in a new legal framework involving erosion of the fundamental principles of international water law.

[7] For a discussion of the poor inter-riparian relationship and the reasons thereof, see Dereje Z. Mekonnen (2013), "The Quest for Equitable Resolution of the Nile Waters Dispute: Wandering in the Wilderness?" *International Journal of Ethiopian Studies* VII (1 & 2), pp. 81-87.

[8] For a detailed discussion of the various challenges, see Dereje Z. Mekonnen (2011), "Between the Scylla of Water Security and Charybdis of Benefit Sharing: The Nile Basin Cooperative Framework Agreement – Failed or Just Teetering on the Brink?" *Goettingen Journal of International Law* 3(1), pp. 349-355.

[9] J. Kerisel (2001), *The Nile and its Masters: Past, Present, Future* (Rotterdam: A.A. Balkema Publishers), p. 164; Kliot, *supra* note 5, p. 18.

[10] The NBI was launched under the shared vision "to achieve sustainable socio-economic development through the equitable utilization of, and benefits from, the common Nile Basin water resources." Claiming historical right over the entire flow and thus denying other riparian states of any share thereof obviously negates the very substance of the shared vision.

1. The Untenable Status Quo

The status quo in the Nile basin is the product of lopsided colonial treaties which, in total disregard to the rights of other riparian states, were designed to serve British colonial interests downstream in Egypt and Sudan. As a result, the basin exhibits a distinctively inequitable pattern of water utilization not seen in any other international basin. Although the Nile is shared by 11 riparian states with burgeoning populations and economies highly dependent on agriculture, the status quo vests Egypt and Sudan –downstream riparian states with little or negative contribution–[11] with exclusive right over the entire flow. It is this extremely inequitable state of affairs which Egypt and Sudan claim as their non-negotiable historical right. This claim, which has recently been rebranded as 'water security', has its roots in the 1929 Agreement which was further reinforced by the 1959 Agreement. Both agreements, however, have no legal force binding upon the upstream riparian states and hence, the inequitable status quo they allegedly undergird has no basis in international law.

1.1. The 1929 Agreement

Concluded through the exchange of notes between Egypt and the United Kingdom, the 1929 agreement[12] constitutes the mainstay of the status quo in the Nile basin. The agreement allocated the then utilizable flow of the Nile to Egypt and Sudan in the ratio of 48 and 4 billion cubic metres as their respective 'acquired rights'.[13] The agreement was made in the aftermath of a political tension between the governments of Britain and Egypt which reached its peak in 1924 when Egyptian nationalists demanding unity of Sudan with Egypt killed the British Governor-General of Sudan.[14] Britain responded with a threat to reduce the flow of the Nile by an unlimited increase in Sudanese irrigation.[15] When the matter was finally settled in 1929, Egypt recognized Sudan's right to

[11] Kliot, *supra* note 5, pp. 23, 25 and 39, pointing out the fact that Egypt and Sudan are points of great water loss in the Nile basin. The *Sudd* swamp in the South Sudan is the point of the biggest loss where between 12 and 30 billion cubic metres of water is lost annually. In Egypt, between 12 and 15 billion cubic metres of water is lost annually due to evaporation from Lake Nasser in addition to the 0.6 to 2 billion cubic metres lost annually due to seepage.

[12] Agreement on the Use of the Waters of the River Nile for Irrigation Purposes, concluded on the 7th of May 1929, in Cairo, available at http://ocid.nacse.org/tfdd/tfdddocs/92ENG.pdf (last visited 20 July 2017).

[13] Tesfaye Tafesse (2001), *The Nile Question: Hydropolitics, Legal Wrangling, Modus Vivendi and Perspectives* (Piscataway, NJ: Transaction Publishers), pp. 74-75.

[14] J. Dellapenna (1997), "The Nile as a Legal and Political Structure", in E. Brans *et al* (eds.), *The Scarcity of Water: Emerging Legal and Policy Responses* (Kluwer Law International), p. 125.

[15] *Ibid.*

utilize an increased quantity of the Nile waters while Britain, in addition to recognizing Egypt's natural and historical rights in the Nile waters, agreed to make safeguarding of the rights a fundamental principle of its policy.[16]

The agreement which was concluded eight decades ago between Egypt and Britain is claimed to have a continued binding force on the former British colonies of Kenya, Uganda and Tanzania as successor riparian states. For the obvious fact that Ethiopia was never a British colony, any discussion on whether or not the 1929 agreement has a continued binding force is of no relevance. The claim though has no legal basis even with regards to the former British colonies as it is rooted in the theory of universal succession which entails the compulsory transfer of all the rights and obligations of the predecessor state to its successors.[17] International law applies, with regards to succession to treaties, the clean slate (*tabula rasa*) theory which relieves the successor states of any duty to be bound by the obligations of the predecessor state.[18] Contrary to the unfounded claim of wholesale transmission of treaty rights and obligations, succession in respect of the 1929 agreement has entailed "discontinuity of all rights and obligations completely and automatically".[19]

The independent successor states could, of course, extend the binding effect of the agreement either through the conclusion of devolution agreements or by declaring to be bound by it.[20] What they did upon independence though is the exact opposite: Tanganyika (now Tanzania) declared the 1929 agreement not binding upon it in identical notes addressed to the governments of Britain, Egypt and Sudan on 4 July 1964; Uganda and Kenya followed Tanganyika in rejecting the agreement on the same grounds.[21] There is, therefore, no legal basis to ensure the continued binding force of the 1929 agreement even on the former British colonies of Kenya, Tanzania and Uganda.[22]

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[16] Dereje Z. Mekonnen (2010), "The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a Water Security Paradigm: Flight into Obscurity or a Logical Cul-de-sac?" *European Journal of International Law* 21(2), p. 432.

[17] *Id.*, pp. 432-433.

[18] *Ibid*.

[19] Yilma Mekonnen (1986), "State Succession in Africa: Selected Problems", 200 *Recueil de Cours international* (V), pp. 107-108.

[20] Dereje, *supra* note 16, p. 434.

[21] S. McCaffrey (2001), *The Law of International Watercourses: Non-Navigational Uses* (Oxford: Oxford University Press), pp. 245-246.

[22] P. Howell (1994), "East Africa's Water Requirements: the Equatorial Nile Project and the Nile Waters Agreement of 1929: A Brief Historical Review", in P. Howell & J. Allan (eds.), *The Nile: Sharing a Scarce Resource: An Historical and Technical Review of Water Management and of Economical and Legal Issues* (Cambridge University Press), p. 86. The claim is not only bereft of any legal basis in international law but is also factually unfounded. Through the East African Nile Waters Coordinating Committee established in

1.2. The 1959 Agreement

The Agreement for the Full Utilization of the Nile Waters[23] signed by Egypt and Sudan on 8 November 1959 is a patently anomalous deal which, though a purely bilateral treaty entered into between two downstream riparian states making very little contribution to the flow, "seeks to apportion the entire flow of the Nile to Egypt and Sudan, excluding the interests of any other riparian, notably Ethiopia".[24]

The agreement reaffirmed the 'acquired rights' of Egypt and Sudan to 48 and 4 billion cubic meters respectively. It also allocated the 22 billion cubic metres of Nile water to be made available through the construction of the *Sudd el Ali* (Aswan) and Roseires dams to Egypt and Sudan which received 7.5 and 14.5 billion cubic metres respectively realizing, thereby, the full control and utilization of the Nile waters by the two parties.[25] The agreement has apportioned the entire flow of the Nile to Egypt and Sudan, further raising their respective share to 55.5 and 18.5 billion cubic metres and leaving, thus, literally no water for the nine upstream riparian states.

Unlike the 1929 Agreement, the 1959 Agreement is the first agreement concluded by independent riparian states. In terms of substance and objective, however, it is not different from the 1929 agreement as it purportedly created a complete monopoly over the waters of the Nile. Despite the baseless claim of the parties, the complete monopoly created by the agreement has no legal basis whatsoever. As a bilateral treaty signed by Egypt and Sudan, whatever rights and obligations it created bind only the parties.[26] For the upstream riparian states which are third parties, the agreement is of no legal significance as it neither confers any right nor imposes any obligation on them.[27]

1955 to represent the interests of Kenya, Tanzania and Uganda with a view to determining a common policy, the East African governments had declared their inherent and indisputable right to a share of the Nile waters. Likewise, the Government of Britain of the day had, in a 22 November 1955 Note to the Egyptian and Sudanese Governments, reserved the right of the East African territories to negotiate an agreed share of the Nile waters.

[23] Agreement between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, Cairo (8November 1959) available at: http://ocid.nacse.org/qml/research/tfdd/toTFDDdocs/110ENG.pdf (last visited 20 July 2017)

[24] J. Brunnee & S. Toope (2002), "The Changing Nile Basin Regime: Does Law Matter?', 43 *Harvard Int'l Law Journal*, pp. 125-126.

[25] Dereje, *supra* note 16, p. 435.

[26] Articles 34 and 35, Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

[27] *Id*., Articles 34, 35 and 36.

2. International Water Law: The Fundamentals

The international legal regime governing the utilization and management of shared international watercourses is anchored in the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses.[28] The Convention which is "generally regarded as reflecting the fundamental rules of customary international law applicable in the field,"[29] sets forth general principles[30] that govern the conduct of riparian states sharing international watercourses. The most fundamental principles which define the rights and obligations of riparian states are the principle of equitable and reasonable utilization and the obligation not to cause significant harm.

2.1. Equitable and Reasonable Utilization

Rooted in the principle of sovereignty, the principle of equitable and reasonable utilization affirms the right of riparian states to utilize, in their respective territories, an international watercourse in an equitable and reasonable manner.[31] The primary function of the principle is to establish "entitlement to the use of volumes of water or entitlement to undertake certain activities on an international watercourse."[32] It is a principle "chiefly […] governing apportionment, or allocation, of water between states sharing an international watercourse".[33] In terms of normative status, there is "no rule of international law concerning the use of international watercourses more fundamental than that of equitable and reasonable utilization."[34]

Determination of what is equitable and reasonable in a given case is made by taking into account all relevant factors and circumstances an indicative list of which is provided under Article 6 of the UN Watercourses Convention.[35] The

[28] UN Convention on the Law of the Non-Navigational Uses of International Watercourses 1997, (1997) 36 ILM 700.

[29] A. Grzybowski, S. McCaffrey & R. Paisley (2010), "Beyond International Water Law: Successfully Negotiating Mutual Gains Agreements for International Watercourses", 22 *Global Business & Development Law Journal*, p. 141.

[30] The general principles provided for in part two of the Convention are: equitable and reasonable utilization and participation, factors relevant to equitable and reasonable utilization, obligation not to cause significant harm, general obligation to cooperate, regular exchange of data and information, and relationship between different kinds of uses.

[31] UN Watercourses Convention, *supra* note 28, Article 5.

[32] X. Fuentes (1998), "Sustainable Development and the Equitable Utilization of International Watercourses", 69 *British Yearbook of International Law*, p. 137.

[33] S. McCaffrey, *supra* note 21, p. 325.

[34] Grzybowski, McCaffrey & Paisley, *supra* note 29, p. 141.

[35] The non-exhaustive list of factors relevant to the determination of equitable and reasonable utilization listed under Article 6 are: (a) geographic, hydrographic,

fact that the Convention mentions "existing and potential uses of the watercourse" among the factors to be taken into account in the determination of equitable and reasonable utilization signifies the illegitimacy of the 'historical rights' claim Egypt and Sudan make to the entire flow of the Nile.

2.2. Obligation Not to Cause Significant Harm

In the context of shared international watercourses where all riparian states have the right to equitable and reasonable utilization in their respective territories, there is a higher likelihood for violation of the rights of some riparian states by others. The obligation not to cause significant harm is another fundamental principle of international water law which circumscribes the right to equitable and reasonable utilization by obliging watercourse states, while utilizing an international watercourse in their territories, "to take all appropriate measures to prevent the causing of significant harm to other watercourse states."[36]

In view of the significant impact the obligation has in determining the legitimacy and propriety of a given utilization, understanding the true purport of the prohibition is crucial. Accordingly, what the obligation pertains to is "harm as a legal injury" and not to "factual harm". Hence, "what is prohibited is conduct by which one state exceeds its equitable share, or deprives another state of its equitable share of the uses and benefits of the watercourse."[37]

Application of the obligation thus presupposes a prior determination of the specific rights of riparian states where any utilization in excess of one's equitable share or depriving another state of the same would be a violation of international law. In the absence of a legal framework determining the specific rights of riparian states, there is no room for application of the obligation. In the context of the Nile basin though, it is Egypt and Sudan which, by apportioning the entire flow to themselves and foreclosing future uses by upstream riparian states,[38]stand in flagrant violation of the obligation. Being downstream riparian

hydrological, climatic, ecological and other factors of a natural character; (b) social & economic needs of watercourse states; (c) population dependent on the watercourse; (d) effects of use in one watercourse state on other watercourse states; (e) existing and potential uses; (f) conservation, protection, development and economy of use and the costs of measures taken to that effect; and (g) the availability of alternatives, of comparable value, to a particular planned or existing use.

[36] UN Watercourses Convention, *supra* note 28, Article 7(1).

[37] S. McCaffrey (1986), "Second Report on the Law of the Non-Navigational Uses of International Watercourses", 2 *Yearbook of International Law Commission* 2(1), p. 133.

[38] Downstream riparian states in general and Egypt and Sudan in particular tend to perceive the obligation as proscribing upstream riparian states from making use of the shared watercourse even when such legitimate exercise of a right causes only factual harm. Contrary to this erroneous understanding, the obligation proscribes downstream

states, there is little they can do to foreclose utilization by upstream riparian states. It is evident, therefore, that the untenable status quo and the unfounded claim to veritable ownership of the entire flow of the Nile would inevitably crumble if and when significant hydraulic projects like the GERD become reality.

3. The GERD: A Harbinger of Change?

The quest for equity and fairness in the utilization of the Nile waters spans a period of over five decades with a series of unsuccessful cooperative initiatives.[39] In spite of the immense hope and optimism which surrounded the launching of such initiatives, change in the inequitable status quo has proven to be more of a chimera than an attainable objective. The history of basin-wide cooperative initiatives from *Undugu* to the NBI is a history of failure in terms of bringing about change in the iniquitous status quo.

Launched in 1983 upon the proposal of Egypt, *Undugu* was the first basin-wide cooperation initiative which served as a platform for the discussion of matters pertaining to the Nile waters within a broad array of issues including agriculture, resource development, promotion of economic, technical and scientific cooperation among the riparian states.[40] The five founding members of *Undugu* – Egypt, Sudan, Uganda, the DRC and the Central African Republic – were joined by Burundi, Rwanda and Tanzania whereas Ethiopia and Kenya participated as observers.[41]

Compared to the prevalent pattern of riparian cooperation the hallmarks of which were bilateralism and exclusive focus on technical issues, *Undugu* could be regarded as a major step forward as it involved almost all the riparian countries and purported to address a wide spectrum of issues. It also succeeded in making modest contributions to the development of the basin through fact-finding activities carried out with the support of the UNDP to help the formulation of a comprehensive economic plan including water resource development.[42]

In terms of bringing about change in the basin's inequitable status quo, or even the hope for such a change, *Undugu* was a complete failure which arguably undermined the incipient mutual trust amongst riparian states. The primary reason for the failure and subsequent deterioration of inter-riparian relations was

utilizations which foreclose or curtail future uses upstream (Grzybowski, McCaffrey and Paisley, *supra* note 29, p. 142).

[39] Dereje, *supra* note 7, pp. 81-87.

[40] *Ibid*., p. 85.

[41] *Ibid.*

[42] *Ibid.*

lack of genuine commitment on the part of Egypt which used the initiative as a tool for hegemonic influence.[43] In a manner typical of an oppressive hydro-hegemon,[44] Egypt insisted that the top agenda of *Undugu* should be hydropower generation through joint hydroelectric projects connecting the national electricity grids of the riparian countries proceeding, at the same time, with its own giant irrigation and land reclamation projects.[45] Abused by its progenitor and perceived, arguably appropriately, as an Egyptian ploy to contain the upstream riparian states,[46] *Undugu* evanesced leaving the riparian states in a state of deeper mistrust and suspicion.

The history of the Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile (Tecconile), another basin-wide cooperative scheme initiated by Egypt, is not different from its predecessor in terms of bringing about change in the status quo. Although it was considered to be a new arrangement which had managed to stave off the political dominance Egypt has had on *Undugu*,[47] Tecconile remained strongly technical in its focus thereby constraining upstream riparian countries like Ethiopia from becoming full members.[48] One remarkable achievement of the Tecconile is, of course, the Nile River Action Plan which was formally approved by the Council of Ministers of Water Affairs in 1995 in Arusha, Tanzania.[49] In much the same way as that of *Undugu*, the significance of Tecconile was neutralized as an important component of the Action Plan on Regional Cooperation which envisaged the establishment of a basin-wide legal and institutional framework failed to materialize.[50]

Tecconile was, one can argue, redeemed from being a total failure by Ethiopia's insistence on the inclusion of the determination of equitable entitlement of riparian states to the Nile waters as a priority issue in the Action Plan. Unanimously approved as a priority project and incorporated into the Action Plan as such, the Nile Basin Cooperative Framework provided the basis

[43] *Ibid.*
[44] M. Woodhouse & M. Zeitoun M (2008), "Hydro-hegemony and International Water Law: Grappling with the Gaps of Power and Law", 10 *Water Policy*, Supplement 2, p. 113.
[45] *Ibid.*
[46] A. Soffer (1999), *Rivers of Fire: The Conflict over Water in the Middle East* (Lanham, MD: Rowman & Littlefield Publishers), p. 62. The initiative was launched with the objective of maintaining the status quo by preventing the utilization of the Nile waters upstream and *Undugu* was intended to be a tool for the supervision and control of Nile water utilization upstream.
[47] Brunee & Toope, *supra* note 24, p. 133.
[48] Dereje, *supra* note 16, p. 427.
[49] *Ibid*.
[50] Brunnee & Toope, *supra* note 24, p. 135.

for the next basin-wide cooperative initiative launched in 1999 in the form of the NBI.[51]

The launching of the NBI was a milestone which evoked immense hope and optimism unprecedented in the basin's history. What made the NBI radically different from previous initiatives was the determination, from the outset, of the basin states to make the long eschewed issue of equitable utilization of the Nile waters a centerpiece of the new initiative by endorsing achievement of "sustainable socio-economic development through the equitable utilization of, and benefits from, the common Nile Basin water resources" as their Shared Vision.

The potential profound change in the basin's unfavourable hydro-political configuration[52] adoption of the Shared Vision was believed to bring about was critical in motivating the reluctant upstream riparians into full membership and participation in the NBI process. The initiative brought about a "remarkable shift in the tone and substance of state-to-state relationships"[53] ushering in a new era of rapprochement and cooperation which made possible the negotiation of an inclusive legal and institutional framework for over a decade.[54]

In spite of the relentless decade-long effort to make it a success, the NBI could not escape failure[55] as the CFA which would have sealed the onset of a real change and progress was rejected by Egypt and Sudan, following which inter-riparian relationships rapidly deteriorated as rapprochement and optimism soon gave way to unprecedented rancor and sabre-rattling. This unfortunate turn of events compels an inquiry into whether there is any room left for cooperative development and shared utilization of the Nile waters. Given the obstinate stance of Egypt and Sudan with regards to the CFA, one would be justified to surmise that the initial endorsement of the Shared Vision by the two downstream riparian countries was a hegemonic ploy to preempt or delay unilateral actions by upstream riparian countries and buy time to pursue their own unilateral hydraulic projects.[56]

The situation has given upstream riparians, notably Ethiopia, the hard lesson that change in the inequitable status quo will not come from the negotiating

[51] Dereje, *supra* note 16, p. 427.
[52] Dereje, *supra* note 8, pp. 349-350.
[53] Brunnee & Toope, *supra* note 24, p. 132.
[54] For a detailed discussion of the negotiation process and the challenges, see Dereje, *supra* note 16, pp. 427-431.
[55] A. Cascão (2009), "Changing Power Relations in the Nile River Basin: Unilateralism vs. Cooperation?" *Water Alternatives* 2(2), p. 263.
[56] Dereje Z. Mekonnen (2010), "From Tenuous Legal Arguments to Securitization and Benefit Sharing: Hegemonic Obstinacy – the Stumbling Block against Resolution of the Nile Waters Question", *Mizan Law Review* 4(2), p. 234.

table. For Ethiopia, the lesson has an element of a *déjà vu* reminiscent of the 1950s where a formal objection to its exclusion from the negotiation of the 1959 Agreement received no attention and thus made no impact.[57] Egypt and Sudan ignored Ethiopia's plea and signed the 1959 Agreement which allocated the entire flow between them leaving nothing for the country contributing 86% of the flow. Ethiopia seems, this time around, to have taken its lessons from history that mere assertion of a right, however legitimate and well founded in law and equity, does not make a difference in reality unless the claimant demonstrates resolve to back it up with action.

Launched after almost all efforts for cooperative development have been frustrated,[58] the GERD has proven to be a potent counter-hegemonic measure which jolted the malign hydro-hegemon[59] hitherto unwilling to acknowledge the fundamental rights of upstream riparian countries. The GERD as such is, undoubtedly, a harbinger of change in a basin locked for decades in a hydro-hegemonic stasis[60] impervious to even moderate change. Whether the apparently inevitable change would materialize and ensure equitable utilization of the Nile waters by all basin states is far from certain as normative compliance producing mechanisms set in motion following the launching of the GERD pose a real challenge of institutionalizing the status quo to the advantage of the hydro-hegemon.

4. Twin Challenges Posed by the DoP

The inequitable status quo in the Nile basin has been sustained mainly by the overwhelming power asymmetry undergirding Egyptian hegemony[61] which was reinforced by the enduring weaknesses of upstream riparian countries which could not go beyond making claims to equitable and reasonable share of the

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[57] M. Whiteman (1964), *Digest of International Law* (US Government Printing House), pp. 1011-1012.

[58] R. Tawfik (2016), "The Grand Ethiopian Renaissance Dam: a Benefit Sharing Project in the Eastern Nile?", *Water International* 41(4), p. 577. Some Joint Multipurpose Projects abandoned following Egypt's rejection of the CFA and its withdrawal from the NBI include all efforts at cooperative development through JMPs under the auspices of the NBI frustrated by Egypt's rejection of the CFA and its withdrawal from the NBI: pre-feasibility study of Karadobi hydropower project with installed capacity of 1600 MW; pre-feasibility studies of the Border Dam (now the GERD), a hydropower project with a storage capacity of 14.5 BCM and an installed capacity of 800 MW, and Mandaya hydropower project with an installed capacity of 2400-2800 MW, all finalized in 2008.

[59] Woodhouse & Zeitoun, *supra* note 44, p. 113.

[60] A. Cascão & A. Nicol (2016), "GERD: New Norms of Cooperation in the Nile Basin?" *Water International* 41(4), p. 552.

[61] A. Cascão (2008), "Ethiopia–Challenges to Egyptian Hegemony in the Nile Basin", 10 *Water Policy* Supplement 2, p. 15.

waters doing little, in terms of launching hydraulic projects, to challenge the inequitable pattern of utilization. Continuation of the status quo has also been made possible by the successive cooperative initiatives which served, in large measure, as instruments of hegemonic control to stall potential developments upstream.[62]

The launching of the GERD marks the first ever real challenge to the status quo which may induce a positive transformation in the basin by forcing the recalcitrant hydro-hegemon to accept the best scenario of cooperative development and shared utilization within the permanent legal and institutional framework brought into existence by the CFA. The likelihood of this scenario being pursued though is very slim as both Egypt and Sudan still believe in the possibility of perpetuating the status quo and have, to this end, adopted a two-pronged strategy aimed at thwarting the transformative impact of the GERD and institutionalizing the status quo by eroding the fundamental principles of international water law.

4.1. Institutionalization of the Status Quo

The attempt to institutionalize the status quo by preempting the applicability of international water law as the framework within which the Nile waters question would find a lasting solution may be traced back to the inclusion of the principle of water security in the CFA**.** Although the principle was included with the hope and belief that it would help overcome the impasse in the negotiation process, it has turned out to be a Trojan horse of the inequitable status quo.[63] The claim to exclusive right over the entire flow of the Nile pursued under the mantra of 'historical rights' which the principle of water security was hoped to dispel reappeared using the same principle as a convenient cloak.

Apparently a minor difference over a proposed amendment to a sub-provision of the CFA (Article 14/b), the proper impact of the proposal in terms of redefining the substance of International Water Law in a manner conducive to the institutionalization of the status quo should not be overlooked. A closer reading of the proposal[64] shows that it introduces two changes which would significantly redefine water security to mean an acknowledgement of the veritable ownership Egypt and Sudan claim over the entire flow of the Nile. The

[62] Dereje, *supra* note 7, pp. 81-87.
[63] *Id.*, pp. 90-92.
[64] Annexed with the CFA to be resolved by the Nile River Basin Commission within six months of its establishment, Article 14(b) to which all countries except Egypt and Sudan agreed spells out the obligation "not to significantly affect the water security of any other Nile Basin state." Egypt proposed a different formulation to replace the agreed version with obligation "not to adversely affect the water security and current uses and rights of any other Nile Basin State."

first change replaces the word "significant" by "adverse" thereby lowering the threshold of harm below the international law standard. The second and far more sinister change extends the scope of the obligation to include "current uses and rights". Given the fact that Egypt and Sudan are currently using the entire annual flow, the proposal signifies a position antithetical to the fundamental principles of international water law demanding upstream riparian states to forego their right to equitable and reasonable utilization of the Nile waters.

The DoP signed on 25 March 2015 by Ethiopia, Egypt and Sudan[65] represents another challenge providing a new legal basis for the institutionalization of the status quo with little concession for upstream riparian Ethiopia. Although Egypt was intent on blocking implementation of the GERD project by all means,[66] realization of its inability to stop the GERD which rather came to be a fact on the ground is the primary consideration which forced a change in strategy.[67] Egypt, thus, came back to the negotiation process and signed the DoP with the objective of institutionalizing the status quo by a normative limitation of upstream riparian rights to non-consumptive utilization – essentially, hydropower generation.

The first prong of the new strategy is evident in the substance of the second principle of the DoP which, in spite of its alluring caption, limits the purpose of the GERD to power generation.[68] With regards to the GERD, therefore, the exclusive consumptive utilization of the Nile waters by Egypt and Sudan has been transformed from being a challenged fact on the ground into a legal reality Ethiopia is bound to honor and respect. The trajectory of the new strategy

[65] Agreement on Declaration of Principles between the Arab Republic of Egypt, the Federal Democratic Republic of Ethiopia and the Republic of the Sudan on the Grand Ethiopian Renaissance Dam Project, signed at Khartoum, Sudan; official text available at http://www.hornaffairs.com/en/2015/03/25/egypt-ethiopia-sudan-agreement-on-declaration-of-principles-full-text (last visited 15 July 2017).

[66] Tawfik, *supra* note 58, pp. 580-581. Egypt's initial response to the GERD was vehement opposition alleging violation by Ethiopia of international law, especially the obligation not to cause significant harm and the principles of prior notification and consultation as well as obligations under the 1902 treaty and the 1993 agreement both of which, allegedly, prohibit construction of the GERD as it would cause appreciable harm to Egypt. When Morsi assumed the Presidency, the challenge took the old-fashioned tactics of "threatening to use force if Egypt's share of the Nile waters were affected, insisting that Egypt accepted no infringements on its water security."

[67] *Ibid*. Tawfik explains Egypt's acceptance of the GERD as an unavoidable fact on the ground as a result of the realization of "the limitations of employing the empty rhetoric of threatening to use force, and referring to legal means."

[68] The Second Principle on the GERD, captioned Principle of Development, Regional Integration and Sustainability, reads: "The purpose of GERD is for power generation, to contribute to economic development, promotion of transboundary cooperation and regional integration through generation of sustainable and reliable clean energy supply."

becomes even more evident when the questionable limitation of the purpose of the GERD –a national project fully financed by Ethiopia– to power generation is contrasted with huge hydraulic projects launched by Egypt and Sudan with no discussion on what their purposes should be. The Southern Valley (Toshka) project in Egypt and Merowe Dam in the Sudan are prime examples.

Launched in 1997 for the purpose of reclaiming some 3.4 million *feddans* of agricultural land using 5.5 billion cubic metre of Nile waters pumped out of Lake Nasser, the project is expected to provide home for about 7 million Egyptians to be moved to the Southern Valley.[69] With its objection conveniently ignored, all Ethiopia could do then was to make its position clear, through a March 20, 1997 note verbale to Egypt, that "it will not allow its share to the Nile waters to be affected by a *fait accompli* such as the Toshka project, regarding which it was neither consulted nor alerted."[70]

The Merowe Dam (Merowe Multi-Purpose Project), "Sudan's largest and most significant water project" with annual electricity yield of 1250 MW and the potential for irrigation of up to 20,000 ha of land[71] was completed in 2008. No upstream riparian country was "consulted or alerted" and Egypt, in spite of its concern about the irrigation plans, accepted the Merowe as a fact merely contending that its use should not go beyond power generation.[72]

The DoP which has become the latest vehicle for institutionalization of the inequitable status quo has been portrayed as a success for upstream riparian countries allegedly signifying recognition by Egypt and Sudan of "the equality of all the Nile states" and acknowledgement by both of "the right of these states to utilize the waters of the Nile for the sustainable development of their people".[73] No part of the DoP, however, warrants such a wildly optimistic reading and, contrary to this unwarranted optimism, the Egyptian Ministry of Foreign Affairs has made it abundantly clear that it "will not affect historical agreements and the water share allocated in these agreements."[74] The

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[69] S. Lonergan & A. Wolf (2001), "Moving Water to Move People The Toshka Project in Egypt A Water Forum Contribution", *Water International* 26(4), p. 590. The enormous cost of the project (considered as Mubarak's Pyramid) out of which only 20 to 25 percent is to be borne by the government is claimed to be the reason behind Egypt's involvement with the NBI which was used as a symbol of riparian cooperation to bring World Bank investment into Egypt (*Id*., 591, 593).

[70] S. Salman (2010), "Downstream Riparians Can Also Harm Upstream Riparians: The Concept of Foreclosure of Future Uses", *Water International* 35(4), p. 358.

[71] M. Saleh (2008), "Hydro-hegemony in the Nile Basin: a Sudanese Perspective", 10 *Water Policy* Supplement 2, p. 33.

[72] S. Salman (2016), "The Grand Ethiopian Renaissance Dam: The Road to the Declaration of Principles and the Khartoum Document", *Water International* 41(4), p. 514.

[73] *Id*., p. 522.

[74] Tawfik, *supra* note 58, p. 582.

unwarranted optimism about the DoP has also been reinforced by an equally unwarranted perception of Sudan's political support for the GERD[75] as "a ground shaking decision which virtually ended its more than half a century Nile alliance with Egypt."[76]

In view of the fact that Sudan has become increasingly dependent on irrigation agriculture as a result of the huge loss of oil revenue entailed by the secession of the South Sudan,[77] its support for the GERD is predicated on a pragmatic consideration of the variegated benefits the Dam avails to it,[78] the most important one being expansion of its irrigation potential[79] using the regulated flow of the Blue Nile –a huge benefit of GERD it will enjoy with no cost. The DoP, thus, signifies a renewed convergence of strategic objectives rather than the waning of half a century of alliance between Egypt and Sudan**.**

4.2. Erosion of the Fundamental Principles of International Water Law

The relevance and irreplaceable role of International Water Law in bringing about a durable solution for the restive Nile basin cannot be disputed. The prospect for such a solution has, however, been significantly undermined by a series of factors including stagnation of the NBI,[80] "riparian race to unilaterally capture as much of the resource as possible through a multitude of giant hydraulic projects"[81] and rejection of the CFA which is indicative of a far more serious challenge –rejection of international water law as the appropriate framework within which the Nile waters question should be resolved. In light of this, cutting a deal with two recalcitrant riparian states who stand in opposition to the CFA showing no signs of moderation does not bode well for the CFA and

[75] *Id.*, p. 579. Sudan's political support for the GERD is predicated on the potential benefits of the project in terms of flow regulation which would significantly increase the irrigated agricultural and reduction in sedimentation which would improve the operation of its dams.

[76] Salman, *supra* note 72, p. 518.

[77] Tawfik, *supra* note 58, p. 585.

[78] D. Whittington, J. Waterbury & M. Jeuland (2014), "The Grand Renaissance Dam and Prospects for Cooperation on the Eastern Nile", 16 *Water Policy*, p. 600.

[79] A. Tesfaye (2014), "Conflict and Cooperation and the Evolution of the Nascent Nile Basin Regime", *Northeast African Studies* 14(1), p.130. Sudan has planned expansion of its irrigated agriculture from 2 to 4.8 million ha requiring 25 billion cubic metre of additional water annually. See also A. Swain (2011), "Challenges for Water Sharing in the Nile Basin: Changing Geo-politics and Changing Climate", *Hydrological Sciences Journal* 56(4), p. 694, stating the fact that due to increased irrigation, potential demand for Nile waters in the Sudan is estimated to increase to 32 billion cubic metre by 2025.

[80] O. Yohannes & K. Yohannes (2012), "Turmoil in the Nile River Basin: Back to the Future?" *Journal of Asian and African Studies* 48(2), p. 204.

[81] *Ibid.*

undermines the common upstream position against the status quo painstakingly built over the years under the leadership of Ethiopia.[82]

Purportedly an agreement on declaration of principles on the GERD Project, the DoP goes way beyond the specific issues pertinent to the Project and ventures into a treacherous redefinition of the core principles of International Water Law unanimously adopted as core principles of the CFA as well.[83] The redefinition of core principles in the DoP involves significant omissions signaling "erosion of the norm-building feature of international law … by those seeking to maintain the status quo".[84] Principles III and IV of the DoP which provide for the principle not to cause significant harm and the principle of equitable and reasonable utilization, respectively, signify such erosion which arguably constitutes the second prong of the new strategy to perpetuate the status quo.

As formulated in Principle III, the principle not to cause significant harm has undergone a substantive reformulation. The principle commits, in its first paragraph, the three countries "to take all appropriate measures to prevent the causing of significant harm in utilizing the Blue/Main Nile." The second paragraph which involves a significant omission with serious normative repercussions reads: "Where significant harm nevertheless is caused to one of the countries, the state whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures in consultations with the affected state to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation."

This reformulation involves a significant omission of the phrase "having due regard for the provisions of Articles 5 and 6" found in Article 7(2) of the UN Watercourses Convention which is copied verbatim in Article 5(2) of the CFA.[85]

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[82] Cascão & Nicol, *supra* note 60, p. 562. F. Lawson (2016), "Desecuritization, Domestic Struggles, and Egypt's Conflict with Ethiopia over the Nile River", *Democracy and Security* 12(1), p. 2, notes the fact that Egypt has given attention to maintaining good relations with White Nile riparian states of Uganda, Kenya and Tanzania in a bid to ensure monopoly and isolate Ethiopia thereby weakening the common challenge to the status quo.

[83] It is important to note that out of the fifteen general principles of the CFA which constitute the normative foundation for the use, conservation and development of the Nile water resources, only one – the principle of water security – was and still continues to be a point of disagreement between Egypt and Sudan and the upstream riparian states.

[84] M. Zeitoun (2015), "The Relevance of International Water Law to Later-developing Upstream States", *Water International* 40(7), p. 950.

[85] The reference in the CFA to Art 4 is exactly the same, in substance, to the reference to Art 5 and 6 made in Art 7(2) of the WCC as Article 4 of the CFA provides, in one provision, the principle of equitable and reasonable utilization together with relevant factors and

The implication of this arguably deliberate omission is immense as it dispenses with a crucial reference to the principle of equitable and reasonable utilization and relevant factors and circumstances (Articles 5 and 6 of the UN Watercourses Convention and Article 4 of the CFA) which serve as important determinants of the type of prohibited harm falling within the ambit of the principle.

Reformulation of the principle in the DoP has effectively removed an essential element of the principle which provides the point of reference for resolution of disputes regarding the legitimacy of a given utilization which might be challenged as causing significant harm –thus blurring the distinction between factual harm and harm constituting legal injury. Consequently, any harm would inevitably be classified as significant and be prohibited on account of factual considerations –a conflation of factual harm with legal injury which would legitimize the untenable status quo by prohibiting any consumptive utilization upstream.[86]

The principle of equitable and reasonable utilization, redefined as Principle IV in the DoP, is the lynchpin of international water law unanimously accepted as one of the principles of the CFA. According to this principle, every riparian state is entitled, within its own territory, to a reasonable and equitable share of the waters. Hence, allocation where this has not taken place, and re-allocation in the case of the Nile basin where the entire flow has already been fully allocated between the two downstream riparian countries, is an unavoidable necessity which is an integral part and a necessary outcome of the principle.[87]

Allocation / re-allocation is sine qua non not only for a proper understanding of what harm means in the context of the "no-significant harm" principle, but also for the practical implementation of the principle of equitable and reasonable utilization through the incipient mechanism of benefit sharing. Contrary to the alleged advantage of benefit sharing to obviate the daunting task of water allocation, the negotiation of water rights and of benefits are not alternative

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circumstances provided for under Art 5 and 6 of the UN Watercourses Convention, respectively.

[86] Tawfik, *supra* note 58, p. 583. Egypt's concern remains to be "the impact of the project on its historical share of the Nile water" which can only be maintained by proscription of consumptive use upstream. The signing of the DoP was fiercely opposed by some Egyptian policy circles for whom it "meant that Egypt would formally accept the GERD without legally committing Ethiopia to respect Egypt's historical share" *Id.*, p. 585.

[87] McCaffrey, *supra* note 21, pp. 325, 345; P. Birnie & A. Boyle (2002), *International Law and the Environment* (2nd ed., Cambridge University Press), p. 303; A. Nollkaemper (1996), "The Contribution of the International Law Commission to International Water Law: Does it Reverse the Flight from Substance?" 27 *Netherlands Yearbook of International Law*, pp. 39, 44.

strategies; rather, "an explicit or implicit recognition or negotiation of property rights is a necessary precondition for the realization of a benefit sharing scheme".[88]

In spite of the centrality of re-allocation for a lasting resolution of the Nile waters question, the DoP has redefined the principle by carving out a section of the definition in Article 4 of the CFA which emphasizes the need for water sharing or allocation as an essential element of the principle. Compared to the definitions in Article 5 of the UN Watercourses Convention and Article 4 of the CFA,[89] the definition in principle IV of the DoP[90] which commits the three countries to "utilize their shared water resources in an equitable and reasonable manner" without any reference to the CFA or the UN Watercourses Convention is all but a mere shadow of the principle. Considered in conjunction with Principle II which limits the purpose of the GERD to power generation and the exclusion of any reference to water sharing or re-allocation which is an integral part of the principle clearly stipulated in Article 4 of the CFA, the principle has been substantially reformulated in such a way that it would provide a convenient normative basis for the beleaguered status quo.

Conclusion

Equitable and reasonable utilization of transboundary watercourses is a lofty objective, the realization of which depends on the proper implementation of the twin core principles of international water law: *equitable and reasonable utilization* and *the obligation not to cause significant harm*. The first is a constitutive principle which determines the rights of riparian states while the second is an interpretive principle which circumscribes the same.[91] Determination of what is *equitable* and *reasonable* in a given case is a responsibility of basin states which they should carry out through negotiation of

[88] I. Dombrowsky (2009), "Revisiting the Potential for Benefit Sharing in the Management of Trans-boundary Rivers", 11 *Water Policy*, pp. 125, 137.

[89] Art. 4 of the CFA reads: "Nile Basin states shall in their respective territories utilize the water resources of the Nile River system and the Nile River Basin in an equitable and reasonable manner. In particular, those water resources shall be used and developed by Nile Basin States concerned, consistent with adequate protection of those water resources. *Each basin state is entitled to an equitable and reasonable share in the beneficial uses of the water resources of the Nile River system and the Nile River Basin* (emphasis added)."

[90] The corresponding definition of the principle in Principle III of the DoP reads: "The three countries shall utilize their shared water resources in their respective territories in an equitable and reasonable manner."

[91] Fuentes, *supra* note 32, pp. 130-135; McCaffrey, *supra* note 21, p. 371; Birnie & Boyle, *supra* note 87, p. 308.

specific watercourse agreements.[92] Once the specific rights of riparian states are determined in an inclusive agreement, the obligation not to cause significant harm circumscribes the right by obliging riparian states to take all appropriate measures to prevent the causing of significant harm constituting a legal injury to other riparian states.

The status quo in the Nile basin negates these fundamental principles of international law as it allegedly vests Egypt and Sudan with exclusive right to the entire flow of the Nile. Their rejection of the CFA is evidence of their unwillingness to abide by the rules of international law. Being downstream riparian states, Egypt and Sudan can, however, do nothing to stop developments upstream and the absence of cooperation will harm them most. Besides, absence of an inclusive legal framework or rejection of the same by some riparian states as in the case of the CFA does not in any way prevent the exercise by riparian states of their sovereign right to equitable and reasonable utilization in their territories.

The launching of the GERD after the frustration of almost every opportunity for cooperative development and shared utilization is a significant counter-hegemonic measure capable of transforming the basin's hydro-political configuration as evidenced by Egypt's ultimate willingness to negotiate with Ethiopia. The context in which this negotiation was carried out and the substance of the final agreement in the form of the DoP, however, pose serious challenges for the prospect of change. In view of the unmitigated opposition of Egypt and Sudan to the CFA and the complete disengagement of the former from the NBI process, there is sufficient reason to beware of the consequences of a counterproductive flight away from cooperation into unilateralism and the erosion of fundamental principles of international water law through a patchwork of individual agreements for every hydraulic project upstream.

The GERD is meant for a typical non-consumptive use –power generation– which does not involve flow reduction. It should, however, be clearly emphasized that Ethiopia's undisputed sovereign right to equitable and reasonable utilization of the Nile to which it contributes 86% of the annual flow cannot be limited to the non-consumptive use of power generation. Reduction of the flow of the Nile as a result of consumptive utilization upstream should be acknowledged in every deal as an inevitability firmly anchored in international law. ■

[92] This is evident from the language of Article 3 of the UN Watercourses Convention which, in paragraph three, provides that "[w]atercourse states may enter into one or more agreements … which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof."

Legal and Practical Aspects of Child Custody, Visitation and Maintenance:
A Case Study in SNNP Regional State

Nigussie Afesha ♣

Abstract

Although divorce disrupts the marital bond thereby terminating marital rights and obligations, each parent's obligations to the wellbeing and upbringing of children (custody, visitation rights, and maintenance) persists. This article examines the practice of courts with regard to child custody, visitation rights and obligation to supply maintenance in the Southern Nations, Nationalities and Peoples (SNNP) Regional State. The experience of various court decisions in SNNP Regional State with respect to these matters is explored. Since the laws do not have detailed provisions that regulate the various issues of child custody, visitation and child support, there is inconsistency in judicial decisions. Many decisions do not distinguish between physical and legal custody. As a result, the legal and physical custody of the child usually rest on the same person. With regard to visitation, there is variation in court decisions although the conventional arrangement seems standard visitation. In some cases, courts specify the duration and form of visitation. However, in many cases, courts do not indicate how and when visitation shall be allowed. There are cases where courts overlook the issue of visitation. There is also inconsistency in court decisions with regard to child support. These problems call for detail provisions to ensure consistency and predictability in child custody, visitation and child support decisions.

Key terms

Family · Divorce · Child custody · Visitation · Maintenance

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Introduction

Family has been understood as an essential element in human life.[1] "It is of great legal interest because of the decisive role it has historically played in the raising and socialization of children and in mutual economic support of its members".[2] In this sense, family is considered as the natural and "fundamental unit of a society".[3] Marriage, one of the essential ways to form a family, is usually considered the most fundamental building block of human societies.[4] Thus, the institution of marriage, found practically in all human societies,[5] strives mainly to establish a stable framework in which children are cared for and supported, both emotionally and financially.[6] It should be noted that the continuation of a marital relationship is an indispensable foundation to achieve such function of the institution of marriage. Such essence of institution of marriage will subsist if and only if spouses are willing to live together and the marital relation does not come to an end. A change in the status of the spouses (from married to single) may alter the rights and responsibilities of the parents over their children. Divorce is one of the legal mechanisms through which spouses can change their legal status to single, and set aside the matrimonial bonds and marital rights and obligations, except for those obligations that persist by law (for instance post-divorce upbringing of children).[7] It is meant to say that "[d]ivorce is fundamentally a dispute between the husband and wife, and regardless of the reasons for their separation, the bond between parent and child remains".[8]

It is understandable that a decision to divorce is a difficult one and most painful when children are involved. The split of parents has negative impact

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[1]Bruce W. Frier and Thomas A.J. McGinn (2004), A Casebook on Roman Family Law, published by Oxford University Press, New York, p. 3.

[2] Ibid.

[3] *See* article 34(3) of the FDRE and the SNNP Regional State Constitution.

[4] Frier and McGinn, *supra* note 1, p. 25.

[5] Shoshana Grossbard-Shechtman (2003), "Marriage and the Economy" in the Shoshana A. Grossbard-Shechtman (ed.) *Marriage and the Economy: Theory and Evidence from Advanced Industrial Societies*, Cambridge University Press, Cambridge, pp.1-36, p. 1.

[6] Barbara Stark (2005), *International Family Law: An Introduction*, Ashgate Publishing Company, USA, p. 14.

[7] Id., p. 75.

[8] Takao Tanase (2011), "Divorce and the Best Interest of the Child: Disputes over Visitation and the Japanese Family Courts", *Pacific Rim Law & Policy Journal*, Vol., 20, No 3, pp. 563-588, p. 571.

upon children's lives.[9] One can mention issues of upbringing, the rights of the parents and the children to visit each other, and the duty to supply maintenance. There are major issues concerning children that must be resolved during the proceedings of divorce.[10] Custody and support arrangements and concerns regarding children's well-being are given utmost attention by most parents.[11] In general, parents have two options with regard to how children can be taken care of after divorce: i.e., they will either work it out by themselves or let the court decide it for them.[12]

When courts, upon divorce, make decisions about where children live, how much contact the other parent has and who can supply maintenance, their decisions should be based on the best interest of children.[13] This means, during the divorce process, if the court finds that the custody agreement, which has been worked out by spouses, is in the child's best interest, a court will approve it.[14] However, if parents fail to reach an agreement regarding the custody of the child or if their agreement is found to be against the interest of the child, the court decides the issues on its own in a way that ensures the best interest of the child.[15]

This limits an unwarranted claim of child custody and avoids more disruption in children's lives than the separation of their parents is already causing. The important thing here is fixing or determining which custody arrangement is best for the child. This in effect involves determining who should be a custodial parent and who has visitation right. This is because, in legal terms, when one is the custodial parent, the other is systematically becoming the noncustodial parent with visitation rights. [16]

The bond between a parent and child continues irrespective of the decision to divorce,[17] and parents are, in effect, still obligated to undertake parental rights

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[9] Rebecca A. DeSimone (2002), *Child Custody, Visitation, and Support in Pennsylvania*, 1st ed., Sphinx Publishing Inc, United States of America, p. 26

[10] Roderic Duncan (2007), *A Judge's Guide to Divorce: Uncommon Advice from the Bench*, Consolidated Printers, USA, p. 175.

[11] Stark, *supra* note 6, p. 75.

[12] Emily Doskow (2006), *Nolo's Essential Guide to Divorce*, 1st ed., Consolidated Printers, U.S.A, p. 139.

[13] Patrick Parkinson (2011), *Family Law and the Indissolubility of Parenthood*, Cambridge University Press, New York, p. 3.

[14] Sanford N. Katz (2011), *Family Law in America*, Oxford University Press, New York, p. 111, and *see* article 113 of the Revised Family Code.

[15] *See* Art 221 of the Revised Family Code and Art 236 of the SNNP Regional State Family Code.

[16] Doskow, *supra* note 12, p. 142.

[17] Tanase, *supra* note 8, p. 571.

and responsibilities even in the aftermath of the dissolution of marriage. There are three key issues relating to children that must be resolved during the proceedings of divorce. These are child custody, the rights of the parents and the children to visit each other, and an obligation to supply maintenance. There are various principles that suggest which types of custody arrangements offer the best comfort zone for the child and how the post-divorce parental rights and obligations are regulated. It should be noted that the kind of child custody arrangement a court decides will ultimately influence the type of visitation right the noncustodial parent has as well as the amount of child support one parent owes to the other.

This article examines these practices of child custody, visitation right and child support award in SNNP regional state courts. The first two sections deal with conceptual and theoretical frameworks of child custody, visitation and child support award. Sections 3, 4 and 5 deal with the legal framework and they discuss the various components of child custody and visitation (which are usually considered as post-separation living arrangements of the child), and illuminate issues related to child support. Court decisions with regard to post-separation living arrangements of the child are also examined. Moreover, the types of child custody, forms and frequency of visitation as well as pattern of child support assessment are discussed.

1. Child custody: Overview of Concepts and Overall Practices

As a rule, parents are joint guardians of their children and have joint custody during marriage.[18] By implication, a guardian has responsibility for the long-term welfare of the child and has all the powers and duties in relation to the child, including day-to-day care.[19] When parents separate, there is a need to consider custody of the children, that is, who should undertake day-to-day care and control of the child, and whether a noncustodial parent should have access to the child and on what terms.[20] Child custody refers to the post-separation

[18] Katz, *supra* note 14, p. 77.

[19] *See*, Debbie Ong Siew Ling (1999), "Parents and Custody Orders: a new approach." *Singapore Journal of Legal Studies*, pp. 205–228, p. 205. She argues: "When divorce terminates a marriage, the children of the marriage lose a fundamental cornerstone to their world of happiness and security. The law recognizes the welfare of such children to be of paramount importance. The court makes custody orders which it considers to be the best for the children under the circumstances. It is proposed that the law should move towards instilling in parents a greater sense of responsibility for their children by embracing the concept that *parenthood is for life and that parenthood entails heavy responsibilities*." (Emphasis, added)

[20] Rosemary Dalby (2001), *Essential Family Law*, Cavendish Essential Series, (2nd ed.), Cavendish Publishing, Australia, p.77.

living arrangements of minor children[21] that involve defining the legal and physical rights and responsibilities parents have over their children.[22] In other words, child custody involves the legal authority to make decisions on the medical, educational, health, and welfare needs of a child, on the one hand, and physical control over a child, on the other.[23] This shows that child custody has two components: physical and legal.[24]

1.1 Legal custody

Legal custody involves making long-term parenting decisions regarding education, medical treatments, discipline, psychological counseling and religion of the minor child.[25] Custodial parents have the right to make decisions on issues like which school children should go, what religion they practice, whether they need psychological counseling, and when they shall see a doctor.[26] Such roles of the parents, otherwise called legal custody, on the basis of the specific role of each or both parents, are further classified into joint custody and sole custody.

In *joint* legal custody parents participate in the decisions on upbringing of a child.[27] They share the responsibilities of raising their children, including decisions about education, religion, medical treatment, and residence. In joint legal custody, "neither parent has final decision-making authority without consulting the other parent."[28] In this case, there is a duty placed on the custodial parent to exchange information with the noncustodial parent based on the presumption that the noncustodial parent is a partner in raising their child and should be able to communicate freely with the child, be informed of the child's school performance, and be notified immediately if the child is undergoing medical treatment or has had a medical emergency. For this reason, "joint legal custody makes more sense when the two parents can agree and find a way of working together to take care of the children".[29] Children will benefit if the parents can raise them in harmony with each other whereby each parent

[21] Stark, *supra* note 6, p. 182.
[22] Alison Clarke-Stewart and Cornelia Brentano (2006), *Divorce: Causes and Consequences*, Yale University Press, New Haven and London, p. 176.
[23] Violet Woodhouse, (2006), *Divorce and Money: How to Make the Best Financial Decisions during Divorce,* 8th eds. Consolidated Printers, USA, p. 357.
[24] Doskow, *supra* note 12, p. 140.
[25] James J. Gross and Michael F. Callahan (2006), *Money and divorce: The First 90 Days and After*, Sphinx Publisher, united states of America, p. 87
[26] Doskow, *supra* note 12, p 140.
[27] Gross and Callahan, *supra* note 25, p 87.
[28] Id., p. 87.
[29] Ibid.

participates in the real parenting effort, and neither bears the sole burden of caring for the children.[30]

Unlike joint custody, in which both parents will make decisions about the child, *sole* legal custody allows only one parent to make decisions about the upbringing of the child.[31] This means, sole legal custody grants the custodial parent the right to make all major decisions without consulting the other parent,[32] otherwise called 'winner-takes-all notion of custody'.[33] For this reason, the sole legal custodial parent exclusively decides where the kids will go to school, what religion they will have and where they will live. In various societies, such parent consents on issues of marriage and or entry into the armed services.[34] In addition, *sole* legal custody grants exclusive physical custody to one parent. It should be noted that granting one parent both sole legal and physical custody is typically done only when the other parent has neglected or abused the child (as explained in Section 1.2 below),[35] or "if there is so much hostility that parents simply cannot communicate at all, or if one parent lives at a great distance, or one parent simply is not involved in the child's day-to-day life and does not spend time with the child."[36]

1.2 Physical custody

Physical custody gives the parent rights and responsibilities for the daily care and control of the child.[37] Physical custody is also referred to as 'residential custody'.[38] It simply means a place where the children live most of the time or on a regular basis. The parent with physical custody has the cares and controls of the children on a day-to-day basis, this includes the power to make short-term parenting decisions rather than long-term ones that may go with the notion of legal custody. Physical custody can be joint/shared, sole, or split.[39]

Joint physical custody became an alternative disposition to sole custody, which warrants exclusive physical control to one parent and visitation to another.[40] Joint physical custody grants physical custody rights to both parents. Parents who share physical custody typically also share legal custody; however,

[30] Ibid.
[31] Ibid.
[32] Clarke-Stewart & Brentano, *supra* note 22, p. 177.
[33] Parkinson, *supr*a note 13, p. 45
[34] *See* for example, Gross and Callahan, 2006, *supra* note 25, p 87.
[35] Clarke-Stewart & Brentano, *supra* note 22, p. 177.
[36] Doskow, *supra* note 12, p. 140.
[37] Clarke-Stewart & Brentano, *supra* note 22, p. 176.
[38] Gross and Callahan, *supra* note 25, p. 87.
[39] Gross and Callahan, *supra* note 25, p. 87.
[40] Katz, *supra* note 14, p. 111.

conversely, sharing legal custody does not necessarily entail shared physical custody. Joint physical custody does not necessarily mean equal (fifty-fifty) time-sharing, but it reflects that the child spends substantial time with each parent. Elaborating this point, Dalby notes, "Joint custody means both parents share parental responsibilities equally, although the time spent with the child may be divided unequally".[41] Parents with joint physical custody may have a parenting plan which may be specified by a court order, or it could be an informal arrangement by the parents that specifies the actual time the child spends with each parent.[42] In principle, both parents would share physical custody in law until the court orders otherwise. This is true even if they are separated and the children are actually only living with one of them.[43] Courts generally prefer shared physical custody because such kind of arrangement gives children regular contact with both parents and this arrangement can substantially mitigate the emotional burden on the children, which could be created as result of divorce. [44]

Joint physical custody has numerous benefits. Form the side of the parents, joint physical custody alleviates the sense of loss that a noncustodial parent feels and relieves a custodial parent from some of the burdens sole care and responsibility for children would create.[45] It may also lessen stress, which may be caused by changes in family structure or function. "A functioning joint custody arrangement provides parents with a better balance of time with and without children."[46] In a nutshell, joint custody has been linked to higher satisfaction with the custody arrangement in parents, if the parents choose joint custody and cooperate for the same than imposed by court.[47] In self-selected arrangements, joint custody translates into more involvement of parents and more positive attitudes toward the ex-spouse's parenting.[48]

From the perspective of children, joint physical custody has the advantage of assuring children continuing contact with both parents and gives them a greater sense of security and lessens their sense of abandonment by one parent.[49] Joint custody has also been linked to lower rates of re-litigation provided that joint custody is freely chosen by parents rather than imposed by the court.[50] On the

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[41] Dalby, *supra* note 20, p. 77.
[42] Clarke-Stewart and Brentano, *supra* note 22, p. 177.
[43] Gross and Callahan, s*upra* note 25, p. 87.
[44] Doskow, *supra* note, 12, p. 140.
[45] Clarke-Stewart and Brentano, *supra* note 22, pp. 200-201.
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Ibid.

contrary, court-imposed joint custody has not been found to reduce re-litigation.[51]

Nevertheless, despite its multitude of advantages joint custody is not without its drawbacks. For one thing, it poses problems for a parent who wants to move to a different area. For another, even if parents stay in the same area, joint custody leads to lesser stability for children, who are shuttled between their parents, encountering differences in household rules, parental expectations, and sometimes even socioeconomic status as they move from one household to the other.[52] Children who moved more frequently between their parents are often at a risk for emotional and behavioral problems, probably because frequent access creates more opportunities for disagreements between the parents.[53]

On the other hand, when children live primarily with one parent, it is called sole physical custody.[54] If one parent has the children most of the time, that parent is usually granted sole physical custody; the other parent gets the right to regular visitation.[55] The non-custodial parent may also have actual physical custody of the child for agreed periods of time.[56]

When siblings are split between parents, it is called split physical custody. Split custody refers to "splitting" of siblings between the parents and may entail any combination of physical and legal custody.[57] Split custody is easiest to describe in a situation where there are two or more children and each parent obtains full physical custody over one child.[58] However, courts believe it is usually in the best interests of the children to keep siblings together.[59] Some of the considerations that may bring about this result are age of the children and child preference.[60]

Courts often want to know whether one custodial arrangement is best. Because of the great diversity among parents, children, and their circumstances, there is no single best solution to the custody dilemma; one cannot say that any one type of arrangement is better for all children or parents. However, courts spend many hours trying to pin down the relative advantages and disadvantages of each. They also determine the kind of physical or legal responsibilities that

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[51] Id., p. 201.
[52] Ibid.
[53] Ibid.
[54] Doskow, *supra* note 12, p. 140.
[55] Gross and Callahan, *supra* note 25 , p. 88.
[56] Stark, supra note 6, p. 182.
[57] Clarke-Stewart & Brentano, *supra* note 22, p. 177.
[58] DeSimone, *supra* note 9, p. 18.
[59] Gross and Callahan, *supra* note 25, p. 88.
[60] DeSimone, *supra* note 9, p. 18.

parents assume over their children and the manner in which such custody arrangement will be enforced.

There are states that determine custody by the age of the child under the premise that a divorced mother is typically entitled to custody of boys until seven years of age and girls until nine years.[61] The father is generally considered the custodial of older children. In some other states, such as Algeria, a divorced wife may be granted custody of boys until the age of sixteen years and retain girls until eighteen years, as long as the mother does not remarry.[62] In Egyptian family law, a father has custody of sons over the age of seven and daughters over the age of nine. [63]

In most western states, custody is determined according to the 'best interest of the child', and this standard encourages a detailed case-by-case analysis.[64] This envisages that courts evaluate all relevant factors; *inter alia*,[65] wishes of the parents and the child. The parents' wishes as to who receives custody will not be the lone factor of the actual award. Too often, parents seek custody for reasons other than what is best for the child. Some parents may be motivated by a desire for revenge against the other parent.[66] Others may petition for custody hoping that they can bargain for a lesser child support obligation. Courts, therefore, will consider the parents' wishes, but generally will not base an award of custody on those wishes without other evidence that ensures the child's best interest.[67]

A court sometimes asks the child with whom s/he prefers to live. The amount of weight the court gives to the child's preference depends on the age and level of maturity of the child.[68] Children under the age of eight usually will not be consulted about their choice of custodial parent.[69] Courts, on the other hand, often give considerable weight to the wishes of children aged fourteen and above provided that the child's preference is on the basis of his/ her relationship with the preferred parent and not on some other factor.[70]

Where one parent is the custodial parent, the other non-custodial parent has visitation rights. In other words, if one parent has sole physical custody, the

[61] Stark, *supra* note 6, p. 182.
[62] Ibid.
[63] Ibid.
[64] Id., p 183.
[65] Linda H. Connell (2003), *Child Custody, Visitation and Support in Illinois*, Sphinx Publishing, United States of America, p. 15.
[66] Ibid.
[67] Ibid.
[68] Id., p. 16.
[69] Ibid.
[70] Ibid.

other parent will have visitation rights as agreed by the spouses or ordered by court.[71]

2. Visitation and Maintenance

2.1 Visitation

The right of visitation, or access of noncustodial parents to a child, is favored in many States.[72] Visitation, which could be agreed by the spouses or ordered by court, defines the conditions for the noncustodial parent to have contact with the child or provides for a child to maintain physical contact with both parents on a regular basis.[73] This is because parents have a fundamental right to spend time with their child after divorce regardless of their separation or unhealthy relationships.[74] When the child has established relationship with a noncustodial parent, the latter is likely to contribute much to the child's wellbeing.[75] However, visitation should not conflict with the long-range decisions of the parent with legal custody. For instance, if the parent with legal custody has decided to raise the child in a certain faith, the parent with visitation rights may not be allowed to influence the child to enter into other religious conviction.[76]

"Although visitation is widely believed to be beneficial to children and parents, there is substantial research evidence which highlights the difficulties in establishing workable arrangements with which both spouses become happy."[77] In most jurisdictions, courts ostensibly make such decisions based on the best interests of the child,[78] which means the best-interest standard plays some role in visitation decisions.[79] When visitation is unhealthy, it might be contrary to the best interest of a child.[80] Consequently, courts are expected to determine the type, frequency and particular forms of visitation.

Visitation may be categorized into standard, supervised and virtual visitation based on the timing and the manner in which visitations will be conducted.[81] In

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[71] Doskow, *supra* note 12, p 142.
[72] Stark, *supra* note 6, p. 159.
[73] Id., p. 161.
[74] James G. Dwyer (2006), The Relationship Rights of Children, Cambridge University press, New York, p. 47.
[75] Ibid.
[76] DeSimone, *supra* note 9, p. 51.
[77] Ian Butler & other (2003), Divorcing Children: Children's Experience of Their Parents' Divorce, Jessica Kingsley Publishers, London, pp. 118-120.
[78] Dwyer, *supra* note 74, p. 49.
[79] Id., p. 47.
[80] Id., p. 48.
[81] With regard to the possibility of various kind of visitation, *see*, for example, Dwyer James G., *The Relationship Rights of Children*, *supra* note, 74, p. 49; DeSimone

standard visitation, the non-custodial parent is allowed to take the child for one/two overnights every week, weekend visitation once per month and extended periods of visitation during vacations from school and over the summer or a couple of weeks in the wintertime.[82] *Supervised* visitation, on the other hand, allows the noncustodial parent to visit a child only in the company of another person (usually a friend or a relative, whom the two parents agree to act as chairperson) or under supervision of child protective workers.[83]

A court may order supervised visitation especially to guard children against a perceived possibility of abuse or neglect.[84] Supervised visitation often calls for a restriction of visitation to a particular location and time.[85] The objective is to enable the noncustodial parent to maintain a relationship with the child while assuring the child's safety.[86] Hence, supervised visitation can be ordered to ensure continuation of the parent and child relationship while maintaining the health, safety and welfare of the children.

The last form of visitation is *virtual* visitation which may be ordered where there is a long distance between the households of custodial and noncustodial parents.[87] Virtual visitation allows the child to virtually spend time and interact with his or her noncustodial parent. "Virtual visitation is ordered to *supplement* traditional physical visits when the geographic distance of a move precludes frequent, in-person visitation".[88] In this sense, "Virtual visitation can be used as part of a compromise solution, allowing the child to relocate with the custodial parent, while still maintaining and fostering a relationship with the noncustodial parent. Consequently, virtual visitation may make it more difficult for a noncustodial parent to prevent the custodial parent from re-locating". [89] Here, the matter is balancing the rights of the custodial parent to live far from the noncustodial parent, on the one hand, and the right of the non-custodial parent to

Rebecca A., *Child Custody, Visitation, and Support in Pennsylvania* , *supra* note, 9; Barbara Stark, *International Family Law: An Introduction*, *supra* note, 6, pp.159-160 and others.

[82] Dwyer, *supra* note 74, p. 49.

[83] DeSimone, *supra* note 9, pp. 51-52.

[84] Dwyer, *supra* note 74, p.47.

[85] DeSimone, *supra* note 9, p. 51-52.

[86] Stark, *supra* note 6, pp.159-160.

[87] Kimberly R. Shefts (2002), "Virtual Visitation: The Next Generation of Options for Parent-Child Communication", *Family Law Quarterly*, Vol. 36, No. 2, pp. 303-327, p. 311.

[88] Jenna Charlotte Spatz (2011), "Scheduled Skyping with Mom or Dad: Communicative Technology's Impact on California Family Law", *Loyola of Los Angeles Entertainment Law Review*, Vol. 31 No. 143, pp. 143-172, p. 145.

[89] Id., p. 144.

remain in close physical proximity to his or her children, on the other. In such a case, the court may order the custodial parent to communicate with the noncustodial parent and their children via the internet to maintain emotional interaction between the noncustodial parents and their children.[90]

There is a presumption that noncustodial parents will receive one of the aforementioned types of visitations. However, in rare cases, visitation rights may be restricted if such visits would seriously endanger the child's welfare.[91] Visitation is, *inter alia*, meant to facilitate opportunities for children to have safe and conflict-free access to both parents and maintain personal relations and direct contact with both parents on a regular basis.[92] Suspension or denial of this right thus amounts to violation of the rights of children and a failure to take account of their interests.[93]

However, the right may be blocked if it poses a threat to a child's safety, physical or mental health or other adverse effects on the feelings and emotional stability of the child.[94] Access to parent should be regarded, as a basic right of the child and it has an important contribution to the latter's emotional and material wellbeing.[95] If a custodial parent restricts a noncustodial parent's access to the child without due cause, it amounts to failure to cooperate with the right of the child to his/her emotional and material development which may result in a change of custody.[96] Hence, denial of visitation is rare and generally requires a finding of actual harm, such as physical violence to the child, drug addiction, sexual abuse, severe conflict or the child's absolute refusal.

Fixing the issue of child custody and visitation triggers the issue of child support. In many cases, the issue of child custody includes visitation, and the child support order is a subsequent order, which emanates from the former. The types of child custody and nature and forms of visitations have direct bearings on child support, otherwise called maintenance.

2.2. Maintenance

Child support is the most common support awarded upon divorce.[97] When courts order one parent to have primary physical custody of the child, the other

[90] Id., p. 310.
[91] Dwyer, *supra* note 74, p. 47.
[92] Stark, *supra* note 6, p. 161.
[93] Id., p. 171.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] Thomas F. Burrage and Sandra Morgan Little (2003), *Divorce and Domestic Relations Litigation: Financial Adviser's Guide*, John Wiley & Sons Publisher, New Jersey, p. 161.

parent will typically have visitation right.[98] The parent with less custody time is usually ordered to pay child support to the custodial parent. The support obligation of each parent may be determined on the basis of the percentage of time the child spends with each parent.[99] Child support is another important indicator of non-custodial involvement in post-divorce parenting activities.[100] It is assumed that the custodial parent is meeting his/her child support obligation through the custody itself.[101] Therefore, fixing child custody and visitation rights also involves determining who is required to supply child maintenance and how much? Child support is simply an amount of money that divorce courts order one parent to pay to the other regularly, usually monthly, until a child attains majority.[102] Payments are often made to the parent with whom the child lives.[103]

"State laws differ, however, with respect to the amount of support to be paid, the process through which this amount is determined, the duration of support", the mechanisms for its enforcement and collection.[104] In some states (for instance Japan), parents agree on child support.[105] "If they are unable to do so by themselves, they must go to mediation, where a trained third party will help them resolve the matter".[106] Other States leave child support determination to the discretion of the court while ordering the court to take into account the following factors: the amount of the financial need of the child, the financial resources of the noncustodial and custodial parents, respectively, and the standard of living the child would have enjoyed had the parents remained married.[107] "The lack of specific guidelines often produces unpredictable and widely ranging results, which in turn makes it difficult to negotiate support. The custodial parent usually incurs a disproportionate share of responsibility because s/he is actually meeting the child's expenses on a day-to-day basis".[108]

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[98] Dwyer, *supra* note 74, p 47.
[99] Woodhouse, *supra* note 23, p. 355.
[100] Cheryl Buehler & Jean M Gerard (1995), "Divorce Law in the United States: A Focus on Child Custody", *Family Relations*, Vol. 44, No. 4, Helping Contemporary Families, pp. 439-458, p. 443.
[101] Woodhouse, *supra* note 23, p. 355.
[102] Roderic Duncan (2007), *A Judge's Guide to Divorce: Uncommon Advice from the Bench*, Consolidated Printers, USA, p. 160.
[103] Ibid
[104] Stark, *supra* note 6, p. 206.
[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid.

The mechanisms for determining the amount of child support vary considerably among states.[109] They include a percentage of the obligor's income, which sets a flat or varying percentage based solely on the noncustodial income.[110] This model assumes that the noncustodial parent will contribute what s/he can. Another model is based on the parents' combined income.[111] This assumes that child support should represent the same proportion of parental income a child would receive if the parents lived together. A third model begins by assuring the ability of the noncustodial parent to meet the child's subsistence needs. Thus, only when the noncustodial parent's income exceeds a certain minimal amount is any obligation imposed.[112]

Despite these differences, computation of child support is normally based on the respective income of the parents, the amount of time the children spend with each parent, and any extra or extraordinary expenses each parent may incur.[113] These extraordinary expenses may be for childcare, medical expense, school tuition, or other special needs of the children.[114] Regardless of the model adopted by a court, income determination is a prerequisite to the computation of child support. The court first determines the appropriate incomes of the parents that are available for purposes of child support computations and this involves deciding whether certain types of income should (should not) be included in the determination of child support.[115]

If there are changing circumstances such as change in income level, the time a child spends with a parent, or change in the special needs of a child, courts may revise the original child support payments.[116] An unanticipated increase in health care needs, for example, may also justify a modification.[117]

3. The Legal Regime and Practices of SNNPR Courts on Child Custody

Children are cared for and supported by their family whether they were born in wedlock or out of wedlock.[118] Both parents have a legal duty to support their

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[109] Ibid.
[110] Ibid.
[111] Ibid.
[112] Ibid.
[113] Burrage & Little, *supra* note 97, p. 161
[114] Ibid.
[115] Id., p. 162.
[116] Ibid.
[117] Stark, *supra* note 6, pp. 205-207.
[118] *See* Art 36(1)(c) of the FDRE and SNNP regional state Constitutions. The Convention on the Right of the Child also requires state parties to use the principle of

child according to their ability irrespective of their marital status: married or separated.[119] When the spouses decide to divorce, they have two options: either they decide by agreement regarding the tutor and guardians of their children or let the court decide it for them.[120] In the latter case, courts are expected to take into account the best interest of the child as their primary consideration.[121] The principle of best interest of the child is applicable for all decisions regarding children, be it custody, visitation right or maintenance.

Child custody decision is an announcement or prescription of the future part each parent will play in the child's life over the years of her/ his childhood.[122] Ethiopia's revised family law allows courts (that decide the dissolution of marriage) to determine which spouse shall have custody of the children, health, maintenance, and the rights of parents and children to visit each other.[123]

'the best interests of the child' as their primary consideration in all actions that concern children. The provision of the Convention reads: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." (*See* Article 3 of the Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 entry into force 2 September 1990).

[119] *See* 36(1) (c) of the FDRE and the SNNP regional State Constitutions *cum* with Articles 234 & 236 of the SNNP regional state family code.

[120] *See* Art 221 of the Revised Family Code and Art 236 of the SNNPR state family code.

[121] *See* art 36 (2) of the FDRE Constitution.

[122] Elizabeth S. Scott (1992), "Pluralism, Parental Preference, and Child Custody", *California Law Review*, Vol. 80, No. 3, pp. 615-672, p. 617. <http://www.jstor.org/stable/3480710 > (Accessed: 24-08-2016).

[123] *See* article 128 of the SNNP regional state family Code. There are persons who claim that courts should see child custody, visitation and maintenance cases in absence of divorce claim. However, there are several family code provisions that support reluctance of the courts to see child custody case in absence of divorce claim. In the first place, parents are the joint custodians of their minor child. This can be inferred from the provision of the Family Code which provides "The father and the mother are, during their marriage, jointly guardians and tutors of their minor children." (*See* Article 219 and 234 of the RFC and the SNNP regional Family code respectively). The family code also indicates that "The spouses shall have equal rights in the management of the family". However, "In case of death, disability, unworthiness or removal of one of the parents, the one who remains shall alone exercise such functions." (*See* article 220 and 235 of the RFC and the SNNP regional Family Code respectively). The court would assign guardian and tutor for the child. A minor shall be placed under the authority of a guardian for proper care of his person and tutor for

Spouses are authorized to resolve the issues of custody and visitation privately through negotiation.[124] However, if they cannot reach an agreement on their own, the only alternative they have is to wait for the court decision.

The court is expected to examine the satisfaction of the best interest of the child based on various parameters such as income, age, health, and condition of living of the spouses. From the children's perspective the court is expected to pay attention to the age and interests of the child.[125] The Cassation Bench of the Federal Supreme Court has considered two factors that should be considered in the determination of child custody. These are the best interest of the child (which conventionally focuses on spousal status quo and financial strength coupled with the age of the child) and the right of child to be heard of his/her interest, (otherwise called "the will of the child") whether s/he likes to remain with her/his mother or father.[126]

As highlighted in the preceding sections, the concept of child custody contains two major components: legal and physical custody. However, such kind of classification is found neither in the Federal revised family law nor the SNNP regional state family code. The law only requires a court (that decides the dissolution of marriage) to decide child custody.[127] The fact that the law is open in this regard, coupled with the existence of various types of child custody that involve the combinations of legal and physical responsibilities leaves a very wide room of discretion to courts in deciding child custody disputes.

Despite this discretion, which emanates from the law being open, in practice, courts do not distinguish between physical and legal custody. Out of the cases collected from different courts, in 98% of the cases, courts give child custody to either of the parents.[128] By implication, legal and physical custody of the child

his pecuniary interests and the administration of his property. (See Articles 216 and 231 of the RFC and the SNNP Regional Family Code respectively).

[124] Id., 236 (1).

[125] Id., 128(2).

[126] Cassation file number 35710, Vol. 8, p. 243.

[127] *See* article 236(2) of the SNNP Regional State Family Code.

[128] *See* File No. 03550; the applicant W/ro Yewubidar Tsegaye vs. Ato Tekalign Abebe (respondent) had a child whose age is one year and eight months. The applicant petitioned to court claiming child custody. The respondent also claimed the same. The court rendered child custody solely for the mother. Likewise, the court rendered a similar decision (i.e., child custody to the mother alone) in File no. 02505, i.e., W/ro Abebech Asefa vs. Ato Mesfine Sileshi; W/ro Amsalech Abebe, the court rendered custody for the mother only (File number 02594); and W/ro Sintayehu moges vs. Ato Alem Tsegaye (File number 03039). On the other hand, in the case between Ato Lukas Gualto vs. W/ro Misirach Tesfaye, the court rendered the custody of the child in favor of the applicant (File no. 3222).

coincide and is placed on the same person.[129] The other important point that is worth mentioning is the kind of legal custody the parents have over their minor child: joint (shared) or sole legal custody.

Unlike sole legal custody which gives one parent wider power to make decision regarding the child's upbringing and wellbeing, joint legal custody enables the parents to make joint decisions on all matters having a significant impact on their children's lives. The Revised Family Code is imprecise whether courts can give sole or joint child custody. However, the practices, based on the cases, reviewed during this research show that courts give sole child custody for either of the parents. In such cases, one parent is named the custodial and guardian with whom the child will live and who usually has a whole range of rights. Such parent is allowed to make all the decisions about the child's life. By logical extension we may conclude that the custodial parent will have the right to make all major decisions regarding the child's health, welfare, education, and religious upbringing. This situation remains unchanged unless the spouses reverse (of course with the approval of the court) such child custody arrangements by agreement.

In one court proceeding,[130] the applicant filed an application, principally seeking divorce coupled with liquidation of property, which also involved child custody. The respondent, on his part, also sought child custody. The respondent, during oral arguments, sought sole child custody –which includes both legal and physical custody– and submitted an alternative claim to be given a right to involve in some major decisions regarding the child's life, which includes discharging of school fee, providing transportation services and tutoring the child. The court, looking at the enthusiasm of the respondent to have a role in the life of the child, asked the applicant whether she agrees with the proposal of the respondent. Based on her consent, the court accepted and approved the proposal of the respondent, which has some elements of joint custody. Here one may question the legal base of the decision under Ethiopian law. Although the law simply states the judicial power to decide over the divorce and custody, this allows courts to apply any doctrine or alternative notions that they think yield a better outcome. Hence, the decision of the court is in conformity with the law.

As highlighted earlier, physical custody gives the parent rights to physical control over the child and for the daily care of the child.[131] It relates to physical

[129] Ibid.

[130] The case was decided at Hawassa first instance court, family bench, in October/ November 2016.

[131] Clarke-Stewart and Brentano, *supra* note 22, v. 176.

placement and the amount of time children spend with each of the parents.[132] The Federal Revised Family Code and the SNPPR Family Code do not indicate the type/s of physical custody (shared, sole, or split) adopted by the law. The law seems to refrain from creating a general presumption for joint custody, but it grants discretion to courts, including the decision to allow sole custody.

Parents can agree on the terms of the custody arrangement. If the court finds their agreement in the best interest of the child, it approves their agreement. Where the spouses cannot agree on who should have physical custody, the court will grant it either solely to either of parents or allow joint physical custody to both of them. The law does not indicate the conditions which warrant the choice of one kind of physical custody over the other. It also fails to set down the circumstances under which a court is expected to grant sole, joint or split custody. Sole physical custody seems to be the most prevalent custodial arrangement in Ethiopia.[133] In 90% of the court cases in SNNPR examined by this author, courts rendered sole child custody for one of the parents, predominantly favoring the mother.[134]

The Federal Revised Family Code and the SNNPR Family Code envisage the possibility of revision, and empower the court, on application and taking into account the change of circumstances, to revise or reverse its custody decision. Either parent can apply at any time for a review of the child custody decision so long as the applicant shows the existence of change of circumstances. A parent must prove to the satisfaction of the court the extent to which the revision is likely to improve the quality of life for the child. Grounds for such revision could be the existence of a better school system, or a better climate that will

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[132] Lawrence M. Berger and other (2008), "The Stability of Child Physical Placements Following Divorce: Descriptive Evidence from Wisconsin", *Journal of Marriage and Family*, Vol. 70, No. 2, pp. 273-283, p 273.

[133] *See* case cited, *supra* note 128. However, in Ato Talemis Degaga vs. W/ro Rahiel Tadesse, the court rendered child custody for both parents. The parties to the case have four children. The case was instituted by the applicant, Ato Talemis Degaga, seeking custody of their four children. The court assigned a social worker to study the best place for the child to reside. The court, after examining the investigation and recommendations of the social worker decided that three of the children should live with their father and one with the mother. (File No. 30689).

[134] *See* cases cited, *supra* note 128. In ten percent (10%) of the reviewed cases, the court rendered child custody for the father. In Ato Lukas Gualto vs. W/ro Misirach Tesfaye (File no. 3222), the litigants have a child, 2 years and 8 momths old. The applicant, Ato Lukas Gualto, petitioned to court seeking child custody. The respondent, W/ro Misirach Tesfaye, challenged his claim. Finally, the court rendered the custody of the child in favour of the applicant. On can also find similar decision in the case between Ato Talemis Dgaga vs. W/ro Rahiel Tadesse and Ato Meseret Mengesh vs. W/ro Felek Magujie (File No. 30689 and 30799 respectively).

benefit the child's health. The child may be indirectly advantaged where the custodial parent's standard of living is raised, thereby raising the child's standard of living, due to a new job or the remarriage of the custodial parent.

If the court gives exclusive child custody to one parent, the noncustodial parent will have visitation rights as agreed by the spouses or ordered by court. For instance, in sole custody, the noncustodial parent is usually awarded visitation rights and may also have the authority to make routine or emergency decisions while the child is in his/her temporary care.

4. Ethiopian Law and Overview of Some Judicial Decisions on Visitation

As highlighted earlier, the right of visitation, or access of noncustodial parents to a child, is favored in many countries.[135] This is with the assumption, that when the child has direct contact with the noncustodial parent on a regular basis, the noncustodial parent is likely to contribute much to the child's life and strength.[136] Besides, parents have a fundamental right to spend time with a child after divorce.[137] If one parent has sole physical custody, the other parent will have visitation rights.[138] The arrangements for contact can define the potential of relationships between child and parents during and immediately after parental separation. Courts are expected to determine the types of visitations or frequencies of access of noncustodial parents to a child. Such arrangements are among the most difficult aspects of the whole process of separation and divorce.

The right of visitation or access of noncustodial parents to a child is embodied under Ethiopian law.[139] Courts shall grant reasonable visitation rights to a parent unless it is shown that it would be detrimental to the best interest of the child, a factor which should by taken by courts as primary consideration.[140] However, there can be difficulties in establishing workable arrangements that satisfy all parties.[141] In particular, the right of visitation may be compromised by the principle that protects the will or consent of the child. [142] In this regard, the SNNP Regional Family Code allows divorcing spouses to either resolve their issues by agreement or (if they fail to do so), submit the case to court that

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[135] Stark, *supra* note 6, p. 159.
[136] Butler, *supra* note 77, pp. 118-120.
[137] Dwyer, *supra* note 74, p 47.
[138] Doskow, s *supra* note 12, p. 142.
[139] *See* Art. 113 (1) of the Revised Family Code and Art 128(1) of the SNNP Regional State Family Code.
[140] Art 128 of the SNNP Regional State Family Code.
[141] Dwyer, *supra* note 74, p .49.
[142] Tanase, *supra* note 8, p. 575.

determines child custody and visitation.[143] In this regard, the SNNP Regional State Family Code provides:

> "Where the spouses decide to divorce by mutual consent in accordance with Article 86 of this Code, they shall decide by agreement regarding the tutor and guardians of their children. Where, in any case of divorce, the spouses did not agree on the tutorial and guardianship of their children, the court which decides the divorce shall also decide the tutor and guardian of children."[144] "The court shall, upon deciding the dissolution of marriage, also decide as to which spouse shall have custody of the children … and the rights of the parents and the children to visit each other".[145]

The court shall, when deciding child custody, also decide the nature and frequency of contact that children have with both parents. This shows that courts shall grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interest of the child. This is because "visitation is intended to help the healthy development and character-building of the child, and must be appropriately limited in scope and manner to meet those ends."[146]

However, the family law is silent on whether the type of visitation that it adopts is standard, supervised or virtual. Yet, there are legal principles that guide courts in their decisions of visitation: (a) their decisions must be in the best interests of children; and (b) courts must give effect to the legal rights of non-custodial parents to form or maintain relationships with children thereby allowing them to be involved in the child's life. This means visitation rights may be standard, virtual or supervised in Ethiopian context as well.

Ethiopian courts have very wide discretion in deciding visitation disputes. In most of the cases, courts maintain the right of a noncustodial parent to visit his/her child. However, there are variations in their decisions. In some of the cases the court specifies duration and form of visitation.[147] In such cases, the

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[143] *See* Art 221 of the Revised Family Code and Art 236 of the SNNP Regional State Family Code.

[144] Art 236 of the SNNP Regional State Family Code. Art 221 of the Revised Family Code embodies similar content.

[145] Id., Art. 128.

[146] Tanase, *supra* note 8, p.571.

[147] *See* file number 06334 W/ro Belayinesh Wolans vs. Ato Dereji Biruk. The applicant requested child custody for her two children whose ages were two and four. The respondent agreed with W/ro Belayinesh's proposal. Hence, the court rendered child custody for the mother and maintained the respondent's right to visitation during the weekends, on Saturday and Sunday. However, the time and the place of visitation are not mentioned in the decision. Similarly, in the case between W/ro Meseret Yemane vs. Ato Faries Mintieto, the court rendered child custody for the mother. The

court decides how much contact a non-custodial parent should have with a child. It provides for the noncustodial parent to visit the child on the weekends. In this situation, the non-custodial parent has two possibilities: either to visit the child at the place where the child resides or to take the child during the weekends (after school on Friday) and bring to the custodial parent on Sunday. Such kind of decision would help children to have frequent, meaningful and continuing contact with each parent thereby enhancing the healthy development of children.

In many cases, the court merely mentions the right of the noncustodial parent to visit his/her child without specifying how and when.[148] It is not clear whether this involves staying at the non-custodial parent's house, overnight visitation, or daytime visits. In such decisions, how much contact a non-custodial parent has is vague, and a non-custodial parent may overstretch the visitation to include overnight visits which may also involve extended days.

There are also cases where courts overlook the issue of visitation.[149] They fail to specify the kind of visitation the noncustodial parent has over his/her child, thereby adversely affecting the regularity and predictability of the noncustodial parent's visitation schedule. Under such circumstances it becomes difficult to interpret the scope and features of visitation. Visitation could be supervised if contact of the child with the parent places the child in serious

applicant and the respondent have two children whose ages were four and nine. Following the dissolution of their marriage, the applicant requested the custody of her two children, both in her statement of claim and during the oral argument. On the other hand, the respondent failed to raise this during the oral litigation. For this reason, the court awarded child custody for the applicant and visitation right for the respondent on Saturdays and Sundays (File No 05399). In (File No. 03039) W/ro Sintayehu Moges vs. Ato Alem Tsegaye, the court authorized the respondent to take the child on Fridays after school and bring the child back to the applicant on Sundays.

[148] *See* File No. 02594 (W/ro Amsalech Abebe vs. Ato Hojela Tsegaye), File No 02505 (W/ro Abebech Asefa vs. Ato Mesfine Sileshi), and (File 01054) W/ro Rahiel Hayilu vs. Ato Hintsa Tekilu. In all of these cases, the courts maintained the right of visitation for noncustodial parent without indicating the duration of the visitation, its form and place of visitation.

[149] In File No. 01054 (W/ro Rahiel Hailu vs. Ato Hintsa Teklu), the parties in dispute have one child aged seven years. The child was with the mother during the divorce process. Following the dissolution of the marriage, none of the parents raised the issue of child custody. As a result, the court (at its own initiative) awarded child custody to the mother. The consent of the child was not heard. The court that rendered child custody did not also address the issue of the noncustodial parent's visitation right. In W/ro Workayantsifu Atsinafu vs. Ato H/Micheal Belachew (File No. 02250), as well, the court awarded custody for the applicant without specifying the visitation right of the respondent.

physical, emotional, or moral danger. It may also be blocked if the visitation poses a threat to the safety, or physical or mental health of a child. Under such cases, courts require visitation to be made in a specified 'safe' place or in the presence of a neutral third party, which enables the noncustodial parent to maintain a relationship with the child while assuring the child's security. The pace in the development of supervised visitation is yet to be seen in Ethiopia.

The law does not indicate the condition in which the non-custodial parent can be deprived of access to the child. Moreover, the law does not clearly address the contents of the right to visitation. For instance, if the parent with legal custody has decided to raise the child in a certain faith, can the noncustodial parent with visitation rights take the child to another religious faith? Here again, neither the practices of the courts nor the reviewed cases offer insights to this issue. However, it can, as stated earlier, be argued that if a custodial parent decides to raise the child in a certain faith, the noncustodial parent with visitation rights may not take the child to another faith.[150] By implication, visitation does not annul the long-range decisions of the parent with legal custody. The noncustodial parent will only have the authority to make routine or emergency decisions while the child is in his temporary care.

Upon application, a court can take into account the change of circumstances, and revise or reverse its visitation decision. Restructuring visitation may involve rescheduling visitation for more time during the summer and over school holidays, but such rescheduling can involve less frequent intervals of time.

5. Ethiopian Law and Overview of Some Judicial Decisions on Maintenance

5.1 Overview of the law on child support

As Me Rodgers duly states, "the obligation to support a child is not dependent upon the marital status of the parent, but purely upon the status of being a parent".[151] Parents are responsible to give their children all the necessary care and support until they become legal adults.[152] Also, children are entitled to a decent standard of living.[153] Hence, the parent with less custody time is usually ordered to pay child support to the custodial parent.[154] This stems from the argument that "One of the definable aspects of parental responsibility is the

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[150] DeSimone, *supra* note 9, p. 51.
[151] Me Rodgers (2004), *Understanding Family Law*, Cavendish limited Publisher, Great Britain, p. 107
[152] Doskow, *supra* note 12, p. 145.
[153] Stark, *supra* note 6, p. 206.
[154] Woodhouse, *supra* note 23, p. 355.

obligation to support a child financially".[155] This begs the argument that there should be a guideline, which embodies provisions on the assessment, collection and enforcement of periodical maintenance payable by certain parents with respect to children who are not in their care.

In Ethiopia, the law sets forth the existence of child support obligation on parents.[156] However, it fails to answer a number of issues such as the amount of support to be paid, the process through which this amount is determined, the duration of support, and the mechanisms for its enforcement and collection. Besides, the law remains silent with respect to some essential issues that are important to determine the amount of child support, such as the ratio of each parent's contribution against their combined incomes, the percentage of time the child spends with each parent and its implication in child support payment, and who pays necessary expenses if the child needs intensive care.

The law does not give a clear definition of income. As the calculation depends on the income of parents, it is going to be hard to get child support if they have no income. Deciding these matters is very important, given the fact that the amount of child support payable is directly related to these issues.[157] "The lack of specific guidelines often produces unpredictable and widely ranging results, which in turn make it difficult to negotiate support. The

[155] Frances Burton (2003), *Family Law*, Cavendish Publisher, United States of America, p. 235.

[156] *See*, Art 113 of the Revised Family Code and 128 of the SNNP Regional State Family Code.

[157] Since 1990, Ethiopia has Draft Child Support Guidelines, which provide a formula for calculating child support based on a proportion of each parent's gross income. When parents are divorced or if they cease to live together with their children as a family, courts are required to establish the amount of child support that should be paid by a noncustodial parent. The Draft Guidelines allow courts to vary the rate of maintenance payable depending on the place where the child support application is made. The situations in which this is permissible are set out in Schedule B of the drat guideline. The Draft Guidelines establish the method for calculating child support under different contexts. Some the courts use this guideline to calculate child support. This guideline is designed to ensure consistency and predictability in the amount of child support. However, the Draft Guidelines are not implemented in most courts. The Draft Guidelines recognize to differences in child support levels by custody type. In this regard, the factors that are considered include the number of overnights per year the child is supposed to spend with the noncustodial parent as specified by the court or agreement, the income of the noncustodial parent and of the recipient parent, the place where the child lives, and the number of children for whom noncustodial is obligated to support.

custodial parent usually incurs a disproportionate share of responsibility because she must actually meet the child's expenses on a day-to-day basis."[158]

As with many other issues in divorce, both spouses can simply agree on the amount of monthly child support payments.[159] At times when spouses decide to divorce, they are given the chance to resolve issues relating to maintenance privately. A court will usually accept and enforce that agreement unless the amount is well below what the best interest of the child requires. On the other hand, if they cannot reach an agreement on their own or through the help of a neutral third party, the last option is letting courts to intervene in the matter. Here again, courts are given one test to apply, i.e., they should consider what is best for child since maintenance merely continues the support which the child was entitled to receive while the marriage existed.[160]

Under the FDRE and the SNNP Regional State Constitutions, both parents have equal rights and duties to take care of their children and to raise them.[161] Such parental obligation will remain unchanged whether the parents are married or divorced. In case of divorce, the courts that decide over the divorce are equally obliged to determine the rights and obligations of each parent towards their children. Once custody of the children has been decided, courts are required to render decision regarding the amount and the method of calculation of child support payment, which will be paid to the custodial parent.

5.2 Overview of some SNNP regional court decisions

Parents shall contribute to child support in proportion to their respective means of income, otherwise called the ratio of each parent's income to their combined incomes.[162] However, there are variations in several decisions of courts. From the reviewed forty SNNP regional court decision, in 38% of the cases, the courts determined the amount of child support without revealing the respective incomes of the parents.[163] In 12% of cases, the courts determined the amount of

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[158] Stark, *supra* note 6, p. 206.

[159] Article 236(1) of the SNNP Regional State Family Code.

[160] *See* Article 36(2) of the FDRE and SNNP Regional State Constitutions along with Article 123(1) &(2) of the SNNP Regional State Family Code.

[161] *See* Article 36(1) (c) of the FDRE and SNNP Regional State Constitutions.

[162] This can be justifiably inferred from the argument that parents have equal rights and duties to take care of their children and to raise them.

[163] *See* (File No. 00693) W/ro Marta Densamo vs. Ato Kedir Aman in which the applicant W/ro Marta Densamo sought child support for her eight year-old child. The respondent had no objection on the maintenance request, and the court awarded ETB 100 (One Hundred Birr) per month. The court might have increase the amount of child support had it examined the level of the respondent's income. In (File No. 0478) W/ro Sintayehu Getahun vs. Ato Alemayehu webe, the applicant (W/ro Sintayehu Getahun) filed a petition seeking child custody and maintenance for her

child support by focusing on the income of the noncustodial parent.[164] In few cases (8%), the courts passed over the child support claims.[165] In one of these cases, the court argued that it left out child support claims affirming both parents had insufficient money to pay child support, to the other parent. In the remaining cases, which constitute 42 % of the cases, the courts considered the combined incomes of the spouses.[166] This finding shows that the courts incline

two children whose ages are not mentioned in the case. The respondent had no objection against these claims. The court awarded sole custody for the applicant along with monthly child support of Birr 400. It is not clear from the case how the court assessed the amount. The combined income of the parents was not also mentioned in the file. There are many cases that show similar practices such as W/ro Firehiwot Nigusie vs. Ato Kebede Alemu (File No. 04558), and W/ro Tigist Haile vs. Ato Tesfahun Fenta (File No. 04433).

[164] *See* File No. 30600 (W/ro Animut Tezera vs. Ato Bayu Zewudu) in which W/ro Animut Tezera requested custody and maintenance for her child aged one year and seven months. The respondent also claimed custody. The court awarded custody for the mother due to the age of the child. The court extended its decision and ordered the respondent to pay maintenance. The court used the income of the respondent (which was Birr 10,014) as the basis for determining the amount of maintenance. The court awarded 1000 Birr as the amount of maintenance. A similar reference to the income of respondent is also made in W/ro Marita Tesfaye vs. Ato Mulatu Telet (File no. 31112) whereby the respondent's monthly income of Birr Eight Hundred was taken into account in the calculating the amount of child support.

[165] In Ato Meseret Mengesh vs. W/ro Felek Magujie (File No. 30799 the applicant, Ato Meseret Mengesh, requested child custody and child support. The applicant stated that the respondent has no permanent residence and adequate income. The respondent also counter-claimed custody and maintenance. Based on the recommendation of the social worker who was assigned to examine the contexts, the court allowed child custody for the applicant, and did not render decision on the issue of maintenance. The same holds true in the case between W/ro Amarech Bonga vs. Ato Ashenafi Loha (File No. 05735).

[166] In W/ro Mintiwab Tola vs. Ato Tesfaye Alemu (File No. 05148), the court examined the combined income of the parents in the calculation of child support for their child, aged nine. Similarly, in Ato Tsegay Tamiru vs. W/ro Tsehay Tesfaye, the court used the combined income of the parents who sought the custody of their twin children who were five years old. Both sought child custody, and the respondent in addition claimed child support. Custody was given to the respondent in addition to which the applicant was ordered to pay a monthly child support of Birr 1,200 (i.e. Birr 600 per child) out of his Birr 3,500-4,000 monthly income because the respondent was found to have no income. In W/ro Amsalech Abebe vs.Ato Hojela (File No. 02433), the court required both parties to declare their income (Birr 1,700 and Birr 1,980 per month respectively), and it considered the sum of their income to determine the amount maintenance. A similar method of reference to combined income was also used in W/ro Mebrat Qolicha vs. Ato Tamirat Mana (File No. 31090).

towards applying combined incomes of the parents to an increasing number of post-divorce disputes.

The other point that needs to be noted is the issue of gross and net income dichotomy which courts use as a base to determine child support. As the amount of child support is, *inter alia*, determined based on the net income of the parents, the amount of money which is going to be considered for child support payment shall be determined after making usual deductions from the gross income, such as taxes, pension contribution, health insurance payment and so on. When we see the practices of courts in this regard, in 27% of the forty cases that were reviewed, the courts depended on income of the parents (after making necessary deductions) to determine the amount of child support,[167] while in the rest of the cases (73%), they simply took the gross income, mentioned either on the contract of employment or the income declared by the respondent.[168]

Asserting incomes of parents could be difficult if they have earned income from several sources. It can be argued that child support is determined after looking at the different sources of income of the parents that make up the total income. For instance, a person, in addition to employment income, may generate money from self-employment, farming and business activities. In this case, the courts regularly ask parents to provide the necessary income information.

However, there are circumstances in which parents may not provide necessary income information, or one of the parents may contest the income information provided to the court by the other parent. In these situations, courts are supposed to check other sources of information (from a third party) that shows income of the noncustodial parent. In the case of the self-employed noncustodial parent, the court may take annual or daily incomes of a third party that is engaged in the same economic activity and has the same level of financial position as a base in order to determine the income of the noncustodial parent.

On the other hand, if noncustodial parent is a businessperson, the court may request him/her to provide his/her financial information. This financial information might include copies of a person’s taxation documents for the current year. However, if one of the parents contests the net income declared to the tax authorities or if the parents do not agree on the amount, the court will make further investigation and decide the amount. There is a case in which the respondent requested the court to calculate child support payment based on the amount assessed by the Customs and Revenue Authority. However, the applicant contested this amount, and the latter’s contest was accepted by the court.

[167] Ibid.

[168] *See* the cases highlighted above, *supra* note164 & 165.

Once the income of the parents, which will be used to calculate the child support is known, the next point is to set the amount a noncustodial parent should be ordered to pay. In this regard, there is argument that "the court may consider the standard of living the child would have had if the parents had remained together".[169] "Child support refers to expenditures on behalf of a minor in order to meet the child's physical, mental, and emotional needs. This means, among other things, food, clothing, shelter, health care, recreation, and education".[170] The amount for child support is intended to cover not only the direct costs for the children, but also the indirect costs, such as housing and transportation. Child support must also include special expenses such as special intensive care due to the health condition of the child. Baker argues:

> The marginal expenditure measure requires that a child support obligor continues to contribute to the marginal support of the child as he would if he were sharing a home with the child and the other parent. The amount a person owes his or her child is determined by the standard of living the child would enjoy if the obligor were living with the residential parent and the residential parent was not living with somebody else.[171]

The applicant may ask "a court to determine what he would contribute if he were living and sharing resources with the mother and child."[172] This requires looking at what parents in different income brackets generally spend on their children, the financial positions of both parents who are under litigation on the amount of child support, consistency in assessments, and a realistic sum which recognizes the true costs of child caring and rearing.

However, there are inconsistencies among the decisions of SNNP regional courts in this regard, owing to the absence of detail laws that regulate the assessment, collection and enforcement of periodical maintenance payable by noncustodial parents. In most of the cases, regardless of the income of the parents, child support in the form of maintenance did not exceed Five Hundred Birr (ETB 500) per child.[173] In almost all of the SNNP regional court cases that

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[169] Connell, *supra* note 65, p. 75.
[170] Id., p. 71.
[171] Katharine K. Baker (2006), "Asymmetric Parenthood" in Robin Fretwell Wilson (ed.) *Re-conceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution*, Cambridge university press, New York, pp. 121-142, pp. 128-129
[172] Id., 129.
[173] *See* the cases, *supra* note, 164 &166. In Ato Adem Hamid vs, W/ro Hanae Abdulekedir, the Cassation Bench awarded Birr 12, 000 (Twelve Thousand) as child maintenance for the respondent, W/ro Hanae Abdulekedir. The applicant lodged his petition to the cassation bench against the decision of the lower courts concerning the amount of money awarded as child support. The first instance court took into

were examined, there is lack of clarity on how the true costs of the childcare were assessed. Moreover, it is not clear whether the child support amount merely covers for food and clothing, or whether it also includes school fees.

Courts should not have been too stringent in deciding the amount of child support, because, this amount (same as the judicial decisions on custody and visitation) can be reviewed where there is/are new circumstance(s). The ground for such review can be factors such as change in jobs, loss of job due to lay off, and reduced income from self-employment. In spite of such prospects of review, however, child support payments are given priority over other expenses.

Concluding Remarks

Custody, visitation and the obligation to supply maintenance are core post-divorce issues that should be resolved in order to ensure children's wellbeing. Child custody involves physical control over a child and the legal authority to make decisions on medical, educational, health, and welfare needs of a child. Upon divorce, one of the parents becomes the custodial parent while the other noncustodial parent is entitled to visitation rights.

Visitation right defines the conditions for the noncustodial parent to have contact with the child or enables a child to maintain physical contact with the noncustodial parent on a regular basis. Courts are expected to determine the types, frequencies and forms of visitation which may be categorized as standard, supervised or virtual (based on the timing and the manner in which visitations are conducted). The determination of child custody and visitation triggers the issue of child support so that parent with less custody time pays his/her fair share of the childcare cost to the custodial parent. Child support is simply an amount of money that divorce courts order a noncustodial parent to periodically

account the strong financial position of the respondent, and ordered the applicant to pay Birr 50, 000 (fifty thousand) per month. This amount was reduce to Birr 12, 000 upon appeal to the Federal High Court. The applicant, Ato Adem Hamid, lodged his petition to the cassation bench. However, the Cassation Bench confirmed the decision of the Federal High Court stating that the amount of child maintenance is decided by taking into account the economic status of non-custodial parents and in accordance with local custom where the claimant resides. The cassation bench also indicated that the applicant has had substantially high income. The court noted that the amount of the child support should not be determined on the basis of the amount of child support an average Ethiopian would provide for his/her child. (*See* Cassation File No. 98552, Federal Supreme Court Cassation Division Case Reports, Vol. 16, pp. 173-176). The amount a person owes to his or her child is thus determined by the standard of living the child would have enjoyed had the child lived with his/her parents.

and regularly (usually every month) pay the custodial parent, until a child attains legal adulthood.

Ethiopian law accordingly imposes duties on parents to provide care and support for their children irrespective of their marital status. Both the revised federal and SNNP regional state family laws provide that a court that decides the dissolution of marriage also renders decision on the custody, education, health, and maintenance of the children as well as on the rights of the parents and the children to visit each other. In this regard, courts apply the rule of best interest of the child. Although Ethiopian law embodies this general principle, the relevant family laws do not have detailed guidelines that regulate various issues, which pertain to child custody visitation and child support.

There are diverse types of child custody arrangements that involve various combinations of legal and physical responsibilities, which parents have over their children. Since our law is too general in this regard, the court decisions that are examined in this article do not distinguish between physical and legal custody, and in effect, legal and physical custody of the child usually rests on the same person.

With regard to the right of visitation or access of noncustodial parents to a child, the conventional and frequently applied visitation arrangement seems ‘standard visitation’. In all the cases reviewed in this research, courts maintain the right of the noncustodial parent to visit his/her child. However, there are variations in court decisions. Although the courts specify the duration of visitation and its form in some cases, the details of visitation are not stated in many cases. There are also instances where courts utterly overlooked the issue of visitation.

The gaps in the law likewise relate to child support. Although Ethiopian law requires a noncustodial parent to provide child support, it fails to address a number of issues such as the amount of support to be paid, the procedure for determination of the amount, the duration of support, and the mechanisms for its enforcement. As a result, there are variations in several decisions of courts.

The inconsistencies observed in the decisions of courts and the gaps in predictability thus call for the sustained professional development of judges and pursuits to enhance the competence of the judicial sector in general. Moreover, there is the need for detailed laws that embody clear and adequate provisions regarding child custody, visitation rights, and maintenance. This would help ensure consistency and predictability in court decisions. ■

Public Interest Environmental Litigation in Ethiopia:
Factors for its Dormant and Stunted Features

Yenehun Birlie ♣

Abstract

Public interest environmental litigation (PIEL) has been introduced into the Ethiopian legal system since 2002 with the prime purpose of facilitating and complementing the environmental protection efforts of the country. However, little progress has been recorded in utilizing this innovative litigation tool. The purpose of this article is to examine the legal and policy frameworks for PIEL and investigate some of the main factors impeding its effective use for the promotion and protection of the environment rights in Ethiopia. Laws related to PIEL are examined and interviews and discussions with the relevant stakeholders are conducted with regard to environmental management in Ethiopia. I argue that even though the legal and policy framework for PIEL, with all its limitations, is in place, gaps in judicial activism, legal culture, political will, public perception towards law, judicial process and justice, the type of legal system, the perception and behavior of the government towards civil society, and inadequate environmental information have adversely affected the development of PIEL.

Key terms

Public interest litigation · Environment · Standing · Justice · Ethiopia

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List of acronyms:

APAP	Action Professionals' Association for the People
CAC	Command and Control
EPA	Environmental Protection Authority
FDRE	Federal Democratic Republic of Ethiopia
PCP	Pollution Control Proclamation
CSP	Charities and Societies Proclamation
PIL	Public interest Litigation

Introduction

Public interest litigation (PIL), is gaining increasing attention and appeal across much of the world in both constitutional democracies and transitioning societies**.** It is particularly heralded for it improves access to justice for marginal and vulnerable communities, raises awareness and debate about a particular issue of general public concern. It is also submitted that PIL acts as a mechanism of empowerment, voice, and accountability.[1]

PIL is a very important tool for the promotion and protection of environmental rights. It is so because it is has been proved very difficult to fully address environmental concerns using the traditional command and control (CAC hereinafter) approach[2] and the private enforcements. It is very important

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[1] J. Oloka-Onyango (2015), "Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View", *The George Washington International Law Review*, V. 47, No. 4, p. 1.

[2] Ever since the birth of modern environmental regulation in the 1970s, crafting and implementing effective, efficient and legitimate regulation and governance has always been a daunting challenge for governments and society. At the beginning, governments managed environmental problems through enforcement of strict rules and standards set out in legislation and treaties. This system is conventionally known as Command and Control (CAC). This approach typically specifies standards, and sometimes technologies, with which regulatees must comply (the "command") or be, penalized (the "control"). The key characteristic of command and control (CAC) regulation is that the regulator specifies what individual firms can and cannot do (enforced by the threat of penalties for non-compliance). This involves centralized legislatures setting blanket environmental targets, such as emission standards, exposure levels or technology standards (the command). Delegated agents, such as environmental protection agencies, are then empowered to police compliance and impose penalties where standards were breached (the control).CAC has been criticized for being inefficient, inflexible, subject to compromises in the political process. Nevertheless, in the 1980s, governments began to shift their attention away from this Westphalian vision of state power through hierarchy. Instead, environmental problems were, in most cases, to be tackled through market-based approaches, voluntarism and other 'light-handed' policy initiatives such as partnerships and cooperation. Yet, by the end of the 1990s, continuing ecological degradation and the increasing complexity of social and environmental problems saw a new shift towards environmental governance. Nowadays governments are working towards, a more comprehensive approach to upgrading the quality of existing regulations, a search for the best mixes of policy tools, linking command-and-control instruments with economic instruments and voluntary approaches. The new environmental governance (NEG) emphasized collaboration, integration, participation, deliberative styles of decision-making, adaptation and learning. Public interest litigation is part of the "new environmental governance" which aims at making the public part of the fight towards environmental degradation. *See* Neil Gunningham (2002), "Beyond Compliance: Next Generation Environmental Regulation", *Australian Institute of Criminology available* at:
https://pdfs.semanticscholar.org/55d2/db0bf9c9002feca23073d1d8dff27c47556c.pdf **(**visited on December 15, 2017), *see* also Gunningham, N and Holley, C (2010) "Bringing

for developing countries like Ethiopia as there is a huge environmental law enforcement deficit and the conventional litigation is expensive, burdensome and unpredictable due to the nature of environmental problems and of relief sought. PIEL also makes sense in developing countries where environmental concerns of involuntary displacement, re-settlement, provisions of basic needs of water and sanitation, indoor air pollution are interlinked with the rights of the poor and the underprivileged sections of society.

Opponents criticize PIL on two grounds: (1) it is improper for judges to mandate social reform in a democracy, and (2) courts, because of institutional limitations and political vulnerability, are destined to see their reform efforts frustrated in the middle or long term.[3] The practice of countries with a mature PIL however shows that if properly regulated, it can entail immense benefits. At least in environmental matters, there is "convincing empirical evidence"[4] that it can be effective. Hence, PIEL can and should complement the government's effort to protect the environment in countries like Ethiopia. This article examines the legislative and policy basis for PIEL in Ethiopia. It then goes on to critically analyze the main factors that have been impeding the development of PIEL.

1. Public Interest Litigation: Meaning, Definition and Concept

Public interest litigation[5] is a "legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected".[6] It is a form of legal proceeding in which

the 'R' Word Back: Regulation, Environment Protection and NRM". Canberra*:* ASSA.; *The OECD Observer* No. 206 (1997) available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.613.789&rep=rep1&type=pdf visited on December 15, 2017), pp.14-15.

[3] John Denvir (1976), "Towards a Political Theory of Public Interest Litigation", *54 N. C. L. Rev.,* 1133 .Available at: http://scholarship .law. unc.edu/nclr/vol54/iss6/1. p. 1133. (Accessed on July 15, 2017).

[4] Michael G. Faure and A.V. Raja (2010), "Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables", *Fordham Environmental Law Review*, V. 21, No. 2. p. 239.

[5] Public interest litigation is known also by a variety of other terms like: public law litigation, social action litigation, causes lawyering, strategic impact litigation. *See* Access to Justice (2002), "*Litigating for Justice A primer on Public Interest Litigation (PIL)*, edited by Joseph Otteh, pp. 1-6.

[6] Indian Supreme Court Judgment *Janata Dal v. H.S. Chowdhary* with Writ Petition (Crl.) No 114 of 1991 *Dr. P. Nalla Thampy Thera, Petitioner Versus Union of India and Others,* Respondents Criminal Appeal Nos. 304-311 of 1991 and Writ Petition (Crl) No. 114 of 1991.

redress is sought in respect of injury to the public in general. Abram Chayes, writing about PIL(or public law interest litigation as he would like to refer to it), in the USA context, defines the term as "the practice of lawyers in … seeking to precipitate social change through court-ordered decrees that reform legal rules, enforce existing laws, and articulate public norms".[7] Though PIL is not an endeavour restricted merely to lawyers, as it could be exercised by NGOs, civic minded citizens or even by the courts. Particularly, compared to the foregoing definition that seems to be narrow and focuses on the rights and the liabilities of the class groups from a purely legalistic engagement in pursuit of financial or other interests and liabilities, it embraces the main aspect of the public interest litigation. It is in this sense that PIL is used in this article.

Promoted by judicial activism and encouraged by the legislative bodies, PIL has been getting momentum in "setting up valuable and respectable records, especially in the arena of constitutional and legal treatment for 'the unrepresented and underrepresented".[8] Initially, public interest litigation started as a tool to fill the gap between government's commitment and enforcement in the areas of degraded bonded laborers, humiliated inmates of protective homes, women prisoners, the untouchables, children of prostitutes, victims of custodial violence and rape. Many other oppressed and victimized groups are attracting remedial attention of the courts, and PIL expanded towards providing relief to "all kinds of critical social ills afflicting the … society".[9] As the result, nowadays, almost "[a]lmost any [public concern] under the sun is covered under the rubric, public interest litigation".[10]

In addition to its role in filling the gap between government's commitment and enforcement, PIL may also be justified from the point of view of the anti-positivists who "question the inevitable legitimacy of majoritarian outcomes".[11] In what is called the "test" case that challenges the legality of existing laws and regulations or attempts to give new meaning to existing laws, judicial intervention via PIL could be justified by "process-defect in the enactment process that structurally works to exclude or dilute the interests of affected groups".[12] Legislation may also be shady because of "inadequate deliberative

[7] Abram Chayes (1976), "The Role of the Judge in Public Law Litigation", 89 *Harv. L. Rev.* 1281 as cited in Helen Hershkoff "Public Interest Litigation: Selected Issues and Examples", p.1. Available at: http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf(accessed ,17 Feb, 2017).
[8] Janata Dal v. H.S. Chowdhary, *supra* note 6.
[9] Ibid.
[10] Ibid.
[11] Ely, *Democracy and Distrust* (1980) as cited by Hershkoff *supra* note 7, p. 9.
[12] Hershkoff, *supra* note 7, p. 7.

process that ignores, distorts, or misstates the concerns of outsider groups".[13] Sometimes the outcome of the legislative process, the majoritarian law, may "deviate from national normative commitments"[14] or lack "minimum rationality".[15]

Furthermore, PIL is justified as it "recognizes the expressive[16] value of law and its constitutive relation to the customs and discourse of a civil society".[17] According to this view, PIL is "part of what sociologists call the 'new' social movements in which participants contest the terms of public meaning".[18] Hershkoff argued that "the very act of litigation affords a juridical space in which those who lack formal access to power become visible and find expression".[19]

In some countries such as India, USA and Pakistan, the procedural restriction of approaching the court has been lifted to the extent of allowing letters and

[13] Ibid.

[14] Olson (1965), *The Logic of Collective Action* as cited in Hershkoff, *supra* note 7, p.8

[15] Loffredo(1993), "Poverty, Democracy and Constitutional Law", 141 *U. Pa. L. Rev.* 1277, (1993) as cited by Hershkoff, s*upra* note 7, p. 8.

[16] The "expressive function" of law is the perceived social meaning of the law. It is the function of law in 'making statements' as opposed to controlling behavior directly. It is about the effect independent of sanction; *see* also, Richard H. McAdams (2000) An Attitudinal Theory of Expressive Law,79 Or. L. Rev. 339, for instance, pp 372-378). Laws simply because they are enacted (though not enforced) can be adhered by citizens. According to Thomas Patricia Funk, there are different channels by which an unenforced law might work: First, people may obey a law out of civic duty. Secondly, by making a statement about what is right or wrong, law may affect the preferences over the regulated behavior ("preference-shaping'" effect). Finally, expected social sanctions increase, if citizens are more inclined to enforce norms embodied in the law. The dominant reading of the literature is that through all these channels, the expressive function of law induces compliance. *See* Patricia Funk (2007), "Is There An Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines", *American Law and Economics Review* V. 9 .N1 (135–159) P. 136. For a more valuable discussions of the expressive function of legal norms, *See* Cass r. Sunstein (1996), **"**On The Expressive Function of Law", *University of Pennsylvania Law Review* .Vol. 144: 2021, Robert Nozick (1981), *Philosophical Explanations*, Harvard University Press, pp. *370-88*, Thomas A.J. McGinn (2015), "The Expressive Functions of Law And Lex Imperfecta". *Roman Legal Tradition*, 11, pp.1-41.

[17] McCann (1996), "Causal versus Constitutive Explanations (or, On the Difficulty of Being So Positive ...)", 21 L. & SOC. INQUIRY 457 (1996) as cited in Hershkoff *supra* note 7, p. 9.

[18] Turaine (1985), "An Introduction to the Study of Social Movements", 53 *SOC. RES.*749 as cited by Hershkoff, *supra* note 7, p. 9.

[19] Hershkoff, *supra* note 7, p. 9.

petitions to the court to be converted into public interest litigation.[20] Generally, individuals or NGOs can bring PIL against the government bodies, polluting companies or private individuals in an attempt to defend the interest of the public particularly of the poor, the marginalized and the less visible member/s of the communities. It is different from the conventional and adversarial system of litigation in that it is not filed by one private person against another for the enforcement of a personal right. On the contrary PIL, in the main, involves disputes over the rights of the public or a segment of it and the grievance is often against the state in respect of administrative or executive action.

According to Guardial Nijar, properly executed and channeled PIL generally serves the following purposes: it provides effective protection of the weaker sections of community; makes the government in general and the executive in particular accountable and act according to its established duty to abide by and enforce legal norms; it remedies democratic deficiency; makes the consideration of transparency in decision making real; protects and sustains democratic governance and the rule of law; by ensuring access to justice it makes it possible for the most effective proponents to bring cases before judicial bodies, i.e. it promotes effectivity in the use of judicial institutions; allows participitative justice, and allows diffused interests air, water, environment, biodiversity and the like to be presented.[21]

2. Significance of PIL in Environmental Matters of Developing Countries

Owing to the failure of the command and control (CAC) approach and private enforcement to fully address environmental problems, PIL plays a key role to prevent, mitigate, remedy or compensate for harm done to the environment.[22] Efforts to enforce emission limit values upon polluters by using private law remedies, and advancing private interests such as nuisance, tort or contract law have not been fully successful due to the nature of environmental problems.[23]

[20] Dinah Shelton and Alexandre Kiss (2005), *Judicial handbook on Environmental Law*, United Nations Environment Programme, p. 45

[21] Guardial Singh Nijar(2006), "Public Interest Litigation, A Matter of Justice: An Asian Perspective", available at https://www.aseanlawassociation.org/9GAdocs/Malaysia.pdf (accessed on August 26/2017), p. 3.

[22] Faure and Raja, *supra* note 4, pp.240-244. *See* also Justice Brian J Preston (2013),"Environmental Public Interest Litigation: Conditions for Success", a presentation by to the International Symposium Towards an Effective Guarantee of the Green Access: Japan's Achievements and Critical Points from a Global Perspective, 30-31, Awaji Island, Japan, p. 1.

[23] Faure & Raja, *supra* note 4, pp. 244-245.

Usually, the harm may be too diffused[24], thereby resulting in low damage amounts to individual victims even if the entirety of the damages is very high.[25] According to Schäfer, this situation creates a "rational apathy" [26] on the part of the victims. Therefore, a rational person could have very little incentive to take on the expensive litigation.[27] Damage to the publicly owned and publicly possessed natural resources, and to publicly owned but privately possessed natural resources that have a particular value to the public, is damage of a collective nature; and because no concrete individual interests are harmed, damages for this type of injury are in principle not recoverable under the traditional tort law.[28] Furthermore, a private suit may not be successful or never be brought to court due to problems in causation or latency, characterized by long time gaps between the emission and the actual occurrence of harm.[29]

The other key argument for PIEL is the immense "enforcement deficit" in environmental laws.[30]The CAC approach to environmental management, particularly in developing countries, is criticized for various reasons. In these countries environmental decay is either ignored or limited to a legislative recognition with little commitment of implementation. The failure of the state CAC approach may occur at the standard-setting level, particularly through the influence of private interest, resulting in less stringent regulatory solutions.[31] However, many failures occur at the enforcement level. In the decades since Stockholm, the developing world has reached an impressive sophistication in its environment-related legal regimes.[32] However, "in what has been the biggest disappointment with regard to these impressive legislative structures, the

[24] The rule on the Application of the traditional measure of damages may prevent full restoration of the damaged natural resources. Consequently, under the traditional tort law, the costs of such measures are not to exceed the lost market value of the property. This may have the effect that the natural resources which lack a direct market value are not fully restored. *See* Edward H.P. Brans (2001), *Liability for Damage to Public Natural Resources: Standing, Damage and Damage Assessment*, Published by Kluwer Law Int., p. 14.

[25] Faure & Raja, *supra* note 4, p. 245.

[26] Hans-Bernd Schäfer (2000), "The Bundling of Similar Interest in Litigation: The Incentives for Class Action and Legal Actions Taken by Associations", 3 *Eur. J. L. & Econ.* 183, p. 184.

[27] Faure and Raja, *supra* note 4, p. 245

[28] *See* Brans, *supra* note 24, p.14.

[29] Faure & Raja, *supra* note 4, p. 245.

[30] Id., p. 204.

[31] Id., p. 245.

[32] P. Wilson, *et al* (2002)., "Emerging Trends in National Environmental Legislation in Developing Countries", in Donna G. Craig et al. eds.,(2002*), Capacity Building for Environmental Law in the Asian and Pacific Region: Approaches and Resources*, pp. 185-186.

symmetry between the making of laws and their implementation has not progressed to anyone's satisfaction".[33]

Constitutional provisions and elegant laws are nothing but 'printed futility' unless enforced through institutions established for that purpose.[34] As Wilson and others duly noted:[35] "apart from establishing appropriate legal and institutional frameworks, the effective implementation of environmental legislation remains one of the most daunting challenges for developing countries", and they underlined that "ineffective law may be worse than no law at all. It gives the impression that something is being done whereas the existing legal arrangements are contributing little in terms of practical environmental management."

Some of the enforcement failures are rather innocent. They may be because of lack of capacity or instruments to take actions against the environmental wrongdoers. In other cases however, a "collusive relationship between enforcers and environmental polluters inhibits effective enforcement of environmental standards".[36]

The principal factor that contributes for the asymmetry between legislation and enforcement in the developing countries is the absence of political will. Developing countries have been working aggressively to develop their economy through capital and resource incentive industrialization, urbanization and chemicalization of agriculture with a hope that "rapid growth will eventually trickle down and eradicate poverty".[37] That has resulted in resource exhaustion, species extinction, ecosystem collapse which threaten people's lives, livelihoods and their very survival.[38] Regardless of the formulation of elegant laws on the environment and sustainable development, developing countries have repeatedly shown acute lack of political commitment to implement these laws. The prized objectives of attaining self-sufficiency, growth and development have prevented these governments from giving priority to this area of concern.[39] Environmental concerns come in a "distant second place" in the order of priority of the

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[33] Parvez Hassan &Azim Azfar (2004) , "Securing Environmental Rights through Public Interest Litigation in South Asia", 22 *Va. Envtl. L. J.* 215, p.221.

[34] *See* VRK Iyer, (1992), Justice at the Crossroads, 59, as cited in Adem K Abebe (2010), "Towards More Liberal Standing Rules to Enforce Constitutional Rights in Ethiopia",10 *African Human Rights Law Journal*, p. 408.

[35] Wilson, *supra* note 31. p. 180.

[36] Faure & Raja, *supra* note 4, p. 244.

[37] World Bank, Report No. 36946-PK (2006), "Pakistan: Strategic Country Environmental Assessment", available at http://wwwwds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/10/02/000160016_ 20061002113552/Rendered/PDF/3694610vol011PK.pdf. p. 1.

[38] Hassan & Azfar, *supra* note 33, p. 219.

[39] Ibid

executive branches of the governments of these countries.[40] The agencies in charge of protecting the environment may be unwilling to bring legal actions against the violators of environmental standards because of political pressure from other mission oriented agencies or powerful investors.

Therefore, PIEL is introduced to supplement the failures of the CAC approach and private enforcements. It is principally important to make the government and particularly the executive discharge its responsibility of implementing environmental laws faithfully and diligently.[41] PIEL "increases the frequency and scope of judicial review of agency action".[42] However, it is not a tool of enforcement intended to displace or replace government enforcement.

Moreover, PIEL enhances access to environmental justice in developing countries. It is a tool of immense importance to people who are not sufficiently powerful to be directly influential in social, environmental, economic and political policy issues that affect them and their communities. Courts in developing countries are criticized for primarily protecting the interest of rich.[43] The needy are considered "unwilling suitors" as either defendants or accused. This seriously dents access to justice and jeopardizes the proper functioning of rule of law.[44]

In countries where PIEL is vibrant, it is used by the courts as a tool to correct this despicable image of the courts in the eyes of the poor citizenry and thus restore the rule of law in the justice system.[45] In this regard the courts in South Asian Countries are seen as the champion of the legal protection of sustainable

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[40] Id., p. 219.

[41] The disparity between "law on the books" and "law on the ground" may not be bridged successfully as court decrees may go unenforced because of political decision, failure of will; or a kind of slippage between text and action different from that found in the legislative arena. *See*, Hershkoff, *supra* note 7, p. 9.

[42] Michael S. Greve (1989),"The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law," *Cornell International Law Journal*: Vol. 22: Iss. 2, Article 2, 229.

[43] Nijar , *supra* note 21, p.1. PIL is also heralded for its substantive emphasis on the needs and interests of groups long excluded from conventional majoritarian politics. *See*, Hershkoff, *supra* note 7, p. 7.

[44] Ibid. In this regard, Justice Bhagwati states that

> "The weaker sections of ... humanity have been deprived of justice for long years; they had no access to justice on account of their poverty, ignorance and illiteracy. … On account of their socially and economically disadvantaged position, they lack the capacity to assert their rights and they do not have the material resources with which to enforce their social and economic entitlements and combat exploitation and injustice."

See *Bihar Legal Support Society vs The Chief Justice Of India & Anr* on 19 November, 1986.

[45] Nijar *supra* note 21.p. 1.

development and the environment.[46] Interestingly the courts extend their helping hands using PIEL to the exploited and the underprivileged in the protection of their rights and interests not just against the dominant social elites but also against the mighty government.[47]

> When the Court finds, on being moved by an aggrieved party or by any public spirited individual or social action group, that the executive is remiss in discharging its obligations under the Constitution or the law, so that the poor and the underprivileged continue to be subjected to exploitation and injustice or are deprived of their social and economic entitlements or that social legislation enacted for their benefit is not being implemented thus depriving them of the rights and benefits conferred upon them, the Court certainly can and must intervene and compel the Executive to carry out its constitutional and legal obligations and ensure that the deprived and vulnerable sections of the community are no longer subjected to exploitation or injustice and they are able to realise their social and economic rights. ...[48]

In the developing countries, most environmental concerns of involuntary displacement and re-settlement, provisions of basic needs of water and sanitation, indoor air pollution are interlinked with the rights of the poor and the underprivileged sections of society. Consequently, it is less likely that these groups "will use the traditional method of litigation, which is expensive and cumbersome".[49] Hence, a public spirited citizens or NGOs must be allowed to bring their grievances to the attention of the court without being hurdled by the requirement of standing. In this regard PIEL could be viewed not just as a form of legal practice, it also constitutes a political practice that affords marginalized groups and interests an entry point into contested issues".[50]

3. Aspects of Public Interest Litigation

3.1. Liberalization of standing

Locus Standi (or standing) is a Latin term, which means legal standing before a court. It can be explained as the legal right of a person to initiate legal proceedings in the court. It determines whether hearings should be held and who should be heard. It can determine the issues that are decided and the interests that are represented in those decisions.[51] A person with standing "is someone

[46] Ibid
[47] Bihar Legal Support Society v. the Chief Justice Of India & Anr, *supra* note 44.
[48] Ibid.
[49] Hassan & Azfar, *supra* note 33, pp. 223-224.
[50] Hershkoff, *supra* note 7, P. 11
[51] Environmental Law Centre (2014), *Standing in Environmental Matters* , p. 7.

with the necessary legal status to trigger a hearing that would not otherwise occur, or someone with full party status in hearings that have been triggered”.[52]

The traditional conceptions of standing were very focused on a private individual’s enforceable legal rights. These conceptions “do not distinguish between standing and the merits of the substantive claim advanced by the person seeking standing”.[53] Standing is equated “with entitlement to the relief sought from the courts”.[54] Standing is also associated with “entitlement to seek relief rather than the entitlement to that relief”.[55] Generally, the traditional approach to standing “focuses on the ‘interest’ that an individual holds, for example being ‘directly affected’ by a decision”.[56] This conception of standing makes it usually unsuitable for public law matters in the courts, and it is even more questionable for use at administrative agencies. The traditional economic argument against expanding litigation is that it would “lead to many, inefficient procedures, resulting in an inefficient use of the court system and potentially to over-deterrence”.[57]

[52] Ibid.

[53] Ibid. *See* also Jonathan H. Adler (2001), “From Stand or Deliver: Citizen Suits, Standing, and Environmental Protection”, 12 *Duke Envtl. L. & Pol'y F.* 39; *Symposium Citizen Suits and the Future of Standing in the 21st Century: From Lujan to Laidlaw and Beyond*, p. 40.

[54] Ibid.

[55] Thomas A. Cromwell (1986), *Locus Standi*: *A Commentary on the Law of Standing in Canada* as cited in Environmental Law Centre *supra* note 51 p. 7**.**

[56] Environmental Law Centre**,** *supra* note 51**,** p. 7.

[57] Hassan & Azfar *supra* note 33, p. 250. It is also argued that only concrete adverseness can assure that the issues are framed and presented with sufficient specificity for consideration by the court, i.e. only a party whose legal position is affected by the Court's judgment can be relied upon to present a serious, thorough and complete argument. The relaxation of standing and the consequential judicial involvement in social change is also viewed as not being compatible with the notion of separation of powers. The judiciary is neither a representative institution nor has the expert knowledge to deal with such matters. It should thus leave issues of public policy to the exclusive territory of the legislature. Besides it is argued against the liberalization of standing from a more practical point of view. It is said that “to open wide the door of the Court to public interest litigants would be to risk opening the virtual floodgates to a multiplicity of proceedings. It is felt that these litigants "disproportionately divert the Court's attention and energy from pressing criminal, anti-trust executive or other private civil litigation”. *See*, Dianne L. Haskett (1981), “Locus Standi and the Public Interest”, 4 *Can.-U.S. L.J.* 39, Available at: http://scholarlycommons.law.case.edu/cuslj/vol4/iss/4.(accessed on July 10, 2017) PP. 41-45. *See* also Schaffner (1977), “Standing and the Propriety of Judicial Intervention: Reviving a Traditional Approach”, 52 *Notre Dame Law*. 944, 945 as cited by Dianne L. Haskett (1981), “Locus *Standi* and the Public Interest”, 4 *Can.-U.S. L.J.* 39 , pp.. 44-45.

According to Thomas Cromwell, modern public law jurisprudence focuses on whether the "issue" raised is suitable for determination.[58] The shift from plaintiff's vested interest to an issue is the foundation of PIL.[59] PIL requires courts to allow plaintiffs with a more unsubstantiated connection to a case than an ordinary civil plaintiff to file a suit. Liberalized standing rule that dissociates standing from a concrete and particularized injury is the main aspect of PIL in environmental matters.

Liberalization of standing is a function both of judicial interpretations and legislative enactment.[60] The relaxation of standing in the United States was the main features of PIL.[61] The relaxation of restrictive rules of standing that started in the 1960s by the judiciary has been expanded by the legislature as of 1970s particularly in environmental matters. By bestowing standing to citizens, the US Congress enables citizens to act as "private attorney general".[62] By lifting a restrictive "direct interest" requirement, modern public law jurisprudence has allowed standing to speculative claims of perceived threats to a statutorily recognized interest from governmental action or private actions.[63]

The scrupulous involvement of the judiciary in India with the environment began with the relaxation of the rule of *locus standi* and the departure from the "proof of injury". In this regard in 1976, the Supreme Court of India in *Maharaj Singh* v. *State of Uttar Pradesh*, stated:

> [w]here a wrong against community interest is done, '*no locus standi*' will not always be a plea to non-suit an interested public body chasing the wrong-doer in court… locus standi has larger ambit in current legal semantics than the accepted, individualist jurisprudence of old. [64]

The *first* reason that justifies the liberalization of standing rules in environmental matters is the "rational apathy" discussed earlier. The *second* reason is that the decree in a case with a large number of stakeholders, such as environmental matters, has the nature of a "public good," which would not be provided for, or is, at best, underprovided by a rational victim.[65] Hence, the requirement of standing "becomes an impediment to the redress process".[66] *Thirdly*, the relaxation of standing and PIL is usually more efficient in dealing

[58] Cromwell, *supra* note 55 p. 7.
[59] Environmental Law Centre, *supra* note 51**,** p. 7.
[60] Adler *supra* note , 53. p.51.
[61] Greve , *supra* note 42, p. 198.
[62] J Adler, *supra* note 53 , p. 52.
[63] Ibid.
[64] *SP Gupta and others* vs *Union of India & others*, AIR (1976) SC 578 .
[65] Hassan & Azfar, *supra* note 33, p. 251.
[66] Ibid.

with environmental cases, because these cases are concerned with the rights of the community rather than the individual.

PIL is typified by a non adversarial approach, the participation of *amicus curiae*,[67] the appointment of expert and monitoring committees by the court, and the issue of detailed interim orders in the form of continuous mandamus.[68] Unlike the traditional tort approach, in liberalized standing, the environment is valued as a unity and that the protection and conservation of natural resources does not stop at the border of private property.

The liberalization of the standing rule in some countries resulted in important consequences which were particularly relevant to environmental matters.[69] *First*, it was possible that there could be several petitioners for the same set of facts dealing with an environmental anguish, and the court was able to deal with the issue from the point of view of an environmental problem to be solved, rather

[67] *Amicus curiae* translated as "friend of the court" is a traditional device which allows for the interests of outsiders to be placed before the court during a legal action. The term is usually applied to a solicitor or barrister of the court who, being present during the proceedings makes some suggestions to the court in regard to the matter before it. Meriam-Webster Dictionary defines it as "… a professional person or organization … that is permitted by the court to advise it in respect to some matter of law that directly affects the case in question. See *Meriam-Webster Dictionary at http://www.merriam-webster.com/dictionary/amicus%20curiae.* Black's Law Dictionary defines *amicus curiae* as "a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter." See *Garner B, Black's Law Dictionary,* 7th Edition (1999) 83. It also applies to persons who have no right to appear in a particular suit but are allowed to protect their own interest and to a stranger present in the court who calls the court's attention to some error in the proceedings. The *amicus* who assists the court is not an original party to the proceedings (unlike the case of the public interest plaintiff) and his position is also quite different from that of an intervening party. An *amicus* does not possess the right to demand service of papers, to file pleadings or to examine a witness, nor is he or she entitled to appeal against a decision or to apply for a rehearing. Even though its role is being changed recently, the traditional role of the *amicus curiae* is simply to assist in a detached, independent manner by placing oral arguments before the court. It is very important in PIL. As will be discussed in the sections to come in this article, APAP has requested Ethiopian Human Rights Commission to appear as *amicus curiae* in the first and hitherto the only PIL case in Ethiopia. *See infra* note 142. *See* also Loretia RE (1984) "The Amicus Curiae Brief: Access to the Courts for Public Interest Associations", *Melbourne University Law Review,* Vol. 14, June ' 84, pp. 524-525.

[68] Justice B.N. KIRPA, "Developments in India Relating to Environmental Justice", p. 3. Available at http://staging.unep.org/delc/Portals/119/publications/Speeches/INDIA%20.pdf (Accessed, August 10, 2017).

[69] Ibid.

than a dispute between two parties.[70] *Second*, the rule enables the court to deal with many interests that went unheeded such as the environmental interests of the under-resourced and illiterate who normally had no access to the judiciary.[71] *Third*, the relaxation of *locus standi* and PIL brought into sharp focus the conflict of interest between the environment and development, and set the stage for a number of specific decisions thereof.[72]

As part of broadening access to justice in addition to relaxation of the standing rules, the courts also relaxed the forms of petitions and allowed *epistolary jurisdiction* (petition written in a letter form).[73] In the seminal judgment on public interest litigation in India, *S. P. Gupta v. Union of India*,[74] the court criticizing procedures as nothing "but a handmaiden of justice",[75] opined that "the cause of justice can never be allowed to be thwarted by any procedural technicalities".[76] The court stated that it would "unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in the exercise of its dispensing power and treat the letter of the public-minded individual as a writ petition and act upon it".[77] Hence, a petition may be filed just by letter addressed to a court instead of going through the complex and expensive requirements of preparing a regular petition.[78] It is a measure aimed at making justice accessible to the disadvantaged and the poor. Fairness also demands that a person acting in *pro bono* in the interest of the poor should not incur personal expense.[79]

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[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Hassan and Azim, *supra* note 33 .p.227.
[74] *Gupta v. Union of India*, A.I.R. 1982 S.C. 149.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Yoseph Mulugeta Dadwaza (2005), "Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?", unpublished LLM thesis, University of Pretoria, p. 16.
[79] Risks of costs being imposed on PIL lawyers in case they lose has been one of the hindrances to the development of the institution. Different attempts have been made to address this problem in different jurisdictions. In the Us for instance, in what is termed as "cost shifting", the Freedom of Information Act Attorney fee (costs) awards (1966); Environmental citizen suit attorney fee awards (1970-1973); Civil Rights attorney fees Awards (1976); Equal access to justice Act (1980); and 200 other Federal statutes modified the rule requiring a loser to pay into 'one way costs' in which the loser is not required to pay. Other countries try to address the challenge via court discretion (protective cost orders). In India for instance, more often than not, the litigant (PIL plaintiff) will not bear the obligation of paying the cost of litigation even when he loses unless it is proved that the PIL was motivated by private interest. In Arts. 362, 363 and

3.2. Remedies

Redress in PIL may be limited to a declaration of the law on the point or an injunction, as "compensation is not usually the main objective".[80] Especially 'structural reform suit', that challenges deficiencies in the enforcement of existing laws and 'test' case that challenges the legality of existing laws and regulations or attempts to give new meaning to existing laws, remedies depend on declaratory relief i.e., "judicial expression of a constitutional or statutory norm that informs and educates the other branches and the public at large".[81]

Indian courts have demonstrated the ability to press against the boundaries of the traditional understanding of remedies. The courts have not limited themselves to the usual remedies. They have shown a willingness to experiment with remedial strategies that require continuous supervision and that appear significantly to shift the line between adjudication and administration. Apart from appointing socio-legal commissions to gather facts during proceedings, they would also create agencies to suggest appropriate remedies and to monitor compliance with orders. The courts' final orders in public interest litigation matters are also detailed, specific and intrusive with a view to facilitating compliance.[82]

3.3. Liberal interpretation of rules

The other aspect of PIL is that courts interpret constitutional and legislative rules as broadly as possible with the view to converting formal guarantees in the constitutions into positive human rights.[83] When faced with PIL, courts take a different role from what they do in private litigation. They give substantive content to public norms in constitutional or statutory provisions that underlie the

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364 of the Ethiopian Civil Procedure Code, the discretion is given for the court to determine who bears the litigation fee. In some cases, the public interest plaintiff can raise the funds themselves through fund raising events, seeking funds from NGOs, etc. *See* Lara Friedlander(1995) "Costs and the Public Interest Litigant" ,55,*McGill Law Journal* v. 40, Thomas D**.** Rowe, JR (1982), "The Legal Theory of Attorney Fee Shifting: a Critical Overview" *Duke law Journal* vol. 651; Hon. Justice Brian J Preston SC(2013) "Environmental Public Interest Litigation: Conditions for Success" a paper presented at the International Symposium entitled "*Towards an Effective Guarantee of the Green Access: Japan's Achievements and Critical Points from a Global Perspective"* 30-31 March 2013, Awaji Island, Japan; Chris Tollefson (2011) "Costs in Public Interest Litigation Revisited", *The Advocates' Quarterly* , V.39, Robert v. Percival & Geoffrey P. Miller (1984), "The Role of Attorney Fee Shifting in Public Interest Litigation", 47 *Law & Contemp. Probs.* 233.

[80] Shelton & Kiss (2005) *supra* note 20, p. 45.

[81] Hershkoff, *supra* note 7, p.11.

[82] J. Cassels (1989), "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" *Am. J. Comp. L.*, V. 37, Issue 3, 498, p. 506.

[83] Id., p. 498.

cases and attempt to prevent or correct inappropriate governmental behavior.[84] Although judicial activism reflected in the liberal and positive interpretation of human rights provisions is a key component, it is not enough. Activism should also be demonstrated by those who are engaged in public interest intervention by way of creatively exploiting gaps and loopholes in those provisions in a manner that could motivate the courts to interpret them in favour of a wider protection and promotion of the rights and freedoms.[85]

4. Public Interest Litigation in Ethiopia

4.1. Access to Environmental Justice

Access to justice is a right guaranteed to everyone in Ethiopia. According to Article 37 (1) of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE)" [e]veryone has the right to bring a justiciable matter to and to obtain a decision or judgment by, a court of law or any other competent body with judicial power".[86] The Constitution also guarantees the right to any association representing the collective or individual interest of its members.[87] The right is guaranteed equally to everyone without discrimination.[88]

The right has been further recognized in the major international and regional human rights instruments to which Ethiopia is a party such as: the Charter of the United Nations, the Universal Declaration of Human Rights (UNHR)[89], the International Covenant on Civil and Political Rights (ICCPR),[90] the African Charter on Human and Peoples' Rights,[91] and the International Covenant on Economic, Social and Cultural Rights (CESCR).[92]

In the context of the environment, Principle 10 of the Rio Declaration provides that "effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."[93] Agenda 21 calls on governments and legislators to establish judicial and administrative procedures for legal redress and remedy of actions affecting the environment that may be unlawful or infringe on rights under the law, and to provide access to

[84] Carl Tobias (1991), "Standing to Intervene", *Wis. L. Rev.* 415. p.420
[85] Yosef , *supra* note 78, p. 16.
[86] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Article 37(1).
[87] Id., Art, 37(1(a &b)
[88] Id., Art. 25.
[89] *See* Article 8 of Universal Declaration of Human Rights.
[90] Article 2(3) of the ICCPR
[91] *See* Article 7 of African Charter on Human and Peoples' Rights.
[92] *See* the Preamble of ICESCR and United Nations. 'General Comment No. 9', Committee on Economic, Social, and Cultural Rights", E/C.12/1998/24 (1998) para. 2.
[93] The Rio Declaration on Environment and Development (1992), Principle, 10.

individuals, groups and organizations with a recognized legal interest. The United Nations Convention on the Law of the Sea (UNCLOS) also provides that states shall ensure that recourse is available for prompt and adequate compensation or other relief for damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.[94]

4.2. Public Interest Environmental Litigation (PIEL)

4.2.1 The constitutional framework

Article 37 of the FDRE Constitution which, as stated earlier, embodies right to access to justice is recognized applies to any action including violations of environmental rights. Unlike the Civil Procedure Code of Ethiopia which puts the requirement of 'vested interest'[95] for one to petition any judicial or quasi-judicial body, the plain reading of Article 37(1) does not seem to embody the requirement of standing. There are some scholars who argue that the constitutional provision should be understood in a literal sense as relaxing or otherwise lifting the "vested interest" requirement, thereby enabling any one, including NGOs, to bring a legal action and seek relief thereof.[96] Others, on the other hand, believe that sub-article makes such interpretation very difficult,[97] and that it is very difficult to establish PIL based on Art. 37 of the Constitution.

Article 37(2) provides that "[t]he decision or judgment referred to under sub-article 1 of this Article may also be sought by any association *representing the collective or individual interest of its members*; or any group or person who is *a member of*, or represents a *group with similar interests*".[98] Article 37(2(a) provides that for an association to bring a legal action, it must show an injury to the collective or individual interest of its members. Hence, an association can challenge only those actions that violate the rights of its members or its rights as an association. For example, an environmental organization in Ethiopia can

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[94] United Nations Convention on the Law of the Sea (UNCLOS) (Art. 235(2)).

[95] Civil Procedure of Ethiopia, 1960, Article 32 (2) reads: No person may be a plaintiff unless he has a vested interest in the subject matter of the suit.

[96] *See*, Yosef, *supra* note 78, p. 40; Getahun Kassa (2007) "Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System" 20 *Africa Focus* 75, p. 86; Mebrahtom Fitiwi , Tsegay Berhane and Tecle Hagos, "Public Interest Litigation (PIL) as a Means to Protect the Environment: The Case of Tigray Regional State" in Mulu Beyene and Zbelo Haileselassie (editors)(2016), *The Role of Law in the Protection of the Environment and Natural Resources*, Mekelle, p.31; *See* also Ayalew Abate, "Public Interest Environmental Litigation (PIEL) by Civil Society Organizations (CSOs) in the FDRE: A Study on the Legal Framework/Infrastructure" in Molla Addisu and et.al. (Eds) (2011), *Proceedings of The Second National Research Symposium On: Research for Socio- Economic Transformation*, Debre Markos University.

[97] Adem, *supra* note 34.

[98] FDRE Constitution, *supra* note 88 Art. 37(2), emphasis added.

claim that pollution from an industry endangers the lives of the group's members and thus its existence as a group.[99] Thus, in addition to the right that every physical person has, associations possess a special right in that they can litigate for the interest of their members under the FDRE Constitution. Even though allowing associations to bring a legal action representing the interest of their members is commendable, it is very difficult to establish PIEL based on Article 37((2(a)) as the requirement of *vested interest* is still there.

According to Article 37(2(b) any group or person who represents a group with similar interest has a standing to bring justiciable matters before a court of law or any other competent body with judicial power. What constitutes a group with similar interest? Do residents of a certain area who are affected by emissions from a factory constitute a group with similar interest? What about those persons who have 'a similar interest' in protecting their right to a clean and healthy environment? The term seems to be broad enough to include these and other groups.

Another important issue in this regard relates to the meaning of 'representation'. Does it require the consent[100] of victims of pollution from a factory or other activities? Or is it possible for an NGO or a public spirited individual to represent "a group with similar interest" without their consent or even without their knowledge?

The Minutes of the Constitution do not offer any help in relation with the interpretation of these issues. The broader interpretation of Article 37(2(b)) that allows PIEL seems more plausible because during the enactment of the FDRE Constitution, PIEL was in the mainstream in most countries and the protection of environment, particularly with participation of all including NGOs, was a pertinent agenda of the time by the world community. At least, the ambiguity

[99] There seems to be no consensus with regard to the association's standing to bring a legal action representing the interest of the members of an association. For instance, the US permits groups to sue on behalf of their members; whereas the German administrative law does not allow an association to sue on behalf of the members (based upon the premise that the interests of association members are different from the association's own interests). *See*, for example. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1971) ("It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review"). *See* also Faber, Die *Verbandsklage im Verwaltungsprozess* 39-40 (1972) as cited in Greve, (1989) *supra* note 42 p. 214.

[100] If it is with the consent of the victims, it is a class action and not a PIL. For a detailed discussion on difference and similarity between class action and PIL, *See,* Renato Corona, "Class Action, Public Interest Litigation and the Enforcement of Shared Legal Rights and Common Interests in the Environment and Ancestral Lands in the Philippines", *available at https://www.aseanlawassociation.org/9GAdocs/Philipines.pdf,* (Accessed on 24/12/2017)

of the provision does not render such line of wider interpretation absurd or contrary to legislative intent.[101]

This line of interpretation seems to be accepted by the House of the Peoples' Representatives (HPR hereinafter) when it enacted the Pollution Control Proclamation (PCP) which expressly introduced PIEL in the Ethiopian legal system for the first time. On the face of the ambiguity of the Article 37(2(b), it is not plausible consider the Pollution Control Proclamation as unconstitutional. Yet, the above line of interpretation of the Constitutional provision is still restrictive with regard to standing, because (unlike the Pollution Control Proclamation) it does not accord personality to the environment which could have protected the environment without the need to represent any victim. In *Action Professionals' Association for the People (APAP) v. the Ethiopian Environmental Authority* (APAP v. EPA) for example, the applicant (APAP) argued that Article 37(2) (b)) provides enough standing to bring PIL cases to court or to any competent body with judicial power.[102]

The HPR seems to lack consistency in its understanding of Article 37(2(b)) with regard to a standing for constitutional interpretation. As per Article 84(2) of the FDRE Constitution, any court or interested party is entitled to challenge the constitutionality of any federal or state law before the Council of Constitutional Inquiry (CCI).[103] According to the Proclamation issued to consolidate the House of the Federation and Definition of its Powers and Responsibilities, law is defined to include proclamations issued by the federal or state legislative organs, and regulations and directives issued by the federal and states government institutions.[104] It also includes international agreements that have been ratified by Ethiopia.[105] According to the Council of Constitutional Inquiry Proclamation[106] it is not just the federal or state laws that can be challenged for unconstitutionality. Article 4 of the Proclamation states that "...

[101] Adem Kassie argues that the restrictive interpretation of Article 37(1) is the most reasonable interpretation to save the whole provision of Article 37 from looking absurd. He argues that had it not been for restricting standing (with a vested requirement), sub-article 1 of the provision would have been enough to allow the liberalization (or the complete abolition) of standing. According him, if the intention of the legislature was to lift the standing requirement, sub-article 2 would have been unnecessary. But it should be noted that in the absence of sub-article 2, sub-article one would have been absurd as "just everyone" cannot bring a legal action even in the absence of the requirement of standing. *see* Adem Kassie, *supra* note 34, p. 417.

[102] APAP Policy document, unpublished. On file with the author.

[103] FDRE Constitution , Article 84(2).

[104] Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation No. 251/2001, Article 2(2).

[105] Ibid.

[106] Council of Constitutional Inquiry Proclamation No.798/2013, Article 3.

customary practice or decision of government organ or decision of government official…" can also be challenged for unconstitutionality before the CCI.

An interested party may mean only a party to litigation in a narrower sense or any person or entity that seeks to challenge the constitutional validity of a law irrespective of him/her having a personal interest affected by the challenged legislation or decision. According to the CCI Proclamation, if the case is pending before a court of law, the court on its own motion or by the petition of one or more of the parties, or one or more of the parties can submit their petition to the CCI.[107] With regard to issues of constitutional interpretation outside courts of law, the CCI Proclamation applies to "[a]ny person who alleges that his fundamental right and freedom provided under the Constitution have been violated due to the final decision rendered by government organ or official".[108]

Hence, only persons with vested interest can approach CCI (and hence the HOF) for constitutional interpretation. Therefore, if any NGO, *bona fide* citizen or the court for that matter, wants to challenge the constitutionality of an environmental legislation or international treaty to which Ethiopia is a party or government decision with regard to the environment, it must show vested interest to approach the CCI.

4.2.2. Enabling Laws of the Ethiopian Human Rights Commission and the Institution of Ombudsman

The Ethiopian Human Rights Commission is established with the general objective to serve as one of the institutions that would take the responsibility to enforce human rights and freedoms[109] and with specific objectives, *inter alia,* to monitor the conformity of laws and policies to human rights standards; disseminate human rights education and investigate human rights violations both on its own initiative and upon receiving complaints.[110] The Ethiopian Ombudsman is established with the aim 'to see to bringing about good governance that is of high quality, efficient and transparent, and […] based on the rule of law, by way of ensuring that citizens' rights and benefits provided for by law are respected by organs of the executive'.[111] While the Commission has a broader mandate, relating to all government institutions, the Ombudsman has the power to investigate cases concerning the action and inactions of the executive branch of the government.

According to Article 2(9) of the Ethiopian Human Rights Commission Proclamation, a "person claiming that his rights are violated", or "his spouse,

[107] Id. Art. 4.
[108] Id. Art. 5(1).
[109] Ethiopian Human Rights Commission Establishment Proclamation No.210/2000. Art. 5.
[110] Id., Art.6.
[111] Institution of the Ombudsman Establishment Proclamation No. 211/2000. Arts. 5 & 6.

family member, representative, or … *a third party*' has a standing to bring complaints before the Commission.[112] 'Third party' includes 'a deputy, an association or an NGO representing an individual or a group'.[113]

Likewise, by lifting the special interest requirement, the Ombudsman Establishment Proclamation allows a standing to "a person claiming to have suffered from maladministration, or his spouse, family member, his representative or *a third party*'[114]. Unlike the Human Rights Commission Proclamation, this Proclamation does not define the scope of "*third party*". But given the fact that the Ombudsman can entertain anonymous complaints considering the gravity of the impugned maladministration,[115] it seems logical to conclude that 'third party' may (as in the case of the Human Rights Commission Proclamation) include a deputy, an association or an NGO representing an individual or a group'.

The standing rules before the Ombudsman and the Commission are thus relatively liberal as compared to the ones before the CCI, the House of the Federations, or the ordinary courts. Hence, it can be argued that the enabling laws of Ethiopian Human Rights Commission and Ombudsman accommodate PIEL although the findings of these institutions are nonbinding.

4.2.3. The Federal Courts Advocates Licensing and Registration Proclamation

The Federal Attorney General is entrusted with the power of registration of federal advocates, issuance, renewal and revocation of licenses.[116] Of the three types of licenses,[117] the special advocacy license is issued to any Ethiopian lawyer who seeks to defend the general interests and rights of the society[118] provided, among other things, that he/she: has a degree in law from a legally recognized educational institution; may not receive any kind of reward from a section of a society and has suitable character to shoulder such responsibility.[119] This provision paves the way for PIL, as it encourages public spirited lawyers who seek to engage in public interest lawyering including the provision of legal

[112] Art 22(2), Ethiopian Human Rights Commission Establishment Proclamation No.210/2000., Emphasis added.

[113] Id., Art 2(9).

[114] Art. 22(1), Institution of the Ombudsman Establishment Proclamation No. 211/2000.

[115] Id., Art 22(2).

[116] Federal Attorney General Establishment Proclamation No. 943/2016.

[117] Federal Courts Advocates Licensing and Registration Proclamation, 2000, Art.10, Proclamation No.199, *Federal Negarit Gazeta,* Year 6, No.27.The three types of licenses are: federal first instance court advocacy license; federal courts advocacy license; and a federal court special advocacy license.

[118] Id., Art. 7

[119] Id., Art. 10.

assistance to the disadvantaged and litigation targeted at bringing about respect and promotion of human rights. Moreover, advocates are required by law to render *pro bono publico* services for minimum of fifty hours a year legal service free of charge or upon minimal payment.[120]

To the knowledge of this author, however, there is no PIEL case brought by an attorney in Ethiopia as far. One of the reasons could be the fact that environmental NGOs do not have this opportunity as advocacy license is granted only to natural persons of Ethiopian nationality.[121] The other reason could be the absence of law authorizing the establishment of law firm as a firm would be in a much better position to bring PIL as seen in other jurisdictions than individual lawyers. Finally, the fact that the granting, supervision and renewal of the advocates license is controlled by the executive branch, this may be a huge impediment for the development of PIL in the fullest sense with a primary objective of correcting the inactions of the executive branches of the government.

4.2.4. CSOs and PIEL in Ethiopia

The Charities and Societies Proclamation (CSP hereinafter) categorizes societies into three: Ethiopian Charities (Ethiopian Societies),[122] Ethiopian Residents Charities" (or "Ethiopian Residents Societies),[123] and Foreign Charities.[124] The Proclamation excludes Foreign and Ethiopian Resident human rights NGOs from overall human rights advocacy activities of the country namely the advancement of human and democratic rights; the promotion of equality of

[120] The beneficiaries of such services are : (1) persons who cannot afford to pay, (2) charity organizations, civic organizations, community institutions, (3) persons for whom a court requests legal services, and (4) committees and institutions that work for improving the law, the legal profession and the legal system.

[121] There are recent tendencies of granting licenses to Law School Legal aids. The issue of cost (of litigation) could also be another reason. Regarding the issue of cost of litigation, See s*upra* note 79.

[122] "Ethiopian Charities" or "Ethiopian Societies" are those Charities or Societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians, generate income from Ethiopia and wholly controlled by Ethiopians. They may be deemed as Ethiopian Charities or Ethiopian Societies if they use not more than ten percent of their funds which is received from foreign sources. *See* Article 2(2) of Charities and Societies Proclamation No.621/2009(CSP Proclamation hereinafter).

[123] "Ethiopian Residents Charities" or "Ethiopian Residents Societies" are those Charities or Societies that are formed under the laws of Ethiopia and which consist of members who reside in Ethiopia and who receive more than 10% of their funds from foreign sources. *See* Article 2(3) CSP Proclamation.

[124] "Foreign Charities", those Charities that are formed under the laws of foreign countries or which consist of members who are foreign nationals or are controlled by foreign nationals or receive funds from foreign sources. *See* Article 2(4) of CSP Proclamation.

nations, nationalities and peoples and that of gender and religion; the promotion of the rights of the disabled and children's rights; the promotion of conflict resolution or reconciliation and the promotion of the efficiency of the justice and law enforcement services.[125] But they are allowed to participate in environmental protection or improvement efforts.[126]

As litigation is a typical case of a human rights activity, foreign and resident charities are not allowed to participate in PIEL. Given the financial and awareness limitations of Ethiopian charities, the exclusion of foreign and resident charities from participating in PIEL may hamper the development of PIEL in particular and environmental protection in general. Regrettably, as will be discussed in the section below the only NGO which pioneered by bringing the first and hitherto the only PIEL with the view to testing the meaning of the Article 11 of Proclamation 300/2002 is in the process of closure[127] as the result of the inconvenience posed by the Charities and Societies Proclamation.

4.2.5 Environmental laws

The right to a clean and healthy environment is recognized as one of the democratic rights of all persons in the FDRE Constitution.[128] As part of the move to realize the right, Article 11 the Pollution Control Proclamation has introduced PIEL as one of the innovative strategies in the Ethiopian legal system, and has thus opened the door for individuals and environmental rights advocacy groups to bring cases before courts. Sub-article one of the provision guarantees any person the right to "lodge a complaint at the Environmental Protection Authority (EPA) or the relevant regional environmental agency against any person allegedly causing actual or potential damage to the environment" without the need to show any vested interest.[129] A complainant is granted with the same broad right of standing before a court when the EPA or regional environmental agency fails to give a decision within thirty days or when he/she is dissatisfied with the decision.[130]

Similarly, Article 10 of Regulation No.159/2008 which was issued as per Article 20 of the PCP provides that any person without the need to show any vested interest can submit his complaint before the competent environmental organ (the Ministry of Environment, Forest and Climate Change or Regional

[125] Charities and Societies Proclamation No.621/2009, Art. 14 (5).
[126] Id., Art. 14(2(b).
[127] Interview (on December 24, 2017) with Ato Wongel Abate Abebe, Executive Director of the APAP and the lawyer who represented APAP, in *APAP v. EPA* case, *infra* note 134..
[128] FDRE Constitution Art. 44.
[129] Environmental Pollution Control Proclamation No.300/2002, (PCP hereinafter), Article 11(1).
[130] Id., Art. 11(2).

Environmental Organs) concerning industrial pollution.[131] The competent organ to which the complaint is submitted is duty bound to respond to the complainant within 90 days.[132] Any person dissatisfied with the decision of the competent organ has 30 days to submit a complaint notice to the head of the competent organ who should issue his/her decisions within 30 days.[133]

While it is commendable that PIEL is recognized in both laws, there are various questions that remain unanswered. One of the issues is whether a suit can be filed against an environmental organ whose inaction causes an environmental pollution. In the case between *Action Professionals' Association for the People (APAP) v. the Ethiopian Environmental Authority* (APAP v. EPA),[134] the plaintiff, a non-governmental organization lodged a complaint on urban pollution to the Federal First Instance Court. It had first lodged its complaint to the EPA as per the requirement of the Article 11 of the Pollution Control Proclamation demanding the latter to take necessary measures to stop the environmental pollution.[135]

Based on various researches and environmental audit reports of the EPA, APAP stated that Akaki and Mojo rivers are being polluted by solid and liquid waste of Addis Ababa and the untreated liquid as well as solid wastes discharged into these rivers by different factories in and around Addis Ababa and Modjo towns.[136] APAP invoked the constitutional right to live in a clean and healthy environment, international human rights instruments and chemical related multilateral environmental agreements ratified by Ethiopia and national legislation, and it argued that these laws and the Pollution Control Proclamation, in particular are clearly violated.[137]

The EPA responded that given the circumstances under which it was working, it has been taking various measures which it deemed necessary such as developing directives, guidelines and standards, on the basis of which it would take measures to realize the environmental rights of everyone in the country.[138]

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[131] Prevention of Industrial Pollution Council of Ministers' Regulation No.159/2008, Article 10(1).

[132] Id., Article 10(2).

[133] Id., Article 10(3).

[134] *Action Professionals Association for the People (APAP) v. the Ethiopian Environmental Authority*, the Federal Democratic Republic of Ethiopia Federal First Instance Court, file No.64902, 1999 E.C.

[135] Statement of Complaint to the Ethiopian Environmental Protection Authority based on Article 11(1) of Proclamation 300/2002, 28/03/98 E.C.

[136] Ibid .

[137] Ibid.

[138] The response given and addressed to APAP by the Ethiopian Environmental Protection Authority to the Complaint lodged by APAP**.** December 8, 2005. (Unpublished on file with the author).

It also stated that it has been conducting environmental audits on 35 factories and undertaking research on the pollution of Akaki River. EPA argued that since the ambient quality standards that are necessary for ascertaining the existence of pollution are not yet adopted by the Environmental Council[139], it is difficult to determine that there indeed is pollution.[140]

Not content with the response of the EPA, APAP filed a case to the court[141] placing the EPA as a sole respondent and prayed for the court to order EPA to take necessary administrative and legislative measures so that the rivers can be protected from all forms of pollutants. The plaintiff also requested the court to establish inspectors to ensure that the defendant is taking the necessary measures.[142]

In its statement of defense, the EPA argued alternatively on two grounds. In its preliminary objection it argued that the plaintiff has no standing to bring a legal action against it as the respondent is not a polluter.[143] It also argued that if it is possible to sue the regulatory organ, the party to the suit should be the concerned regional bureaus and not the EPA as the latter's responsibility is to initiate/recommend the enactment of laws, policies, standards and guidelines which should be approved by either the HPR or the Council of Ministers. On a substantive front, the EPA argued that given the institutional hurdle and other capacity problems, it has been doing its best to discharge its duty of protecting the right to a clean and healthy environment of citizens.[144]

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[139] A supreme body composed of the Prime Minister or his designate (Chairman) , members to be designated by the Federal Government, a representative designated by each National Regional State, a representative of the Ethiopian Chamber of Commerce, a representative of local environmental nongovernmental organizations, a representative of the Confederation of Ethiopian Trade Unions, and the Director General of the Authority. It is empowered to review and approve directives, guidelines and environmental standards prepared by the EPA (*see* Articles: 7-9 of Environmental Protection organs Establishment Proclamation No. 295/2002.

[140] The Federal Democratic Republic of Ethiopia Environmental Protection Authority, Response to Action Professionals' Association for the People, 17/04/1998 E.C., Ref.No.1/AP-GU/1/1.

[141] APAP v. EPA, *supra* note 134.

[142] The plaintiff also requested the Ethiopian Human Rights Commission to present itself as *amicus curiae* during the course of the litigation.

[143] APAP v.EPA, statement of defense, 11/07/1998 Ethiopian Calendar (March 20, 2006)

[144] Ibid. Moreover, with regard to the plaintiff's request of the court to have the EPA ordered to clean up the rivers, it contends that it is the obligation of the polluters and not the EPA. It also requested the court to reject the plea of the plaintiff to appoint environmental inspectors as there is no legal ground for such appointment. The EPA stated that it has doubts whether the Proclamation issued to Control pollution in the country in 2002 could be applicable to the facilities established several years before its entry into force.

The First Instance Court rejected APAP's application by accepting the preliminary objection of the EPA. The court stated that the cumulative reading of sub-articles one and two of Article 11 of the Pollution Control Proclamation grant standing to anyone to bring such cases against the polluter and not against the EPA.[145] Dissatisfied with the decision, APAP appealed to the Federal High Court[146] only to see that its application was rejected "for lack of legal and factual error" in the lower court's decision.[147] Finally, APAP took the case to the Cassation Division of the Federal Supreme Court which refused to consider the merit of the case, stating that the decisions of the lower courts do not have fundamental error of law.[148]

APAP should be acclaimed for pioneering to bring the first PIEL case in Ethiopia. However, it seems to have missed the fact that not only the Pollution Control Proclamation allows PIEL but also determines against whom the action could be taken. Article 11(1) seems to be clear PIEL before the Ministry is allowed "*against any person allegedly causing actual or potential damage to the environment*".[149] So, a person who can be defendant is an actual or potential polluter. The Ministry or a regional environmental organ can only be a defendant if they are either actual or potential polluters. It should be noted here that the courts did not examine the question whether the EPA's failure to discharge its statutory obligation constitutes committing pollution (by omission or inaction) in the meaning of Article 11 of the PCP.

APAP argued that the use of the term "*may institute a court case*" (under Article 11/2) instead of "*may appeal to court*" clearly shows that a suit could be brought against the EPA if it fails to discharge its duties diligently and effectively.[150] APAP contended that taking the same case to court (with the same relief) is inappropriate if it has been decided by a competent environmental organ. To construe Article 11(2) as allowing the plaintiff to take its case to the first instance jurisdiction of an ordinary court and not by appeal would be superfluous, and would waste time and public resource.[151]

Hence, the need to rescue the provision from sounding superfluous requires a *positive* interpretation which can render the EPA a defendant.[152] But what APAP

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[145] APAP v. EPA, *supra* note 134.
[146] APAP v. EPA, Statement of Appeal to the Federal High Court, 06/12/06 E.C.
[147] APAP v. EPA, Federal High Court , File No. 51052, Judgment rendered on the 12th of June 2008.
[148] APAP v. EPA, Federal Supreme Court Cassation division, File No.39779, Decision of 3 December 2008.
[149] Pollution Control Proclamation, *supra* note 129, Art. 10(1).emphasis added.
[150] APAP v. EPA , appeal, *supra* note 134
[151] Ibid.
[152] Ibid.

should have established standing right and the defendants based on Article 11(1) of the PCP. Sub-article 2 is rather meant to design a remedy when an environmental organ fails to render a decision within the given period of time, or where the decision is not satisfactory to the petitioner.

PIL is not just about victory in the courts. It is about the process, and it serves as a mechanism for social criticism and mobilization. It is not about setting legal precedents as a consequence of the judicial process, but has extrajudicial effect, i.e. it has the capacity to raise consciousness, mobilize constituencies, garner political leverage, and develop cultures of accountability and norms of legality.[153] The lesson that public spirited citizens and NGOs gained from APAP vs. EPA did not lie in the loss of substantive goal, but that APAP found the courage, energy, and creativity to resist injustice done against the environment and the victims in the face of overwhelming odds. Seen from this perspective, APAP has done a laudable work as it is the first and hitherto the only NGO to try to use the procedural avenues laid down in the legislation to protect the environment. But the benefits would have been even greater had it not been for the substantive and procedural misunderstanding.[154]

One may suspect that APAP chose to file its complaint against the EPA because identifying polluters would be a daunting task as it requires scientific study. In this regard its choice of the defendant may make sense. However, there was extensive scientific study and APAP had the environmental audit reports of the EPA to identify polluters and bring a legal action against them.[155] According to the lawyer who handled the case, the sole reason they went against the EPA is to see how the courts would interpret Article 11(2) of the PCP.[156] He said that they wanted to see if the executive could be a defendant in the Ethiopia PIEL system.[157] But they could have achieved it by making the EPA a co-defendant along with the polluters. In this sense, for all its pioneering status, the APAP v. EPA case could be viewed as an opportunity dearly missed.

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[153] Helen Hershkoff & A. McCutcheon (2000), "Public Interest Litigation: An International Perspective" in *Many Roads to Justice*. M. McClaymont & S. Golub (eds.), pp. 96-97; *See* Also J. Lobel (1995), "Losers, Fools & Prophets: Justice as Struggle", 80 *Cornell L. Rev.*, 1331.

[154] Mekete Bekele Tekle (2011) , "The Scope of Citizens' Environmental Rights protection Under Ethiopian Law" , Michael Faure & Willemien du Plessis (ed.)(2011),*The Balancing of Interests in Environmental Law in Africa*, Pretoria University Law Press , p. 126.

[155] *See* Statement of Complaint of APAP, *supra* note 135. This was also confirmed by Ato Wongel during interview, *supra* note 127. *See* also the APAP Policy document, *supra* note 102.

[156] Interview with Ato Wongel, *supra* note 127.

[157] Ibid

5. Why isn't PIEL Flourishing?

After nearly a decade and half since its introduction, PIEL is not a developed strategy for the protection and promotion of environmental rights in Ethiopia. It should be noted that liberalized standing may not always ensure procedural justice and a just substantive outcome,[158] as the success or otherwise of PIEL depends on various factors ranging from socio-political, economic as well as cultural traditions and circumstances of a state. The barriers that have impeded the development of PIEL in Ethiopia are briefly examined below.

5.1 Barriers caused by the political tradition

The Ethiopian Constitution espouses the principle of separation of powers and attempts to outline the powers of the legislature, the executive and judiciary. Consistent with its political tradition, Ethiopia today is characterized by a very powerful executive and a relatively weak judiciary which does not take initiatives to protect human rights. The judiciary lacks the necessary courage and sufficient legal powers to exercise its duty of checking abuse of power by the other branches of the government particularly the executive. The FDRE Constitution has taken away the counter-majoritarian role of courts by excluding them from reviewing the constitutionality of laws.

Heightened sensitivity and concerted action in the judiciary has been credited for nurturing and facilitating an expanded notion of access to justice and in fostering PIL in South East Asian Countries. The extent to which the courts are willing to exercise their inherent powers with regard to judicial oversight of the administrative agencies may also contribute the development of the PIL. For instance, in the US, in the case of doubt, courts "generally have been very generous in granting standing and attorneys fees to public interest interveners, because they know that Congress wants the respective statutory provisions to be interpreted liberally".[159]

The concept of judicial activism is nonexistent in the Ethiopian legal system.[160] The people's lack of trust on the independence of the judiciary might have contributed for the slow development of litigation in the public interest.[161]

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[158] It must be noted that PIL does not change the policy of the government: public authorities are free to take the same decision again for any other similar situation. *See* Jona Razzaque: Participatory Rights in natural Resource Management: The Role of Communities in South Asia in Jonas Ebbesson and Phoebe Okowa (eds.), (2009) *Environmental law And Justice in Context* , Cambridge University Press.

[159] Boyer & Meidinger (1985), Privatizing Regulatory Enforcement, 34 *Buffalo L. Rev*. 833, 839, as cited by Greve, *supra* note 42, p. 231.

[160] *See* Mekete, *supra* note 151,p. 126.

[161] The 2005 Comprehensive Justice System Reform Program (CJSRP) states low public perception regarding the independence of the judiciary.

As seen in APAP v. EPA case, the courts did not even consider whether EPA's failure to discharge its statutory role constitutes pollution under article 11 of the PCP. Civil Societies and human rights NGOs are reluctant to seek remedies from the courts.[162] This might have a bearing on the NGOs silence from confronting Proclamation No. 621/2009 which threatens their very existence and operation in Ethiopia.[163]

It is probably attributable to the deeply rooted political tradition of reverence to the executive (a power which was for many centuries believed to have descended from God's will as it was articulated by the saying '*Semay ayitares, nigus ayikeses*' ('You cannot plough the sky, nor sue a king'). This political tradition seems to explain lack of judicial control against the executive branch even when the latter fails to deliver constitutional entitlements.

As highlighted earlier, the primary purpose of PIL is making the executive branch accountable for its actions or inactions. But consistent with the Ethiopian political tradition of strong and seemingly untouchable executive, the legislature has half-heartedly introduced an incomplete aspect of PIL which makes it difficult to bring legal action that renders the executive branch a defendant (for its inaction) in public interest litigation. The interpretation of Article 11 of the PCP by the courts in *APAP v. EPA* illustrates the modest level of judicial courage, inquiry, innovation and proactive interpretation against the interests of the powerful executive.

The absence of a strong tradition of public interest lawyering may also be one of the reasons that hinders the development of PIEL in Ethiopia. In this regard, Prempeh argues that "lack of an organized public interest or human rights bar or a tradition of *pro bono* representation" is one of the reasons for the failure of African lawyers to capitalize "upon the liberalization of constitutional standing to seek judicial enforcement of the Constitution".[164] The absence of law firms and a strong and independent bar in Ethiopia may be one of the reasons for the failure of seizing the opportunity created by the liberalization of standing in environmental matters by virtue the Pollution Control Proclamation highlighted above.

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[162] Adem, *supra* note 34, p.410.

[163] Ibid.

[164] HK Prempeh "Marbury in Africa: Judicial review and the challenges of constitutionalism in contemporary Africa" (2005-2006), 80 *Tulane Law Review*, 1239, p. 1297.

5.2 Barriers caused by the Ethiopian legal system

In addition to the political, social and economic context, the "nature of the existing legal regime, the independence and prestige of the judicial system"[165] has its own impact on the development and success of PIL. In both common law and continental legal systems, the state has traditionally been the main protector of the public interest. The *Ministère public* and the Attorney General have been the guardians of public interest in the Civil and Common law legal systems respectively.[166] These institutions, in addition to their primary function of prosecution of criminal acts, are tasked with vital "powers in the pursuit of the public interest in civil proceedings".[167]

However, as "the concept of the public interest expanded equally in both systems with the social problems of our modern civilization", as a result of which private individuals and groups "also demanded the right to invoke actions and take active part in representation of the new interests".[168] Consequently, there arose a need to revisit the "state's monopoly" of public interest litigation and the related doctrines of standing and cause of action. But this erosion of the state monopoly in public interest protection and the expansion in the involvement of private individuals and groups in the public interest did not come at equal pace in both legal systems.

The *first* factor relates to the way the two systems understand the concept of the public interest. In civil law countries, the public interest "has been steadily viewed as a common interest accountable to the state as to the unit of social coexistence, or a private interest which became public in its pursuit by a public official".[169] Common law countries on the other hand "regard the public interest as an interest separate from that of the state –moreover, an interest which is often in direct conflict with the interest represented by the government".[170] As the result, "[t]he position of government representatives [Ministère public and the Attorney General] in public interest litigation differs in various legal systems

[165] Hershkoff Sarat & Scheingold (1998), *Cause Lawyering and the Reproduction of Professional Authority: An Introduction in Cause Lawyering: Political Commitments and Professional Responsibilities* (Sarat & Scheingold eds.), cited in Hershkoff *supra* note 7.

[166] V. Langer (1988), "Public interest in Civil Law, Socialist Law, and Common Law Systems: the Role of the Public Prosecutor" (36), *The American Journal of Comparative Law*, 279; *See* also Lesley K. McAllister (2008), "Revisiting a "Promising Institution: Public Law Litigation in the Civil Law World", *Georgia State University Law Review* 24(3), 663-692.

[167] Ibid.

[168] Ibid.

[169] Id., p. 280.

[170] Ibid.

in a similar fashion as the concept of the public interest itself.[171] Using Professor Griffith's terminology of criminal process models,[172] Langer observes:

> the Continental approach represents a Family Model where the citizenry granted its trust to the State's representatives in the pursuit of common interests, while the common-law approach represents a Battle Model where inadequacy of the representation of the public, or even hostility of the government with regard to the true interests of the public is presumed, and preference is given to the representation by a community spokesman.[173]

Hence, an active citizenry that supplements (and at times challenges)the government initiative with regard to protecting the public interest is viewed more important in the Common law legal system than in the Civil law legal system.

The *second* factor emerges from the way the two systems view law and legal process and this is one of the determining factors for the development and flourishing of PIL. It is submitted that "the code-based nature of legal rules justified by strict notions of legislative supremacy can to a certain extent restrict the role of the judge in a civil law system to strictly applying the law as it is given by the legislature".[174] As the result, the civil law judge has limited role of creative interpretation and discretion which makes judicial activism, one of the fundamental aspects of PIL, almost nonexistent. Compared to the common law, where a judge has a more expansive mandate and disposition to use his common sense and extra legal reasoning in deciding cases, judges in the civil law systems, Apple and Deyling argue, "view themselves less as being in the business of creating law than mere appliers of the law, i.e., a more technical and less active role in the development of the law than their common law counterparts".[175]

Hence, public perception in the *Ministè're Public* as a trusted protector the public interest does not nurture the initiative of private citizens to be substantially engaged in the public interest litigation. Even when they attempt to be involved in public interest litigation, the judiciary is relatively less encouraging. Therefore, the judicial activism aspect of public interest litigation

[171] Ibid.

[172] Griffith (1970), "Ideology in Criminal Procedure or A Third Model of the Criminal Process", 79 *Yale L.J.*, 359 , p. 361

[173] Id., p. 280-281. *See* also Antonio Gidi (2003), "Class Actions in Brazil: A Model for Civil Law Countries", *The American Journal of Comparative Law*, Vol. 51, No. 2, pp. 311- 408.

[174] Yosef , *supra* note 78, p. 21.

[175] J. Apple and R. Deyling (1195), "A Primer on the Civil Law System", available at <https://www.fjc.gov/sites/default/files/2012/CivilLaw.pdf>, p . 37 (Accessed on August 28, 2017).

is more likely to be successful in common law rather than in civil law systems because of the different roles that judges assume in the respective systems can cause variation in the pace, dynamism and development of PIL.

As Ethiopia's legal regime predominantly belongs to the civil law legal system, one may argue that the development of PIL might have been affected by the legal system. Consistent with the civil law system, important powers in the pursuit of the public interest in civil proceedings are entrusted to the Ministry of Justice, and at present the Federal Attorney General of Ethiopia is entrusted with the power of "enforcing civil interest of ... the public".[176]

Although the speed and intensity of development of PIL might have been affected by the type of the legal system in a country, there is a steady trend toward the convergence of the two legal traditions. For example, the common law /civil law divide in relation to PIL seems to have withered away through time. Hence, the current practice of PIL in the world shows that the divide is no more a defining factor as it is being applicable in and embraced by countries belonging both to the civil and common law legal systems.[177] This can, *inter alia*, be attributed to the synthesis that is being created among the two legal systems[178] and the global recognition of human rights norms and democratic ideals that have caused the proliferation of constitutions with enforceable bills of rights.[179]

5.3 Barriers caused by the current system of government

The other factor that may explain the slow pace in the legislative strengthening of PIL could be explained in terms of political will. The beginning of PIL in the US is marked by "calculations of power".[180] PIL increases the frequency and scope of judicial review of agency action and toughens the power of the courts and the hands of outside intervenors in the administrative process.[181] The relaxation of the standing rules in the US has "transferred discretion from administrators to private interests who come to be in a position to decide which lawsuits to bring and which legal standards to enforce" and "has reduced executive control and leadership".[182]

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176 Federal Attorney General Establishment Proclamation No. 943/2016. Art. 5(4).
177 Yosef , *supra* note 78, p. 21.
178 Apple and Deyling, *supra* note 175.
179 Yosef , *supra* note 78 ,p. 21
180 Greve, *supra* note 42, p. 229.
181 Stewart(1975), "The Reformation of American Administrative Law" 88 *Harv. L. Rev.*, 1667 as cited by Greve *supra* note 42, p. 229.
182 Karen Orren (1976), "Standing to Sue: Interest Group Conflict in Federal Courts", 70 *American Political Science Review*,723, 724 as cited by Greve, *supra* note 42, p. 229.

According to Greve, the separation of power that leads to the relentless struggle for power between the legislative and executive power in the US is the primary reason of the legislative consolidation of PIL in the country.[183] As the result, the legislature has an institutional interest not just "in usurping executive power for itself but also in delegating it to others, including the judiciary and special interest groups".[184] The legislature which is wary of "imperial presidency" and "runaway bureaucracy" uses judicial adjudication to control government agencies.[185] Partisan politics plays its role in augmenting the legislative's interest in using judicial control over the executive agencies.[186] Consequently, "the growth and consolidation of the citizen suit [PIL] mechanism fall in a period of American history during which the Congress has been dominated by the Democratic party, and the presidency, with the exception of the Carter years, by the Republicans".[187]

However, in parliamentary systems like Ethiopia where the executive is elected by the legislature and where the great majority of the laws and policies are initiated by the executive, it is difficult to establish a strong motive for the legislature to use legislative oversight to control the executive. The fact that the parliament and the executive are dominated by the same party, in the Ethiopian context, exacerbates the problem and has effectively made checks and balances inconceivable, and the parliament's role has been confined to endorsing bills presented to it by the executive rather than meaningfully holding the latter accountable or enacting laws that enhance human rights protection. Although the laws assign responsibilities to the government, they do not provide legal liability that must be activated when the executive does not perform these responsibilities. Why would the legislature restrain the authority of what is after all "its" executive?[188]

It should be noted that having a parliamentary system of government *per se* may not necessarily limit the growth of PIEL. India, who has a parliamentary system of government, has one of the most matured PIL systems in the world. And the development of PIL in England is also very encouraging.[189] But in these

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183 Greve, *supra* note 42.p. 229.
184 R. Melnick (1983), "Regulation and the Courts" 18-23, as cited by Greve, *supra* note 42, P. 230.
185 Greve, *supra* note 42, p. 230.
186 Ibid.
187 Ibid.
188 For more discussion on the issue, *see* Greve, *supra* note 42, p. 230.
189 In England, long before the emergence of PIL, there was the device of *relator action*. The foundation of this principle is the interest of the Crown as *parents patriae* in upholding the law for the benefit of the general public. It is the interest of the Crown to see the "public bodies discharge their functions properly and that they do not abuse or misuse their powers". Hence, in both England and India, the weakness of the parliamentary form

parliamentary systems, there has been a strong tradition of judicial independence.[190] Partly because it belongs to the common law legal tradition where judicial activism is more extensive and partly encouraged by the power vested in it by the Constitution, the judiciary in India can test not only the validity of laws and executive actions but also of constitutional amendments.[191] It is entrusted with the final say on the interpretation of the Constitution and the judges are strong enough to check on the violations of rights by the other branches, and maintain their independence and.

But in countries like Ethiopia where the judiciary has never truly been a third branch of the government (while the executive an all controlling branch), the likelihood of the judiciary emerging as a protector of the public interest against other branches is very minimal. This problem is partly caused and compounded by the fact that Ethiopia belongs, predominantly, to the civil law legal system where the judges have a very small room for judicial activism. As has been seen above, the judiciary is stripped of some of its inherent powers.[192] The current system of government thus exacerbates the already existing problems of the judiciary, and impediments against the flourishing of PIL through legal development and implementation may partially be explained in terms of the system of government in place under the FDRE Constitution.

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of government in promoting PIL has been compensated in many ways. *See* K. Surendra Mohan (1984), "Public Interest Litigation and Locus Standi",*523 Cochin University Law Review*, available at: http://dspace.cusat.ac.in/jspui/bitstream/123456789/10995/1/Public%20Interest%20Litigation%20and%20Locus%20Standi.PDF, last visited on 2/12/2017. *See* also McCormick, C. (2014). "Public Interest Litigation in the United Kingdom: Enemy of the State", *King's Inns Student Law Review* 4, 133-148.

[190] Pritam Kumar Ghosh (2013) , "Judicial Activism and Public Interest Litigation in India", *Galgotias Journal of Legal Studies*, 2013 GJLS Vol.1, No.1. p. 82. It is said that an: "independent judiciary armed with the power of judicial review was the constitutional device chosen to achieve" the Constitutional objectives of India. The role of the executive in the appointment of the judges of the high and supreme courts in India is limited compared to that of Ethiopia. For more discussion on the judicial appointment in India, *see* Soaham Bajpai "Judicial Appointments in India: Judicial Approach" , available at: https://www.gnlu.ac.in/bc/JUDICIAL%20APPOINTMENTS%20IN%20INDIA-%20JUDICIAL%20APPROACH.pdf (Last visited: 18/12/2017.)

[191] Ibid.

[192] *See* for instance , Article 62(1) of the FDRE Constitution, Proclamations 250/2001 and 251/2001 as discussed above . For an elaborate discussion on the impact of separation of powers on the independence of the judiciary, *see* Assefa Fiseha (2011), "Separation of powers and its implications for the judiciary in Ethiopia", *Journal of Eastern African Studies*, Vol. 5, Iss. 4, 2011; Muluken Berhanu , "Independence of the Judiciary in Parliamentary Democracy: The Ethiopian Experience", unpublished, available at http://repository.smuc.edu.et/bitstream/123456789/2419/1/procewedings_of_the_third_student_resaerch_forum.61-76.pdf

5.4. Barriers related to lack of access to information and awareness

Access to accurate, timely, reliable and usable environmental information is one of the prerequisites for environmental protection. The Rio Declaration on Environment and Development stresses the importance of access to information for the protection of the environment.[193] Effective access to meaningful information opens the way for empowering citizens to exercise a measure of control over resources and institutions and is viewed as an important step in the democratization of environmental decision-making.[194] Access to government information is a *sine qua non* to enable citizens and NGOs to exercise their role in PIEL meaningfully. Access to information enhances public scrutiny of the environmental impacts of industrial activities, executive actions (or inactions) and developmental endeavors; and this in turn acts as a 'vital discipline' for environmental protection agencies.[195]

Access to environmental information is constitutionally guaranteed in Ethiopia.[196] It is also provided for in the Environmental Policy[197], the 2008 Freedom of Mass Media and Access to Information Proclamation (FMMAI)[198] and other mainstream environmental legislation.[199] However, the practical availability and disclosure of environmental information is inadequate. This is exacerbated by the absence of administrative law that governs and ensures the transparency of the procedures through which government entities exercise their power. The MEFCC is empowered to establish a central information system and promotes efficiency in environmental data collection, management and use and prepare a periodic report on the state of the country's environment.[200] It is

[193] Rio Declaration *supra* note 93, Principle 10.

[194] Yenehun Birlie (2011), "The Right to Know: The Legal and Policy Foundation for Access to Environmental Information in Ethiopia", Unpublished, LLM thesis, University of Alabama.

[195] Jeremy Rowan-Robinson *et al,* (1996), "Public Access to Environmental Information: A Means to What End?" 8 *J. Envtl. L.* 19, at 20, as cited by William A. Wilcox, (2001) "Access to Environmental Information in the United States and the United Kingdom"**,** 23 *LYLAICLR* 121 , pp.194-200.

[196] Article 29 of the FDRE Constitution.

[197] FDRE (1997), *Environmental Policy of Ethiopia*.

[198] FDRE, Freedom of the Mass Media and Access to Information proclamation, No.590/2008 (hereafter FMMAI).

[199] PCP, s*urpra*, note 129, Environmental Impact Assessment Proclamation No. 299/2002, Negarit Gazette, 9thYear No. 11, art. 15(1&2); Environmental Protection Authority (2003**),** Environmental Impact Assessment Procedural Guideline Series 1. *See* Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation No. 916/2015, Article 309/1(L &O).

[200] Proclamation No. 916/2015, Ibid.

expected to be the information hub concerning the environment. But it lacks the capacity to effectively discharge this duty.

Another concern relates to public unawareness about public interest environmental litigation, and regarding the right to a clean and healthy environment, and the right to environmental information and. Adequate awareness in this regard has a reciprocal cause and effect relationship with the effective assertion of these rights in the court of law when they are violated.[201] Many judges also lack environmental sensitivity and have misconceptions about the relationship between environmental protection and development.[202] My interviews with the concerned personnel of the Ministry[203], Addis Ababa Environmental Protection Authority[204]and Oromia Land and Environmental Protection Bureau[205] reveal that public unawareness about PIEL opportunities is one of the main reasons for the inadequate utilization of PIEL opportunities. The MEFCC is responsible to "promote and provide non-formal environmental education programs, and cooperate with the competent organs with a view to integrating environmental concerns in the regular educational curricula".[206] Accordingly, the Ministry has been engaging in some awareness raising activities by using platforms such as the media.[207] But given the gravity of the problem, much remains to be done.[208]

The role of the media in environmental awareness raising and in the realization of the right to environmental information is pivotal. It informs and educates the public about environmental problems, probable solutions and precautionary measures. It can also expose the failures of environmental agencies and individual environmental offences against whom PIEL could be brought by NGOs and bona fide citizens.[209] The Environmental Policy of Ethiopia recognizes the important role that can be played by the mass media, and it states the need "to effectively use them in creating and promoting environmental awareness in view of the physical problems of access and

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[201] Interview with Ato Wondwosen Tadesse an environmental law expert at the Ministry of Environment, Forestry and Climate Change, January 17, 2017, S*ee* also Mekete *supra* note 154

[202] *See* Mekete *supra* note 154.

[203] Interview with Ato Wondiwosen *supra* note 201.

[204] Interview with an employee at Addis Ababa EPA, who prefers to remain unnamed, Decemeber 2016.

[205] Interview with an employee at Oromia Land and Environmental Protection Bureau who prefers to remain unnamed, December 2016.

[206] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 916/2015, Art. 309(1)(p).

[207] Interview with Wondwosen , *supra* note 201 .

[208] Ibid.

[209] Yenehun , *supra* note 194, p. 34.

communications …".[210] Practically however, the private media is weak, the public media is gravely supervised by the government, self-censored and the media in general seems to put its priority elsewhere such as on the entertainment and other less politically sensitive areas rather than human rights issues.

It is indeed very difficult for private media to criticize and uncover the environmental impacts of mega projects that are undertaken by the government. Nor would the government media (that claims to be informed by the principle of "developmental journalism"), dare to reveal the environmental flaws of various mega government projects or even private industries. This problem is, as stated above, compounded by the exclusion of the foreign and resident CSOs from human rights advocacy activities. The government's deep distrust of and restrictions against the media has made it very difficult to promote environmental democracy based on accountability and engagement of citizens. Hence, lack of environmental information and low level of awareness about the environment are among the root causes for the dormant and stunted features of PIEL in Ethiopia.

Conclusion

Resilience to environmental hazards and problems is at its lowest in countries like Ethiopia where the majority of citizens live under the poverty line (i.e., minimum level of the necessities for livelihood). It is such citizens who ultimately shoulder the impact and the ill-effects of national and international environmental woes. The challenge is further exacerbated by their unawareness of the law and their rights. This environmental injustice is aggravated by gaps in access to legal experts, PIEL and a responsive judiciary.

In a country where the government is the main actor of developmental activities, the role of community participation in various forms in balancing the tension between development and environmental protection is crucial. PIEL is one of the avenues for the participation of communities in the decision making process because it enables representatives, interest groups, bona fide individuals and human rights NGOs to challenge the decisions of government agencies' and polluters in the court of law. PIEL is a very useful instrument in injecting an informed, participatory and transparent approach to the processes of sustainable development, and to governmental and private sector actions that affect the environment in the course of waste disposal and using resources as inputs.

However, after 15 years of legislative recognition, PIEL in Ethiopia is yet a dormant and stunted tool in environmental protection. Fundamental issues such as judicial activism, legal culture, political will, the role and perception of the

[210] Environmental Policy *supra* note 197, section 4.7(d).

public towards law, judicial process and justice, the type of legal system, the perception and behavior of the government towards civil society and gaps in environmental information are among the root causes that should be addressed so that PIEL in Ethiopia can attain the height that it deserves. ■

Rethinking Plea Bargaining Policy: The Case of Ethiopia

Alemu Meheretu Negash ♣

Abstract

This article examines the desirability of plea bargaining in Ethiopia focusing on its policy justifications as encapsulated under the 2011 FRDE Criminal Justice Policy. Emphasizing upon the specific contexts of Ethiopia, the article analyzes policy documents, laws and comparative literature. The policy relies on the traditional rationales of plea bargaining. However, most of the elements in the rationales are under continuous criticism, and thus not compelling. The exception could be the efficiency rationale which presumably has a special force in attracting developing economies like Ethiopia. Yet in actuality, this is not as compelling as imagined at least on two fronts. *First*, the rationale is divorced from being principled in that lack of resources or the desire to spare resources cannot vindicate an encroachment of fundamental rights and freedoms. *Second*, the contextual investigation of the trial and case delay in Ethiopia lends no conclusive support for it. If trials are exceptions and simple, they will not be resource intensive, and thus are manageable with limited resources. To a limited extent, plea bargaining is acknowledged for efficiency, but this comes at the expense of the overarching values of criminal justice namely fairness and accuracy and probably with other unintended perverse consequences: violation of defendants' rights, corruption and abuses, wrongful convictions, among others.

Key terms

Plea bargaining · Ethiopian Criminal Justice Policy · Trial · Policy justifications of plea bargaining · Efficiency · Fairness · Remorse · Trauma of trials · Ethiopia

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Introduction

Plea bargaining has been a subject of controversy since its inception. While proponents praise it for its role in managing caseload and enhancing the efficiency of the criminal process,[1] opponents challenge the very foundation of plea bargaining as contrary to constitutional principles, ethics, and fair trial guarantees.[2] The major criticisms against plea bargaining include the following: that by allowing lenient sentencing in exchange for a guilty plea it makes criminal justice too soft on criminals and thus undermines the deterrent effect of criminal sanctions[3]; that by inducing plea offers, it is likely to produce involuntary guilty pleas and risk innocents plead guilty[4]; that it shifts power to prosecutors leaving judges to do little more than ratify prosecutorial plea bargaining decisions[5] ; that it ignores victim interests; that it offends fair trial

[1] Kobayashi, Bruce H. & John R. Lott (1996), "In defense of criminal defense expenditures and plea-bargaining", *International Review of Law & Economics* Vol.16, pp.397-416; K.V.K. Santhy (2013), "Plea Bargaining in Indian and US Criminal Law: Confessions for Concessions" *NALSAR Law Review* Vol. 7, No. 1,p. 99. On the economic analysis of plea bargaining, *see* William M. Landes (1971), "An Economic Analysis of the Courts", *Journal of Law & Economics* Vol. 14 No.1, pp. 61-107; James E. Bond (1982), *Plea Bargaining and Guilty Pleas*, 2nd. Ed. (New York: Clark Boardman & Co), (discussing the constitutional status of plea bargaining and standards for accepting guilty pleas); Frank H. Easterbrook (1983), "Criminal Procedure as a Market System", *J. Legal Stud.* Vol. 12, pp. 308-09 (arguing that plea bargaining is desirable as a mechanism for setting the price of crime).

[2] Stephanos Bibas (2012), *The Machinery of Criminal Justice* (New York: Oxford University Press); S. Schulhofer (1991), "Plea bargaining as disaster" *Yale Law Journal* Vol. 101, p. 1979.

[3] *See* generally D. Guidorizz (1998), "Should We Really Ban Plea bargaining? The Core Concerns for Plea bargaining Critics" *Emory Law Journal* Vol.47, p.753; Kenneth Kipnis (1976), "Criminal Justice and the Negotiated Plea", *Ethics*, Vol.86, p.93; R.A. Fine (1987) "Plea bargaining: An Unnecessary Evil", *Marquette Law Review,* Vol.70, No.4, p.615; Sam W. Calan (1979), "An Experience in Justice without Plea Negotiation", *Law & Society Review*, Vol.13, p. 327.

[4] This is commonly referred to as the *innocence problem*. For more, see F. Andrew Hessick III & Reshma Saujani (2002), "Plea bargaining and convicting the Innocent: The Role of the Prosecutor, the Defence Counsel, and the Judge", *Byu. J. Pub. L.*, Vol.16, p. 189; Katherine J. Strandburg (2003)), "Deterrence and the Conviction of Innocents", 35 *Conn. L. Rev.* Vol. 35, p. 1336; Fred C. Zacharias (1998), "Justice in Plea Bargaining" *Wm. & Mary L. Rev*. Vol.39, pp.1151-55. For the discussion of this from the Ethiopian context, *see* Alemu Meheretu, "The Innocence Problem in Context: The Case of Ethiopia", forthcoming.

[5] This blame works well in those jurisdictions which bestow prosecutors with broader discretionary powers. *See* Maximo Langer (2005-06), "Rethinking Plea bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure", 33 *Am. J. Crim. L.* Vol.33, p.223; Andrew Sanders *et al* (2010), *Criminal Justice* (Oxford

rights[6]- it circumvents the standard of proof, contradicts the right to silence, the right to be presumed innocent, the right against self-incrimination and the right to equality.

Despite these controversies, plea bargaining has not only occupied an overwhelmingly dominant position in adversarial systems, but has also transcended diverse justice structures including the classical inquisitorial systems. Likewise, apparently motivated by this trend, Ethiopia has adopted plea bargaining at policy level and a draft criminal procedure is underway to emulate it. This article investigates the justifications put forward to introduce plea bargaining in Ethiopia. In particular, it addresses the following specific issues: the rationales for Ethiopia to introduce plea bargaining and their force, and whether plea bargaining is desirable in Ethiopia. The article has benefited from the rich literature on plea bargaining but at the same time has focused on the specific contexts of Ethiopia. It uses a thorough analysis of policy documents, laws and comparative literature.

The article is structured into five sections followed by a conclusion. The first section provides a brief comparison of factors that necessitate plea bargaining as applied in diverse criminal procedure structures. The second section addresses the legal/policy framework of plea bargaining. Sections 3, 4 and 5 investigate the justifications put forward to introduce plea bargaining in Ethiopia and appraises them in the context of the Ethiopian criminal justice system.

1. Why Plea Bargaining: Overview of Some Jurisdictions

This section is about a brief comparison of the purposes/factors that necessitate plea bargaining as applied in diverse criminal procedure structures. The overview refers to USA, England, Germany, and Italy.[7] Its purpose is to lay some background for a subsequent analysis of the Ethiopian experience.

Many jurisdictions employ various forms of negotiated justice including plea bargaining and cooperation agreements in order to manage caseload pressure, increase the efficiency of their criminal justice and to assist the prosecution of

University Press); S. J. Schulhofer (1988), "Criminal Justice Discretion as a Regulatory System", *Journal of Legal Studies,* Vol.17, pp.43-82.

[6] *See* Stephanos Bibas (2012), *The Machinery of Criminal Justice,* supra note 2.; Penny Darbyshire (2000), "The Mischief of Plea bargaining and Sentencing Rewards", *Criminal Law Review*, p.895; Douglas Smith (1986), "The Plea-Bargaining Controversy", *Journal of Criminal Law and Criminology,* Vol.77, No.3, pp.949-968.

[7] These countries are selected on the assumption that they represent the two major criminal procedure structures which inspired the Ethiopian Criminal Procedure Code -the adversarial and the inquisitorial systems. The selection of Italy and Germany can further be justified on the reforms both countries undertook to introduce and formalize plea bargaining, respectively.

complex crimes.[8] However, the context of caseload pressure varies across jurisdictions. It could be attributable to social factors such as an increase in crime rates especially that of complex and organized crimes, as is the case in some European countries or it could be imputable to developments of criminal law or procedure (over criminalization and complex procedures) as is the case in adversarial structures such as England and the USA.[9] In the latter`s case, it is widely believed that the extremely complex procedure in adversarial criminal trials, in particular the burdensome jury trial, which is time-consuming and resource intensive, has largely contributed for the infiltration of plea bargaining into the criminal justice system.[10]

Germany which traditionally insisted on the strict adherence of the principle of compulsory prosecution relaxed it by allowing bargaining over petty offenses.[11] This coupled with the rise of complex crimes such as white collar, environmental and drug related crimes[12] provide a leeway for negotiation to flourish.[13] It is suggested that proving *mens rea* and establishing causation

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[8] The latter applies to the USA, Germany and England in varying degrees and it is often called cooperation agreement, a notion which is different from plea bargaining proper and is not covered here. *See* infra note 28.

[9] *See* generally Regina Rauxloh (2011), "Formalization of Plea Bargaining in Germany- Will the New Legislation Be Able to Square the Circle?" *Fordham Int'l L.J* , Vol.34, p. 296.

[10] For more discussions, *see* Albert W. Alschuler (1968), "The Prosecutor's Role in Plea Bargaining", *The University of Chicago Law Review,* Vol. 36. No.1, pp.50-112; Malcolm M. Feeley (1997), "Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining*", Isr. L. Rev.*, Vol.31, pp. 202-05; John H. Langbein (1979). "Understanding the Short History of Plea Bargaining" *L. & Soc`ty Rev.*Vol.13, pp.262-265; For a different explanation, *see* M. McConville and C. Mirsky (2005), *Jury Trials and Plea Bargaining: A True History* (Oxford: Hart Publishing).

[11] Yue ma (2002), "Prosecutorial Discretion and Plea bargaining in the United States, France, Germany and Italy: A Comparative Perspective", *International Criminal Justice Review,* Vol.12, p.36.

[12] One may wonder why plea bargaining in Germany is often linked to such crimes. The complex legal and evidence issues these crimes involve could be one explanation. Yet, this may not justify the matter sufficiently as similar problems of complexity may exist in other crimes too. Some commentators justify this on the courts` inclination of treating defendants of white-collar crimes favorably simply based on their economic and social status as "they are often the most respected members of the society from similar backgrounds as prosecutors and judges". *See* Kai-d. Bussmann (1991), *The Discovery of Informality: Negotiations in Criminal Proceedings and their Legal Construction,* p. 13 cited in Regina Rauxloh, above at note 9, p.303. Scholars argue that judges and prosecutors showed more willingness to negotiate and more respect to defendants of a high social status.

[13] *See* generally H Jung (1995), "The Criminal Process in the Federal Republic of Germany- An overview [in Demas–Marty(ed), *The Criminal Process and Human Rights: towards a*

complicates investigation as well as trial, consequently causing a swelling of caseloads.[14] This interacted with the insufficiency of the German Criminal Procedure Code to cope with the matter, creates a fertile ground for informal settlements, and pushes criminal justice actors to see plea bargaining as an ideal way of dispensing with cases.[15] Using plea bargaining and cooperation agreements as tools to prosecute complex crimes is not unique to Germany. Indeed, it also serves similar purposes in the USA[16] and England.[17]

In Italy, its conviction to the principle of legality, amendments and court decisions meant to guard defendant's rights, and the absence of guilty plea procedures, all complicated the trial process and consequently exposed the country to massive case backlogs that attracted severe criticisms by the European Court of Human Rights.[18] This forced reformers in Italy to consider alternatives to trials including plea bargaining, so that the efficiency of Italian criminal justice could be enhanced.[19]

In the jurisdictions stated above, other than Italy, plea bargaining emerged through practice[20] and it was subsequently formalized by law. In Germany, for example, plea bargaining was practiced for nearly four decades before it was formalized in 2009.[21] It is striking to see a code-based criminal procedure in

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European Consciousness (Dordrecht, Boston, London: MartinusNijhoff Publishers), pp. 61-63].

[14] Regina Rauxloh (2011), Formalization of plea bargaining, *supra* note 9.

[15] Id, p. 300 & 327.

[16] In the USA, mostly cooperation agreements serve such a purpose and are important law enforcement tools. See Patrice Brown & Stevan E. Bunnell (2006), "Negotiating Justice: Prosecutorial Perspective on Federal Plea Bargaining in the District of Columbia" *Am. Crim. L. Rev.*Vol.43, p.1073.

[17] In particular, this applies in serious fraud offences.

[18] The problem was so rampant that the Court, on a number of occasions, expressed its concerns over Italy`s violation of Art 6(1) of ECHR which guarantees fair and public hearing within a reasonable period of time. The court condemned Italy in a series of its decisions on delays and prolonged pre-trial detentions. *See* Jeffrey J. Miller (1990), "Plea Bargaining and Its Analogues under the New Italian Criminal Procedure Code and in the United States: Toward a New Understanding of Comparative Criminal Procedure", *N.Y.U. J. INT'L L. &POL.* Vol.22, pp. 221-222.

[19] William Pizzi and Mariangela Montagna (2004), "The Battle to Establish an Adversarial Trial System in Italy", *Mich. J. Int'l L.*Vol.25, p. 437.

[20] Since its inception plea bargaining has been justified from the perspectives of efficiency and remorse. In the 1970s when the propriety of plea bargaining was increasingly challenged in the USA and England, courts and practitioners defended it from remorse and efficiency angle. (*Brady* in the US and *Turner* in the UK are examples to this). *See* supra note 10.

[21] Regina Rauxloh, *supra* note 9; Stephen C. Thaman (2007), "Plea bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases", *Electronic Journal of Comparative Law* Vol. 11.

Germany, in a structure which insists on mandatory prosecution surrendering to an `informal` practice such as plea bargaining. It is less surprising that plea bargaining in the US or in England evolved through practice, because in these jurisdictions, no codified law of criminal procedure could regulate the discretion that had existed. In Italy, however, the situation is different because plea bargaining was introduced by law as part of reforming the Italian Criminal Procedure Code.

The extent to which countries rely on plea bargaining provides an intriguing contrast. No jurisdiction[22] relies on plea bargaining like the U.S does; more than 90% of cases are resolved via plea bargaining.[23] On the other hand, about 50% of cases are handled through plea agreements in Germany[24] ; around 68% of cases in England and Wales in magistrates' courts and 72 % in Crown courts get disposed of through guilty pleas without a trial, albeit, not all necessarily with plea bargaining.[25]

2. Policy/Legal Framework in Ethiopia

As discussed above, the experience of jurisdictions suggests that plea bargaining finds its way into justice systems either through practice or reforms. Apparently, the latter applies to Ethiopia i.e., plea bargaining is introduced as part of reforming the criminal justice system. This is not to imply that plea bargaining is completely alien to Ethiopia. Indeed, researches reveal that an informal and rudimentary plea bargaining exists.[26] But so far the practice had no chance of influencing the reform formally. No attempt is made to study it either.

The Ethiopian Criminal Justice Policy (hereinafter the ECJ Policy) has introduced plea bargaining. The ECJ policy lays down the framework for plea bargaining and requires a new criminal procedure code to be issued to emulate it. In response, a draft criminal procedure code is underway. This does not mean

[22] Perhaps the exception could be Scotland where in 2004-05, 97 per cent of all district court cases (excluding dismissals) were resolved through plea bargaining. Id., p.38.

[23] United States Sentencing Commission, Statistical Information Packet, Fiscal Year 2009 at <http://www.ussc.gov/JUDPACK/JP2009.htm> (Accessed: July 14, 2010).

[24] Maike Frommann (2009), "Regulating Plea bargaining in Germany: Can the Italian Approach serve as a Model to Guarantee the Independence of German Judges", *Hanse Law Review*, Vol. 5, No. 2, p. 200.

[25] Data from CPS Annual Report 2011/2012 available at: <http://www.cps.gov.uk/publications/reports/2011/annex_b.html> (Accessed: 15th May 2013).

[26] Alemu Meheretu (2014), *Introducing Plea bargaining in Ethiopia: Concerns and Prospects* (PhD thesis, University of Warwick, UK), pp.135-164; *see* also UNODC (2011), *Assessment of the Criminal Justice system in Ethiopia; in support of the Government`s reform efforts towards an effective and efficient criminal justice system*, p. 54.

that there is no law at all dealing with plea bargaining. In fact, while defining the powers and the duties of the then Ministry of Justice and now the Attorney General, Proclamation No. 691/2010 and Proclamation No.943/2016 under Article 6(1)(d)[27] entrust the Attorney General with the power to plea bargain. This together with the ECJ policy represents the first step towards providing a legal/policy framework for plea bargaining in Ethiopia. Surely, one cannot speak of a legal framework, which clearly and sufficiently regulates the institution of plea bargaining. This is something the upcoming Criminal Procedure Code (albeit far behind schedule) is expected to articulate.

That said, a quasi-plea bargaining[28], in which suspects receive lenient treatment or immunity in exchange for cooperating in the prosecution of others, is recognized under the Anti-Corruption[29], Anti-terrorism[30], and Witness and Whistle-blower's Protection Proclamations.[31]

3. Appraisal of Policy Justifications of Plea Bargaining: Enhancement of '*Efficiency*'

Of the various reforms the ECJ policy targets, the introduction of plea bargaining represents an unprecedented and ambitious venture. But what motivates Ethiopia to emulate plea bargaining? Would it serve its intended purposes? The ECJ Policy tries to justify plea bargaining based on its traditional rationales: (a) that it enhances the efficiency of the criminal justice system; (b) that it promotes remorse and rehabilitation of offenders; and (c) that it helps avoid the trauma of trial for defendants and victims.[32] This section examines the justification of efficiency[33] and appraises it in the context of the Ethiopian

[27] While the first proclamation defines the powers and duties of Ministers, the second proclamation establishes the office of the Attorney General.

[28] This, often known as cooperation agreement, is different from plea bargaining. While cooperation agreements are about finding evidence and thus do not avoid full-scale trials, plea bargaining is about avoiding or shortening full-scale trials. Still, most countries which adopt plea bargaining recognize cooperation agreements as a vital tool of garnering relevant evidence in a criminal participation –particularly to investigate and prosecute those suspects up in the ladder of a criminal activity. It is important to note that cooperation agreements and plea bargaining may overlap –a defendant admitting guilt and at the same time providing information against his fellow offenders.

[29] Article 43(1), The Federal Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation, Proclamation No. 239/2001.

[30] Article 33, TheAnti-Terrorism Proclamation No. 652/2009.

[31] Article 3, Protection of Witnesses and Whistle-blowers of Criminal Offences Proclamation No.699/2010.

[32] FDRE (2011), The Criminal Justice Policy of Ethiopia, p. 36 (hereinafter the ECJ Policy).

[33] Here efficiency is used in relation to resource and time savings.

criminal justice system. The second and third justifications, are examined in Sections 4 and 5.

The need for a more efficient resolution of cases is the major explanation for most jurisdictions to resort to plea bargaining.[34] Plea bargaining is praised for saving judicial as well as prosecutorial time and resources. For Ethiopia too, the major motivation to adopt plea bargaining relates to efficiency gains. The Ethiopian Criminal Justice policy subscribes to this justification in providing that plea bargaining cuts costs and time spent in full-scale trials; and that it helps reduce case backlog and workload.[35]This rationale stresses on the comparative efficiency advantage plea bargaining offers to the justice system: its advantage to conserve time and resources which otherwise would be consumed in full-scale trials; and its instrumentality to manage criminal caseloads.

Ostensibly, the efficiency justification is the strongest justifications for adopting plea bargaining in Ethiopia, a nation which has been struggling with massive case backlogs.[36] In theory, this has far-reaching implications in expediting the process and promoting speedy trial, enhancing access to justice and improving the conditions of detention centres and prisons. For instance, by minimizing the amount of time defendants spend in pre-trial detention, it may improve the handling of suspects/ detainees in Ethiopia, a country known of its congested and poor detention and prison conditions.[37] However, a principle-based as well as contextual investigation of this justification suggests that it is not as compelling as it seems to be. A separate elaboration of this argument is in order below.

3.1 The efficiency justification: challenging the conventional wisdom

There seems a conventional wisdom that plea bargaining represents the most efficient (albeit, not the most proper) modality of case disposition that guarantees efficiency in any criminal justice system. With plea bargaining, it is suggested that considerable time and resources are conserved. Yet, viewed from the Ethiopian reality, this conception is defective on the following fronts: (i) the

[34] Though delay and the need for efficiency appear to be the underlying and ultimate justification for plea bargaining in any system, the cause of delay and the context in which plea bargaining developed differs significantly.

[35] The ECJ Policy, *supra* note 32, p.36 (author's translation).

[36] Despite the rise of caseload, one study shows that there is significant improvement in managing it at federal level. *See* World Bank, *Uses and Users of Justice in Africa: The Case of Ethiopia's Federal Courts*. (Washington, DC: World Bank, 2010) <http://documents.worldbank.org/curated/en/2010/07/13145799/uses-users-justice-africa-case-ethiopias-federal-courts> (Accessed 7 October 2014) p.11.

[37] On prison conditions, see Country Report on Human Rights Practice for 2012, United States Department of State available at <http://www.state.gov/j/drl/rls/hrrpt/2012/af/204120.htm> (Accessed 14 March 2013).

efficiency justification is divorced from being principled and completely trades off other sacred values of criminal justice which Ethiopia needs most; (ii) the examination of the justification in context lends no conclusive support to such an outcome and the desired efficiency can be ensured without plea bargaining.

3.1.1 The efficiency justification is unprincipled

Plea bargaining is "…more a mechanism of convenience and 'mutual benefit'[38] than an issue of morality, legality or constitutionality".[39] It hardly relies on principled justifications from moral, legal and constitutional perspectives.[40] Modern constitutions, including the FDRE Constitution guarantee the right to trial. To induce waiver of this right by offering sentence or charge/count concessions does not square with constitutional rights of defendants. As William Stuntz succinctly puts it:[41] "in criminal trials the constitution is omnipresent, in guilty pleas [plea bargaining] it is nearly invisible".The most affected constitutional rights include: the right to be presumed innocent, the right to equality, the right to appeal, the right to silence, the right to public hearing and the right to legal counsel.[42] Further, plea bargaining creates what is commonly termed as *trial penalty*: "[i]t would be quite unacceptable that, in a legal system which presumes innocence and which permits every person to go to trial, a person who was found guilty after trial should be punished more severely simply because he had not pled guilty".[43]

Certainly, jurisdictions embrace plea bargaining for economic/efficiency reasons. With the advent of plea bargaining it has become common that the most embellished values of criminal justice (i.e., fairness and accuracy), have been relegated and sacrificed for the value of economy.[44] Nonetheless, the value of efficiency/economy is not something a criminal justice system pursues at all costs. Put simply, plea bargaining which involves "fundamental questions of

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[38] This is controversial. The assumption in plea bargaining is that both parties would arrive at a mutually favorable or satisfactory settlement of the case. Yet, this is unrealistic. Quite conversely, studies often reveal that plea bargaining is dominated by the public prosecutor. *See* Donald G. Gifford (1983), "Meaningful Reform of Plea Bargaining the Control of Prosecutorial Discretion", *U. Ill. L. Rev*. 37 p. 39; Maximo Langer (2006) "Rethinking Plea Bargaining, *supra* note 5, p.223.

[39] K.V.K. Santhy (2013), *supra* note 1, p. 1.

[40] S. Schulhofer (1991-92), *supra* note 2, p. 1979.

[41] W. J. Stuntz (2006), "The Political Constitution of Criminal Justice", *Harv.L. Rev*, Vol. 119, p. 791.

[42] *Supra* note 6. For more on this from the Ethiopian context, *see* Alemu Meheretu (2016), "The Proposed Plea bargaining in Ethiopia: How it fares with Fundamental Principles of Criminal Law and Procedure?", *Mizan Law Review*, Vol. 10 No. 2.

[43] Andrew Ashworth (1993), "The Royal Commission on Criminal Justice: Part 3: Plea, Venue and Discontinuance", *Criminal law Review*, Citing one judge p. 837.

[44] Regina Rauxloh, Formalization of Plea bargaining, *supra* note 9, p. 329.

sentencing policy, of propriety of compromising questions of criminal guilt, and of the use of governmental inducements to secure waivers of constitutional rights"[45] is hardly justified in terms economic gains. Indeed, it is often the case that constitutional rights supersede claims of efficiency.

The propriety of a criminal process must be primarily measured against its outcome accuracy and its fairness in arriving at such an outcome. Irrespective of their efficiency gains, laws and institutions which fail to uphold such values (i.e., fairness and accuracy) should not be accepted. As Rawls notes:

> Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise, laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. [46]

The efficiency-driven plea bargaining which inherently relates less to evidence and circumvents fundamental safeguards against wrongful convictions (such as presumption of innocence, strong standard of proof and other procedural rights), patently fails on this. The problems against accuracy and fairness that are imputable to plea bargaining are two-fold: convicting the innocent and acquitting or treating the culprit too leniently. Admittedly, trials are not immune from such accusations. Nonetheless, plea bargaining is much more prone to produce these problems than trials.[47] With increasing sentence differentials tailored against the chance of acquittal along with strong risk aversion of the innocent than the guilty[48], the unequal bargaining power of the parties[49], lack of procedural

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[45] Albert W. Alschuler (1983), "Guilty Pleas and Plea Bargaining", in *Encyclopedia of Crime and Justice,* Vol.2, p.836.

[46] John Rawls (1991), *A Theory of Justice* (The Belknap Press of Harvard University Press), p. 3.

[47] Unlike in trials once pleaded guilty, every one (including innocents) is convicted in plea bargains. *See* Albert W Alschuler (1981), "The Changing Plea Bargaining Debate", *Cal. L. Rev*. Vol.69, p.714; Gregory M Gilchrist (2011)," Plea Bargains, Convictions and Legitimacy", *Am. Crim. L. Rev*. Vol.48, p. 145 (`More innocent defendants are convicted by plea bargains than would be by trials alone`).

[48] Studies show that the innocent is inherently more risk averse than the criminal because the latter willingly assumes risk while breaking the law in the first place. *See* Andrew Hessick and Reshma M Saujani, Plea bargaining and convicting the innocent, *supra* note 4, p. 201; Michael K Block & Vernon E Gerrety (1995) "Some Experimental Evidence on Differences between Student and Prisoner Reactions to Monetary Penalties and Risk", *J. Legal Stud.,* Vol. 24, p. 138 (finding prisoners- criminals less risk averse than students-innocents).

[49] Stressing on the huge difference in bargaining powers of the prosecutor and the defendant Langbien compares plea bargaining with torture. J H Langbien (1978)," Torture and Plea bargaining" *Uni. Ch. L. Rev*. Vol. 46, pp. 12-13.

safeguards, mistrust of the system[50], innocents are likely to plead guilty simply because they believe it is rational to do so. Empirical evidence also supports this conclusion.[51]

Further, by under-punishing many or not punishing them at all (it permits the dropping of one or either of the charges, or allows generous sentencing concessions) and over-punishing others (this happens due to overcharging or indirectly via trial penalties), plea bargaining undermines the purpose of punishment. As rightly pointed out by Albert Alschuler[52] "… [J]ust punishment must rest on what an offender did (and possibly on his or her personal characteristics) rather than on a defense attorney's bargaining skills or a defendant's tactical decision to ease the government's burdens of trial. [In this sense] … plea bargaining is incompatible with this principle". By and large, "plea bargaining remains an inherently unfair and irrational process, one that turns major treatment consequences upon a single tactical decision irrelevant to any proper objective of criminal proceedings".[53]

For proponents of plea bargaining, the expediency/efficiency advantage overrides all the above fundamental objections. i.e.; a sacrifice of accuracy/fairness can be justified to reduce expenditures incurred in criminal process. However, it is simply unprincipled to subordinate the substantial interest the defendant and any society have on the accuracy of verdicts to economic gains. Human life and liberty are values that any society should cherish irrespective of their economic costs.

On the other hand, some tend to consider plea bargaining as an exercise of balancing "against the risk that defendants may be tempted to plead guilty must be weighed the benefits to the system and to defendants of encouraging those

[50] *See* Andrew D. Leipold (2005), "How the Pre-trial Process Contributes to Wrongful Convictions", *Am. Crim. L. Rev*. Vol. 42, p.1154:

> "Some innocent defendants are so mistrustful of the system that they believe their guilt is a foregone conclusion if they stand trial, and so they readily accept any inducement to plead. These feelings of mistrust are sometimes nourished by defense counsel who begin with a presumption of client guilt, and both begin and end the representation by looking for the best available bargain".

[51] John Baldwin & Michael McConville (1978), "Plea Bargaining and Plea Negotiation in England", *Law & Soc'y Rev.*Vol.13, pp.296–98 (discussing the innocence problem of plea bargaining in England); D. Michael Risinger (2007), "Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate", *J. Crim. L. & Criminology*, Vol. 97, pp.778–79; Lucian E. Dervan and Vanessa A. Edkins (2013), "The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem", *J. Crim. L. & Criminology*, 1 Vol. 103, pp. 20-21.

[52] Albert W Alschuler (1992), "An exchange of Concessions", *NLJ* Vol. 142, p 937.

[53] Albert W. Alschuler, Plea bargaining debate, *supra* note 47, p. 652.

who are in fact guilty to plead guilty".[54] Yet, "it is simply impermissible to balance the virtues of trial against the economic costs of trial".[55]

The foregoing concerns are all the more important to Ethiopia whose trials/courts are less utilized and whose criminal justice system is underdeveloped and still struggles to fully uphold the values of fairness and accuracy. In particular, the problem of limited /no access to legal counsel, prolonged pre-trial detention and poor conditions of detention centres, and fact finding problems –abuses of arrest and remand, lack of scientific and forensic evidence, absence of pre-trial review of evidence[56]– all conspire to aggravate the concerns and result in the miscarriage of justice.

Undeniably, Ethiopian policymakers have anticipated the dangers of plea bargaining and provided for measures directed at arresting its flaws. These include such guarantees as the requirement of sufficient evidence that warrants conviction, legal representation, and judicial approval of the plea agreement. However, the above guarantees are less likely to contain the inherent and contextual blemishes of plea bargaining and are thus incapable of ensuring its fairness and accuracy for reasons relating to: (i) the nature of the guarantees which are prone to circumventions; (ii) the legal, material and structural problems compounding the Ethiopian legal system; and (iii) the nature of plea bargaining which involves powerful sentencing differentials and sustains considerable power asymmetry between the adversaries.[57]

3. 1.2 The efficiency justification in context

The contextual interrogation of efficiency justification invites one to closely examine the degree of complexity of the criminal process (in particular that of trials), the size of demand and workload, the nature of case delay, the availability of other legitimate ways of case disposition and the possible perverse effects of plea bargaining. Examined from these perspectives, the efficiency rationale hardly fits in as a strong *raison d'être* for plea bargaining in Ethiopia.

a) The nature of the criminal process

In adversarial jurisdictions which are regarded as the birth place of plea bargaining, the complex jury trial, party autonomy (which drains considerable time and resources[58]), and over-procedures of the criminal process are often said

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[54] Andrew Ashworth, The Royal Commission, *supra* note 43, p .837.

[55] Albert W. Alschuler, Plea bargaining debate, *supra* note 47, pp.671& 677.

[56] AlemuMeheretu, Introducing Plea bargaining, *supra* note 26, pp. 170-184.

[57] Ibid. For detailed discussions, *see* AlemuMeheretu, The Innocence Problem in Context, *supra* note 4.

[58] Jenny McEwan (2011), "From Adversarialism to Managerialism: Criminal Justice in Transition", *Legal Studies* Vol. 31, p. 544.

to have triggered the use of trial avoidance procedures as plea bargaining.[59] The extreme complex procedure in adversarial criminal trials, in particular the ponderous jury trial is often blamed for its inefficiency[60]: "the rise of adversary procedure and the law of evidence injected vast complexity into jury trial and made it unworkable as a routine dispositive procedure."

On the other hand, relatively simpler trial procedures of the continental Europe mean plea bargaining remained less frequent. In such systems as Italy, Germany and East European countries, the need for plea bargaining is often linked to the rise of crime rates particularly that of complex and organized crimes which complicated the criminal process.[61]

Unlike adversarial jurisdictions which insist on upholding plea bargaining, the criminal process in Ethiopia is less constrained by procedures both on paper and in practice. Neither over-procedures nor party autonomy/control drags the criminal process. Jury trials, which are often blamed for consuming considerable time and resource, are unknown in the Ethiopian criminal justice system. The criminal process is not resource intensive either. Investigations and prosecutions are relatively cheap. For the most part, complex procedures of investigation, prosecution or trial are uncharacteristic of the Ethiopian criminal process.

The process is largely unconstrained by such procedural and evidentiary rules as exclusionary rules and other strict rules of evidence, disclosure rules, pre-trial hearings and reviews, strict standards of prosecutions. For instance, the standard used to press for a charge is not defined; in practice it is left for individual prosecutors and applied inconsistently. Nor are the sufficiency and reliability of prosecution evidence reviewed by courts at the pre-trial stage. Perhaps partly due to this, prosecutors often institute charges without sufficient evidence and preparation.[62] Likewise, with few exceptions[63] pretrial disclosure, which consumes time and resources and at times drags the criminal process, is unknown in Ethiopia.[64]

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[59] *See* above section 1.

[60] J H Langbein (1979), "Understanding the Short History of Plea Bargaining", *Law & Society Review*, Vol.13, No.2, p. 261.

[61] *See* generally Regina Rauxloh, Formalization of plea bargaining, *supra* note 9.

[62] This practice is ironically labeled as 'charging to fail'. *See* uses and users, *supra* note 36 p. xxi. The Ethiopian Criminal Justice Policy tries to address this problem by requiring the Attorney General to provide for standards for measuring the sufficiency of evidence. This is yet to be acted upon by the newly established Attorney General.

[63] This relates to serious corruption cases, and to some extent the identity of prosecution witnesses attached to the charge. Incidentally, the procedure of preliminary inquiry can serve disclosure purposes. Yet, by and large it has not been in practice.

[64] This is not to imply that disclosure is not desirable to Ethiopia. It is essential to narrow down the power and resource asymmetry which prevails between the parties. That is why the ECJ policy has introduced disclosure.

The trial process is much simpler and less costly compared to other adversarial variants. Though largely adversarial in theory, it mainly remains less adversarial in practice. This is so mainly owing to the huge asymmetry of power and resource between the parties. The defense has very limited access to evidence and defendants in the majority of cases stand trial unrepresented. This manifestly makes lawyerly combats, protracted exchange of arguments and complex interpretation of issues a very rare event. No party autonomy which causes 'a drain of resources`[65] applies to Ethiopia. Parties, in particular the defence, have very little, if not at times, no control over the process.

Nor does the rise of crime rates relating to complex and organised crimes complicate the Ethiopian criminal process as it does elsewhere in continental Europe. Interestingly, reports show that compared to industrialized nations the crime rate is very low in Ethiopia, which even has further dropped by 6 per cent.[66] In general, Ethiopian courts entertain relatively simple cases.[67]All these suggest that as it stands now, overall, the criminal process is simple, less time consuming, and thus less expressive. This means cases can be tried with a reasonable time and cost without plea bargaining.

However, this does not mean that the *status quo* remains forever. Changes could be made, and in fact some reforms are underway as can be evidenced from the Ethiopian Criminal Justice Policy.[68] Yet, since these changes are yet to be in force, they are not relevant to assess the nature of the existing criminal process. This should not, however, create an impression that the need to introduce plea bargaining will arise once the reforms are implemented. This is because of two reasons: First, as shown below there are several legitimate ways through which the efficiency of the process can be enhanced. Second, the efficiency gains due to plea bargaining would come at a very high price –by trading off the overarching values of criminal justice as shown below.

b) The size of demand and workload

The magnitude of demand and the size and the context of workload of the formal system /courts are among the factors one has to explore before looking

[65] J. McEwan, 'From Adversarialism to Managerialism', *supra* note 58, p. 544 (Noting that "…the managerialist persuasion of criminal processes in this county [England and Wales] will continue, and possibly strengthen, because of the drain on resources that party autonomy entails".)

[66] As of 2000, the combined rate for all crimes was 115.99 per 100,000 persons. This can be compared with 4123.97 of the USA and 1709.88 of Japan. *See* Winslow, R. (2008). *Ethiopia* at: <http://www-rohan.sdsu.edu/faculty/rwinslow/africa/ethiopia.html. > (Accessed 21 January 2014).

[67] Uses and users of Justice, *supra* note 36, p.75.

[68] The ECJ policy targets many reforms including introduction of disclosure and pretrial hearing.

for trial avoidance procedures such as plea bargaining. On the demand side, the formal system (including courts) is less utilized by the society [69] (perhaps owing to the preference of informal dispute settlement, problems of trust in courts, and other procedural barriers), and, in effect, trials operate as an exception. The fact that trials are exceptions, simple or at least not complex imply that they are not resource and time intensive and thus are manageable even with limited resources and time.

This does not mean the size of demand for the formal system will remain stagnant. Indeed, reports indicate an annual increase in the number of cases entering the court system at the Federal level.[70] Interestingly, however, this did not trouble Ethiopian courts. With the implementation of multiple case flow management measures, "the caseload has remained under control, with judges handling an increasing number of cases, while continuing to maintain or increase the disposition rate".[71] In the circumstances, the nature of demand and workload which is 'under control' does not necessitate the use of the most controversial case disposition system, i.e., plea bargaining.

Moreover, as low litigation rate or mode of dispute settlement is largely connected with legal culture[72], it is unlikely to change significantly any time soon. Where demand increases and swells caseload, it can be effectively handled using the combination of the above measures as has already been established from experience.

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[69] Gebre Yntiso, *et al* (2011) (eds.), *Customary Dispute Resolution Mechanisms in Ethiopia*, Vol. 2 p.xi; John W. Van Doren (1994), "Positivism and the rule of law, Formal systems or concealed values: A case study of the Ethiopian Legal system", *J. Transnat`l L.*,Vol.3, p.171; UNODC Assessment, *supra* note 26.

[70] UNODC Assessment, *supra* note 26 p. 18; Hammergren (2009), L., *Final Evaluation, Justice Subprogram of PSCAP*, p. 29 (suggesting it as a sign of confidence boost in the system).

[71] Ibid, *see* also Uses and users of Justice, *supra* note 36.

[72] Günter Bierbrauer, (1994), "Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese, and Germans", *Law & Soc'y Rev.*, Vol.*28 p.*243; Max Gluckman, ed., (1969), *Ideas and Procedures in African Customary Law*, (London: Oxford Univ. Press for the International African Institute); William Felstiner (1974) "Influences of Social Organization on Dispute Processing", *Law & Society Rev.*, Vol.9, p.63.

c) The Nature and causes of Delay: Can plea bargaining address them?[73]

It is axiomatic to say that plea bargaining helps manage caseload and address problems of delay. This is not to suggest that it is a panacea for any form of delay regardless of its context/causes. Although it is not the purpose of this article to investigate the causes of delay in the Ethiopian criminal justice system, a brief discussion of the subject matter is necessary. Generally, the most common explanations of delay in criminal cases include: caseload (which is determined mainly by the size of demand and available resources), legal processes and procedures (too many procedural and evidentiary rules, strict standards of evidence, complexity of crimes and complex investigations, etc.), organisational structures and practices (actions and inactions of the parties, witnesses and the court), and perverse incentives/tactics.[74]

Which one of the above explanations of delay applies to Ethiopia? Are there any other causes of delay peculiar to Ethiopia? And to what extent do these causes contribute to delay? Which one of these problems can be addressed by plea bargaining? These are central questions one has to explore before embarking upon the efficiency advantage of plea bargaining i.e., its importance to manage delay and caseload. Unfortunately, no comprehensive empirical study that addresses these questions has been carried out so far.

Yet, the piecemeal studies conducted on courts at Federal level and observations indicate that all the above common causes of delay (other than legal processes and procedures) are relevant in explaining delay in the Ethiopian criminal process. Legal processes and procedures, which are simple and less complex, are remotely associated with delay. Accordingly, avoiding full-scale trials (the legal process and procedures) and replacing it with plea bargaining helps very little. Even then, should any little advantage obtained, it would come at a greater cost of trading off accuracy and fairness, and with other serious undesirable perverse effects highlighted in the following paragraphs.

Delay of criminal justice in Ethiopia is mainly imputable to the ineffectiveness of legal institutions i.e., the way the investigation, prosecution and adjudication organs function. From some piecemeal studies and own

[73] Admittedly, for practical reasons this exercise is far from being comprehensive. Extensive studies are needed before plea bargaining is formally introduced. It is unrealistic to simply copy foreign models and use the justice system as a guinea pig. Except the 15-page general policy note (which describes quite few models), no study has been carried out to inform Ethiopia`s plea bargaining policy.

[74] Jason Payne (2007), "Criminal Trial Delays in Australia: Trial Listings Outcomes, Research and Public Policy Series" No.74; Dory Reiling, et al, *Justice Sector Assessments, Handbook* available at: <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JSAHandbookWebEdition_1.pdf> (Accessed: 21 Jan 2013).

observations, the major causes of delay include[75]: organisational structures and practices, caseload, perverse incentives, and gaps in the legal framework.[76]

i) *Organisational structures and practices*: within the Ethiopian context these encompass[77]: both judge and party initiated frequent and longer adjournments, gaps in accountability and effective performance measurement system, deviation of the practice from the law (much reliance on written submissions as opposed to oral arguments, less continuity of trials and more intermediate steps than envisaged by the law)[78], lack of coordination among justice institutions, [79] protracted case discontinuance practices and its circumvention,[80] and reduced role of prosecutors in investigation and supervision of police –which is responsible for 'enormous backlog in the prosecutorial offices'.[81] While the Ethiopian Criminal Justice Policy and the Draft Criminal Procedure Code have responded to the above concerns,[82] the practice of Federal courts also reveals that the problems can be fairly addressed.[83] For instance, adjournments, the major sources of delay in oral proceedings, are effectively controlled.[84] This means, plea bargaining is not essential to address the above problems.

ii) *Caseload:* Of the main causes of delay, apparently *caseload* can be contained using plea bargaining. However, in reality this cannot be properly understood in isolation from the context of caseload. Such factors as the magnitude of the caseload, the variables that explain it, the available alternatives

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[75] Uses and users of Justice, *supra* note 36, pp. 73-84; *See* also MenberetsehaiTadesse (2010), "የተዘነጉ የወንጀል ፍትሕ ሥርዓት ድንጋጌዎች/ Yetezenegu yewonjel fitihe sera`at dingagewoch" (Amharic), *Ethiopian Bar Review*, Vol. 4 No.1, p. 11.

[76] This is not to suggest that these are the only causes. Further research is needed to have a complete picture of the problem and the extent to which each factor contributes to the delay.

[77] FDRE, *Comprehensive Justice System Reform Program, Base Line Study* (hereinafter CJR Baseline Study) (2005) pp.61-2; Uses and users of Justice, *supra* note 36, p. 11; *See* also Menberetsehai Tadesse, *supra* note 75, p.11.

[78] Menberetsehai Tadesse, *supra* note 75, p 11.

[79] CJR Baseline Study, *supra* note 77, pp.61-62 ("The lack of co-operation between practitioners is a prevalent and unfortunate characteristic of the justice system as a whole"). However, it is important to note that currently there are some developments in this regard -notably the joint investigation of crimes and joined-up justice conferences.

[80] "Prosecutors often find it easier and more efficient to wait until the case reaches [period of] limitation rather than reporting to their superiors on their decision". This created case backlog. *See* CJR baseline study, *supra* note 77, p.185.

[81] Uses and users of Justice, *supra* note 36, p. 11.

[82] Both the Policy and Draft Criminal Procedure Code have embraced efficiency enhancing measures and procedures including setting case processing time limits, ADRs, RTD, pretrial hearing, etc.

[83] Uses and users of Justice, *supra* note 36, p. 11.

[84] Id., p. vxi.

to fix it, among others, are crucial in determining whether caseload necessitates the controversial trial avoidance procedure of plea bargaining. Caseload is directly related to the size of demand and the availability of material and human resources. In Ethiopia, with the overwhelming majority of cases being handled through CDRs (Customary Dispute Resolution Mechanisms), the size of demand to courts is extremely low[85] while material and human resources are generally scanty. From this it follows that caseload is linked to limited human and material resources, and perhaps the inefficient performance of justice institutions than the size of demand.[86] Thus, without fulfilling minimum standards in terms of personnel and material resources, and putting in place effective case management systems, it is simply unacceptable to blame the criminal justice system of delay and search for its solution elsewhere by resorting to plea bargaining. The delay caused by caseload can be effectively addressed with a modest increase in human and material resources and putting in place effective case management systems including effective performance measurement. Indeed, the experience of Federal courts where they managed to reduce backlog despite the rise of caseload, lends strong support to this conclusion as indicated below.

iii) *Perverse incentives/tactics:* This may take many forms. In theory, this could be imputable to the conduct of the parties (defendants, defence attorney, and the prosecution), or the court. While data on most of these is unavailable, excessive appeal rate and its use for dilatory tactics are documented. Court statistics show an increasing appeal rate even though the success rate remains low.[87] Studies show that Federal courts are making 'considerable progress' in controlling appeal-generated delay.[88] Other commonly abused procedures or dilatory motions such as disclosure motions are currently less relevant for Ethiopia as they are yet to be in use.[89] Should such procedures be a cause for concern in due course, they can be strictly regulated.

iv) *Gaps in the legal framework*: this relates to the absence of standard on the reasonable case processing time, i.e., no limit on how long a case should last

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[85] *Supra* note 69.

[86] One study attributed the problems to poor resources (human and material) and bad performances of legal professionals. *See* CJR Baseline Study, *supra* note 77, p.62. Here, it is important to note that this study is a bit old (2005). But in the absence of any recent baseline study, it can provide us a sense of the problem.

[87] For instance, at the FSC criminal appeal rate was 25 per cent in 2005-06 and rose to 40 per cent in 2008-09. Yet, reversal rate is very low i.e. below 10 per cent which is far below the standard for efficient appeal system i.e., low appeal rate and 50 per cent reversal rate. *See* uses and users of justice, *supra* note 36, pp. 58-59 and 81-84.

[88] Id., p. 83.

[89] The ECJ policy recognizes both prosecution and defense disclosure.

(disaggregated by investigation, prosecution[90], trial[91] , and appeal) and no limit on remands, which often results in successive and unwarranted remands and adjournments. Plea bargaining is of no or insignificant avail to address causes of delay such as gaps in the legal framework**.** This can be addressed by making sure that any legal gap is covered rather than resorting to plea bargaining.

In the circumstances where case backlog and delay are much less correlated with the nature of trials, and can be fixed using other options notably backlog reduction programs, and other trial alternatives, plea bargaining (avoiding trials) helps very little to ensure the desired efficiency gains. As shown above, the causes of delay largely rest, among others, on the capacity of legal institutions, frequent and longer adjournments, gaps in the legal framework and gaps in practice. Consequently, delay is largely avoidable and efficiency can be ensured without plea bargaining. The experience of Ethiopian courts, which is separately discussed below, lends solid support for this.

d) Patterns of delay and its management

A noticeable development on the trends of delay in Ethiopia has to do with its tendency of reduction despite growth of caseload. As World Bank survey states: "As a result of their programs, and the use of the database, the courts not only keep track of disposition times, but also have succeeded in reducing them for the most part, both in original jurisdiction cases and at the appellate levels".[92] The use of digital case tracking system has helped both federal and regional courts[93] to collect data on productivity, clearance and congestion rates, appeal rates, execution of judgements, percentage of case resolved within specific time frames, and number of adjournments.[94] This enables courts to reduce delays.[95] Courts at both the Federal and Regional level have eliminated their backlogs, with the majority of pending cases less than 6 months old.[96] According to UNDOC Assessment Report[97] the fundamental problems of backlog and delay

[90] Perhaps the exception is the time limit to institute a charge which is fixed by law to be 15 days as of the receipt of police investigative file. *See* Article 109 Criminal Procedure Code. However, the fact that this is not sanctioned by law makes the standard meaningless. It is not observed in practice, either. *See* Tsehai Wada (2010) "Timely Disposition of Criminal Cases in Ethiopia", *Journal of Ethiopian Law,* Vol.24 No.1, p.74.
[91] For discussion on the length of trial and adjournments, *see* Id, p.64-68.
[92] Uses and Users of Justice, *supra* note 36 p. xxiii.
[93] Unlike in Federal courts, the digital tracking system is not fully installed at all regional courts. *See* J. Plummer (2012), *Diagnosing Corruption in Ethiopia: Perceptions, Realities, and the Way Forward for Key Sectors* (Washington D.C.: World Bank), p. 203.
[94] Uses and Users of Justice, *supra* note 36; Ibid.
[95] Ibid
[96] UNDOC Assessment, *supra* note 26, p.18.
[97] Id, p.19.

in Ethiopia are being effectively addressed "while coping with significant resource constraints".

The management of backlog/delay is attributed to the implementation of the following various measures/policies,[98] namely: limiting the duration and number of adjournments[99], judges' performance management systems (tracking judges` disposition rates and times), increasing the number and skills of judges and prosecutors, ADR strategies, police-prosecution joint investigation[100], Real Time Dispatch (RTD), the new sentencing guidelines, the reorganization of social courts, and court annexed ADR programs. This reveals that congestion and delay can be effectively managed by scaling up and consolidating these measures without the need to apply plea bargaining. This is not to suggest that delay and congestion cannot recur and cause pressure on the system. Admittedly, it is a common concern for any system. But the point here is that short of the most discredited plea bargaining, there are several legitimate ways of handling it as can be evidenced from the above experiences and the use of various dispute resolution alternatives.

3.2 Alternatives to plea bargaining

The extensive application of customary case disposition mechanisms and forms of abbreviated trials and specialized procedures take substantial credit in promoting efficiency. In Ethiopia, Customary Dispute Resolution (CDR) appears to have a high potential and a greater prospect than any other trial alternatives targeted by the government, provided that its limitations, in particular its incompatibility with human rights (rights of vulnerable groups), procedural fairness are sufficiently addressed. Various reasons[101] justify this argument. *First*, CDR is not alien to Ethiopia but rather has been a well-entrenched practice. Unlike transplants of plea bargaining, it is not affected by problems of legitimacy and resistance, which ultimately facilitates its smooth

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[98] Uses and Users of Justice, *supra* note 36 p. 20; UNDOC Assessment, *supra* note 26, p.18; Ministry of Justice & Region Justice Bureaus (Justice Sectors) Five Years (2010/11-2014/15) Strategic Plan, (July 2010). (Hereinafter 'Justice Sector Strategic Plan').

[99] To reduce delay, Federal Courts adopt the following policy on adjournments: "No judge-initiated adjournments are allowed; where the defendant does not appear, the hearing will go on without him/her; the general aim is to have hearings continuous without any intermediate recesses. Moreover, judge's performance is measured based on the number of cases disposed per month". Id, p. 78.

[100] Prosecutors investigate crimes with police thereby avoiding the earlier delayed exchanges of investigation files between them, and thus contributing to the reduction delay. *See* Uses and Users of Justice, *supra* note 36 p.11.

[101] For more advantages of CDR/ADR as well as its limitations, *see* Alula Pankhurst and Getachew Assefa (2008) (Eds), *Grass-roots Justice in Ethiopia: The Contribution of Customary Dispute Resolution* (Centre Français des Etudes Ethiopiennes, Addis Ababa) pp.260-65.

application. *Second*, unlike other modes of case disposition (such as trial and plea bargaining), CDR involves a win-win approach, consequently satisfying both victims and defendants which in itself is vital in bringing lasting peace. This is important especially in Ethiopia for it may minimize revenge and self-help measures. *Third*, unlike other alternatives, it is accessible and is very cheap, the parties incurring no or little cost in the process.That is why the Ethiopian Criminal Justice policy recognizes CDR principles and CDR institutions.[102]

Established at *Kebele* level [the lowest administrative unit], social courts provide accessible forum for the society to resolve disputes involving less serious crimes. Social courts could process cases more efficiently since the procedure they apply is simple, informal and amicable. This would enable regular courts to focus on more serious crimes and thus manage their caseloads.[103] This is particularly the case with the reorganisation of social courts and the expansion of their jurisdiction which was originally limited to petty offences.[104] Although data on the disposition rate of social courts is unavailable, they are generally credited for playing their part in enhancing the efficiency of the justice system.[105]

Modelled after its French analogue, Real Time Dispatch (RTD) or Next day justice courts are established in Ethiopia to dispose of flagrant cases and non-flagrant cases where evidence is readily available. In spite of some concerns of fairness to defendants (which can be addressed by guarantying the defence more time and legal counsel), RTD could be generally seen as a success in terms of enhancing the efficiency and effectiveness of the criminal process.[106] By rectifying its limitations particularly improving its fairness to defendants, the criminal justice system can benefit more from the procedure of RTD.

The guilty plea procedure in Ethiopia is not just one form of evidence as is the case with inquisitorial systems, but like adversarial systems, it is capable of avoiding full scale trials and leading to immediate case disposition.[107] By

[102] The ECJ Policy *supra* note 32, section 4.1(d) and section 4.6.1 p. 38.

[103] There are concerns on the quality of decisions social courts handed down. Such problems need to be investigated and addressed so that the system draws more benefits from social courts.

[104] *See*, for example, Addis Ababa City Government Kebele Social Courts Amendment Proclamation, 2007. Proclamation No 31 Addis Negarit Gazeta.Year 5, No 54.

[105] Justice Sector Strategic Plan, *supra* note 98.

[106] Ibid.

[107] The does not imply that convictions necessarily follow guilty pleas like in the classical adversarial systems. The court retains the discretion either to immediately convict the accused or demand the prosecution to present the full case. *See* Article 135 of the 1961 Criminal Procedure Code of Ethiopia. In deciding over these options, it naturally assesses the validity of the giulty plea –the court determines whether the guilty plea is entered voluntarily and intelligently.

sparing resources and time for trial and prosecution, this enhances the efficiency of the system. Before rushing to plea offers (plea bargaining), the guilty plea patterns in Ethiopia should be investigated which mainly inculde: guilty plea rates (i.e. the percentage of cases with a guilty plea as compared with the totality of cases), the disincentives against and the incentives toward pleading guilty or not guilty, and the magnitude of the factors and incentives that influence the pattern. Probably, one may get the desired efficiency gains with accurate and fair guilty plea dispositions without the need to resort to plea bargaining.

The problem of late guilty pleas which are sometimes referred to as *cracked trials,* and often described as wasteful, need be addressed. Ethiopian courts approach late guilty pleas disparately. While some reject late guilty pleas altogether, others admit them any time before judgement without considering the time/stage of pleading guilty in determining the amount of sentence reduction.[108] Thus, regardless of the particular time the guilty plea is tendered, defendants stand to benefit flat sentence mitigation, *ceteris paribus*. This could discourage earlier guilty pleas and promote tactical moves thereby wasting time and scarce resources.

3.3 Efficiency vs. other adverse effects

Some suggest that beneath the efficiency justification rests the failure of governments to adjudicate each case that flows to the justice system with integrity and diligence. While this could be partly true, it does not mean that plea bargaining offers no efficiency gains. For Ethiopia, however, it would be, as shown above, much less efficient than perceived. And to the extent it is acknowledged for efficiency, it comes at a greatest cost –by trading away the overarching values of the criminal justice namely fairness and accuracy for efficiency. In jurisdictions like Ethiopia, plea bargaining is very likely to entail the following unintended perverse effects:

First, it is open to abuse and corruption in Ethiopia where the capacity of legal institutions is less developed, the prevailing legal culture, in particular rule of law is utterly weak[109] and accountability is intolerably low[110], the excessive

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[108] Alemu Meheretu, Introducing plea bargaining, *supra* note 26, pp. 159-60.

[109] On several measurements of rule law, Ethiopia's performance is among the countries that are at the bottom in terms of ranking. *See* M Agrast *et al ,WJP Rule of Law Index 2011* (Washington, D.C.: The World Justice Project) p.60; Linn A. Hammergren (2012), "Justice Sector Corruption in Ethiopia" in[Janelle Plummer(ed), *Diagnosing corruption in Ethiopia: Perception, Realities and the way forward for key Sectors* (Washington DC, The World Bank) p. 200] (noting that despite improvements, the government`s desire to maintain power conflicts with rule of law); A. Abebe (2012), "Rule by law in Ethiopia: Rendering Constitutional limits on Government Power Nonsensical" CGHR Working Paper 1, (Cambridge: University of Cambridge Centre of Governance and Human Rights)(showing that Ethiopia is a rule by law state).

discretion involved in the proposed model of plea bargaining interacted with the lack of transparency inherent in plea negotiations. Justice actors concede that plea bargaining in Ethiopia risks corruption.[111] In the absence of independent and vibrant media (which are critical of the justice system) such abuse and corruption would remain undisclosed.

Second, it undermines defendants' rights. Its inherent dissonance with human rights of defendants[112] reinforced by the prevailing poor human rights record (weak protection of defendants' rights in the criminal process in particular),[113] plea bargaining would leave defendants' rights at a greater risk. A case in point is confession. As it is reliant on confessions/ guilty pleas whose reliability cannot be properly tested, plea bargaining could reinforce the use of coerced confessions. This would be all the more troubling in Ethiopia where procedural safeguards against forced confessions are scanty and members of the police are often accused of using torture and other improper methods to extract confessions.[114]

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[110] The WJP Rule of law index puts Ethiopia at the bottom in terms of accountability among the 66 surveyed countries. The report states: Accountability is very weak by regional standards (ranking 63rd globally and second to last among low income nations). *See* M. Agrast *et al WJP Rule of Law Index, supra* note 109.

[111] On average, more than two-third of the justice actors participated in a study believe that plea bargaining in Ethiopia is likely to invite corruption. *See* Alemu Meheretu Introducing plea bargaining, *supra* note 26, p. 253.

[112] Plea bargaining is inherently incompatible with such rights of defendants as the right to be presumed innocent, the right to equality, the right to appeal, and the right to silence. For example, *see* Andrew Sanders *et al* (2010), *Criminal Justice* (Oxford University Press); Phillip R. Spicer (1982), "Overview: Plea bargaining in Texas" *St. Mary`s* L.J. Vol.14, pp.74-75. For a contextual analysis of the problem, *see* Alemu Meheretu, The Proposed Plea Bargaining, *supra* note 42.

[113] One writer notes that "human right in Ethiopia is a luxury which the government does not take seriously and their inclusion in the Constitution is simply a matter of formalism", *see* John Markakis (2006), *Ethiopia: Anatomy of a Traditional Polity* (Addis Ababa, Shama Books), p. 333; *See* also reports of human rights groups as Amnesty International, Human Rights Watch, US State Department (all accusing the government of human rights violations).

[114] Most defendants face criminal prosecution without a lawyer and with no pretrial review of evidence. There are reports that police routinely use torture to extract confessions. See for example Reports by UN Committee against Torture (2010) (expressing its deep concerns over "the numerous, ongoing, and consistent allegations" on "the routine use of torture"); The African Commission on Human & People's Rights Resolution No. 218, 2012; Amnesty International Annual Report 2013 available at:
<http://www.amnesty.org/en/region/ethiopia/report-2013>, (Accessed: 25 June 2014). (Reporting that during interrogations detainees are tortured, ill-treated and forced to sign confession documents).

Third, it is likely to result in wrongful convictions. The prosecutor's discretion to pick charges, huge sentencing differentials, the circumvention of fact-finding process and standard of proof would induce innocents (who are risk averse) to plead guilty. This would be exacerbated by contexts and structural limitations in Ethiopia,[115] such as: the particulars of defendants (poor, uneducated, unrepresented defendants), fact finding problems, abuses of arrest and remand,[116] prolonged pre-trial detention and poor conditions of detention centres[117] and weak legal profession and ethics. Under the guise of encouraging guilty pleas, plea bargaining can become coercive and produce unreliable and inaccurate outcomes. Innocents who intend to cover up real criminals in exchange for a payment or simply to cover up their loved ones could also be easily convicted.[118] Although trials are not immune from wrongful convictions, plea bargaining is more prone to it. By offering attractive concessions, circumventing the fact-finding process and lowering the standard of proof, it could reinforce such motives thereby increasing push factors for innocents to plead guilty. This plainly offends the very purpose of the criminal process.

4. Remorse as Justification for Plea Bargaining

Remorse forms one of the justifications often raised to support plea bargaining. The ECJ policy validates plea bargaining from remorse perspective –it is claimed that by encouraging remorse, plea bargaining facilitates the rehabilitation of offenders.[119] This penology based justification makes two assumptions: First, it assumes that all guilty pleaders are remorseful. The second assumption is a corollary of the first–that a remorseful defendant will take lesson from his/her past wrong and is less likely to commit another crime, and hence 'deserves less moral condemnation' than defendants who insist on challenging the prosecution`s case.[120] Both are simplistic assumptions, however. While the possibility of having defendants who plead guilty out of pure remorse

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[115] For details, *see* Alemu Meheretu, Introducing Plea Bargaining, *supra* note 26, pp.170-183.

[116] Linn A. Hammergren, *supra* note 109, p. 215; Country Report on Human Rights Practice for 2012, United States Department of State available at <http://www.state.gov/j/drl/rls/hrrpt/2012/af/204120.htm>, p. 4(March14/13).

[117] EHRC (Ethiopian Human Rights Commission). "Report on Visits to 35 Federal and Regional Prisons.", (2008, EHRC, Addis Ababa); Justice sector strategic plan, *supra* note 98 (indicating such problems as inadequate prison services and overcrowded prisons and absence of national statistics on prisoners)*;* Country Report on Human Rights Practice, supra note 116(`Prison and pre-trial detention center conditions remained harsh and in some cases life threatening…`).

[118] While training prosecutors, one prosecutor told me a case where a sister pleaded guilty of murder simply to cover up her brother, the breadwinner to the family.

[119] The ECJ Policy**,** *supra* note32, p.36.

[120] *See* generally Albert W. Alschuler, plea bargaining debate, *supra* note 47.

cannot be ruled out, quite often defendants plead guilty for a host of reasons that are extraneous to remorse[121]: where evidence against them is overwhelming; where they are advised by their attorneys; simply to avoid 'process costs' – guilty pleas triggered by material and emotional costs of trial; or where they are induced by sentence differentials –a guilty plea can be entered simply to avoid severe punishments at trial. As Alschuler observes "… most guilty pleas are not the fruit of genuine repentance. Instead, defendants feign repentance to earn sentence reductions".[122] Some challenge the remorse rationale on grounds of practicability. They simply doubt whether it is practically possible to distinguish remorse motivated guilty pleas from tactical ones.

What is more the lenient sentence the defendant receives in exchange for pleading guilty may not be proper in achieving the purposes of punishment be it rehabilitation, retribution or deterrence. Since remorse is no guarantee that an offender may not repeat his/her wrongs, it hardly goes with the rationale of general deterrence.[123] Ironically, some scholars show on empirical terms that "guilty plea defendants repeat their crimes at approximately the same rate as defendants convicted at trial and sometimes, in fact, at a higher rate".[124] On the contrary, plea bargaining can have perverse effects on punishment. A more lenient sentence in plea bargaining sends a message to offenders that justice can be purchased and that they can easily beat the system, which can in effect weaken the deterrent effect of punishment.[125] Nor does the plea bargaining

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[121] Empirical studies have disproved the rhetoric/assumption that guilty pleas are the consequence of genuine remorse. *See* M McConville*et al* (1991), *The Case for the Prosecution*. (London: Routledge); D Newman (2012), 'Still Standing Accused: Addressing the Gap between Work and Talk in Firms of Criminal Defence Lawyers", *Int. Journal of the Legal Prof.*, Vol.19, No.1, p.3-27. For more general discussions, *see* Albert W. Alschuler (1983), "Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System", *U. Chi. L. Rev*., Vol. 50, pp. 949-52. (where the writer identifies three types of guilty pleas: "no dispute" guilty pleas (guilty pleas not disputed as the defendant pleads guilty out of remorse or for lack of defense), "process cost" guilty pleas (guilty pleas triggered by material and emotional costs of trial), and "bargained" guilty pleas (guilty pleas induced by sentence differentials).

[122] Albert W. Alschuler, plea bargaining debate, supra note 47, pp.662-3.

[123] Andrew Ashworth (2000), *Sentencing and Criminal Justice,*3rd ed. (London: Butterworths), p.143. For more critics on remorse justification, *see*, for instance. A. Sanders and R Young (2000), *Criminal Justice,* (2nd ed.) (London: Butterworths), p. 401; p. Darbyshire, The Mischief of plea bargaining, *supra* note 6, p. 901.

[124] W. Rhodes (1978), Plea Bargaining: Who Gains? Who Loses? PROMIS Research Publication No. 14 (INSLAW); A Alschuler, Plea Bargaining Debate, *supra* note 47, pp. 661-662.

[125] Kenneth Kipnis (1976), supra note 3 p. 93; R.A. Fine (1987), *supra* note 3, p.615 (arguing that plea bargaining encourages crime by weakening the credibility of the system).

sentence match the seriousness of the crime and the degree of guilt. Plea bargaining, which operates on charge and sentence concessions, is often characterized by impunity and/or under-punishment. In the circumstances, the retributive purpose of punishment remains unattended.

Another limitation of the 'penological' rationale relates to the contrary understanding of the assumptions the rationale is based. It posits that while guilty pleaders are remorseful, those who contest prosecution are not and thus deserve no leniency. This appears preposterous, however. As defendants might plead guilty for reasons extraneous to remorse, they might plead not guilty and contest prosecution for a number of factors that have nothing to do with absence of remorse: ill comprehension of the process, attorney`s advice, strong defence, actual innocence and litigious culture, among others.[126]

The remorse justification has been treasured by many jurisdictions including England and the USA for long. Since the landmark cases of *Turner* (UK) and *Brandy* (USA), remorse constitutes one of the main rationales of plea bargaining.[127] Yet, experience shows that through time it has now lost force in both jurisdictions. In England, there is shift of emphasis from the rationale of remorse to efficiency and case management justifications.[128]

5. The Justification of Avoiding the Trauma of Trials

Some argue that both victims and defendants often need to avoid the publicity and trauma of trials and instead prefer plea bargaining for it better serves their interests to this end.[129] Likewise, the ECJ policy states that plea bargaining benefits both defendants and victims by shielding them from the trauma of trials.[130] Here the assumption is that plea bargaining spares defendants and victims from trial inconveniences and, avoids the stigma and embarrassment of going public in a trial both for the defendant and the victim. In this sense, it is maintained that plea bargaining promotes defendants` and victims` interests.

[126] Albert W. Alschuler, Plea bargaining debate *supra* note 47; *see* also *supra* note 45.

[127] Fiona Leverick (2004), "Tensions and Balances, Costs and Rewards: The Sentence Discount in Scotland", *Edin.L.R.*, p. 371; *Brandy v. United States*, [1970] 397 U.S.742, 753.

[128] *Supra* note122; Juliet Horne "Plea Bargains, Guilty Pleas and the Consequences for Appeal in England and Wales", Warwick School of Law Research Paper No. 2013/10 (Special Plea Bargaining Edition). Available at SSRN: <http://ssrn.com/abstract=2286681 or <http://dx.doi.org/10.2139/ssrn.2286681> (Accessed 29 March 2016)>.

[129] D. Newman (1996), *Conviction: The Determination of Guilt or Innocence Without Trial* (Little Brown and Company), p.96;Nancy McDonough (1979), "Plea Bargaining: A Necessary Evil", *U. Ark. Little Rock L. Rev*. Vol.2, p. 386.

[130] The ECJ Policy, *supra* note 32 p. 36 (author's translation).

However, this validation is far-fetched for it completely trades away the merits of trial as well as the interests of victims and defendants in trials, and tends to portray plea bargaining as the best option available to promote their interests.

5.1 The justification of avoiding defendant's trauma

It is often proposed that beyond reducing the sentences, plea bargaining enables defendants to have a criminal record of a less serious crime and saves them from public stigma and repercussions of serious criminal records such as suspension of civil and political rights. However, these justifications, in particular the one which purports to protect defendants from the public stigma, serve no legitimate purpose of the criminal justice. On the contrary, by treating defendants leniently and avoiding the social stigma associated with public trials, it could negatively impact on the deterrent effect of punishment. Even if this objective is sought, plea bargaining is ill suited, because it merely spares the hearing of evidence; the plea agreement would still be endorsed in an open court, and publicity eventually ensues via the press. Perhaps by enabling defendants to plead guilty to a lesser crime, it may neutralize the stern public sigma associated with serious crimes. But this comes at a higher price, i.e., at the cost of undermining the principle of proportionality of sentences and the purpose of punishment.

The Draft Criminal Procedure Code subscribes to the efficiency rationale and claims that plea bargaining spares justice actors` time and resources. One can imply the defence here. Although, not mentioned in the reform, it is often suggested that plea bargaining enables defendants receive lenient sentences. Yet, this hardly justifies plea bargaining for it is extraneous to the aims of the justice system, if not contravening its purposes. Where a defendant deserves leniency, this can be done without plea bargaining. Legislative reforms on sentences and trials can effectively achieve this. In trials, mitigating grounds including guilty pleas can be used to this end.

For the most part, plea bargaining benefits justice professionals and the justice system, and the advantages to the defendant are not only ancillary but also likely to be overwhelmed by the former.[131] On the contrary, there are considerable instances where plea bargaining can be counterproductive to defendants. Notably, it is likely to result in wrongful conviction of innocent defendants and discrimination against similarly situated defendants. Certainly, the above justifications of plea bargaining are too weak to prevail over the adverse effects of plea bargaining.

[131] *See* generally R. Rauxloh (2012), *Plea Bargaining in National and International Law* (New York, NY: Routledge).

5.2 The victim-oriented justification

The claim that plea bargaining helps victims avoid the trauma of trial is not compelling. *First*, the trauma of public trials is an issue for victims in some specific crimes committed against interests that are predominantly private in nature, leaving the vast majority of crimes unaffected or at least less affected. The need for privacy is especially felt in crimes such as sexual crimes. Victims of such crimes do not feel comfort to stand trial as a witness and be cornered with questions that flow from direct as well as cross examinations from their assailer. However, this can be regulated using other measures as anonymous witnesses and trial in camera rather than doing away with the trial altogether.

Second, lenient treatment of defendants in plea bargains hardly satisfies victims and the public. Instead, it is likely to undermine their trust in the justice system and push them to self-help measures. Victims are morally satisfied seeing their perpetrator receive the deserved punishment rather than a lenient sentence that follows plea bargaining. Yet, in plea bargaining they observe defendants pleading guilty to less serious offence than what is actually committed and lenient sentence, which does not reflect the seriousness of the crime, being imposed.

The concern would be all the more worrisome in the Ethiopian context. According to the observations of some judges, in serious crimes such as murder, relatives of victims sometimes tend to deliberately work toward an acquittal of the offender (by providing exculpating information) so as to take self-help measures later.[132] In property related crimes (such as theft and robbery), the Federal Supreme Court sentencing manual attaches the amount of sentence to the value of the property against which the offence is committed. This approach, which substantially reduces sentence, has sparked public (including victims) dissatisfaction, and even some dubbed the manual as: 'a defender of thieves'.[133] From these, it follows that plea bargaining, an institution characterized by lenient treatments and propensity of corruption, could make victims lose confidence and resort to self-help measures.

Third, plea bargaining, on top of denying victims any meaningful participation in the process, makes them lose their participation even as a witness. All the above may have frustrating effects on victims –which in turn may negatively affect reporting of crimes and trigger self-help measures. *Lastly*, plea bargaining denies the public including victims a forum for wider discussion and the benefit of cathartic roles of trials.[134]

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[132] Alemu Meheretu, Introducing Plea Bargaining, *supra* note 26.
[133] Id., p. 188.
[134] Cyrus Tata & Jay M. Gormley, (2016), "Sentencing and Plea Bargaining: Guilty Pleas Versus Trial Verdicts, Oxford Handbook on line", p.12.

Perhaps, plea bargaining could promote victims` interest only when it allows them a meaningful participation, if not a veto, to influence the plea agreement. Nonetheless, this is a test plea bargaining, in general and the proposed variant, in particular, barely passes. Admittedly, the prosecution is required to consult victims in its plea bargaining decisions and where necessary to have them attend the process.[135]This, nonetheless, falls short of ensuring meaningful participation. Whether to have victims attend in the process is entirely within the prosecution`s discretion. Besides, the duty to consult is not sanctioned. Even where the prosecution honours its duty; victims may remain a passive spectator, and they may not directly participate in the process. Nor are they provided with a forum in which their voice is heard before court. There is no obligation on the part of the court to consider victims' interests and needs while endorsing plea agreements, either. Therefore, the claim that plea bargaining promotes victims` interests is superficial and misleading.

Conclusion

The FDRE Criminal Justice Policy validates plea bargaining based on its traditional rationales: the penological/remorse rational, defendant and victim oriented justifications and the efficiency justification. The penological rationale erroneously assumes that guilty pleas are remorse motivated, an assumption which is difficult to sustain in the circumstances where defendants plead guilty for a host of reasons other than remorse. Moreover, it lacks theoretical foundation for it hardly fits in with the purposes of punishment. This is why the remorse rationale has lost its force even in jurisdictions like the USA and UK where it was upheld for a long time.

Defence and victim oriented justifications are based on assumptions of their meaningful participation in the process –assumptions which are largely romantic than real, in particular in the proposed variant of plea bargaining and within the Ethiopian context. The –limited role of defendants in plea negotiations in general[136] (which is constrained by the institutional imbalance of bargaining power, disproportionate interests at stake, among others), the possibility of competent representation less likely in plea bargains[137], and coercive sentencing

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[135] *See* Article 226 of the Draft Criminal Procedure Code.

[136] Frank H. Stephen, *et al* (2008), "Incentives, Criminal Defence Lawyers and Plea bargaining", *Int'l Rev. L. & Econ.*Vol.28, p.212 (suggesting …qualitative evidence exists on the passive role played by criminal defendants in the plea bargaining process).

[137] With financial and non-financial incentives involved, the defence counsel may find it difficult to choose trial against plea bargaining even if his client`s interest so suggests. *See* Albert Alschuler (1975), "The Defence Attorney`s Role in Plea bargaining", *Y.L.J* Vol. 84, p. 1180 (who argues that [plea bargaining] subjects defence attorney to serious temptation to disregard their clients' interests.)

differentials show that meaningful participation of the defence is less probable. This is likely to be exacerbated in Ethiopia by the dire defense resources, and by the particular circumstances of defendants who are mainly poor, illiterate and unrepresented.

Similarly, the victim oriented justification –i.e., the claim that plea bargaining helps victims avoid the trauma of trials– ignores the overriding merits of trials in terms of making the offender accountable and punishing him/her with the deserved punishment. The lenient treatment of offenders which epitomises plea bargaining rather offends victim`s interests. The Ethiopian Criminal Justice policy simply overstates the advantages of plea bargaining while neglecting the pressing problems it may create for victims and defendants alike. Regrettably, no thorough consideration has been made on its feasibility, notably its implications on the fundamental principles of justice and rights of individuals. Conceivably, plea bargaining could promote victims` interest where it allows them a meaningful participation that can shape its outcome. Yet, this is not the case with Ethiopia`s proposed version of plea bargaining. In the circumstances, the justification remains a chimera.

Ostensibly, the expediency/efficiency justification seems to have a special force in jurisdictions like Ethiopia whose criminal justice is poorly resourced. Yet, this is less compelling at least on two counts. *First*, the reasoning is divorced from being principled in that lack of resources cannot vindicate an encroachment of fundamental rights and freedoms. Human life and liberty are values that any society should cherish irrespective of its economic status. Put simply, efficiency cannot subordinate the substantial interest the defendant and the society have on constitutional rights in general and the fairness of the process and the accuracy of verdicts, in particular.

Second, plea bargaining is not a panacea for all efficiency-related problems. The contextual investigation of the trial and delay in Ethiopia lends no solid support to the efficiency rationale. The fact that trials are exceptions, simple or at least not complex mean they are not resource and time intensive and thus are manageable even with limited time and resources. The cause of delay in the Ethiopian criminal justice is mainly attributed to the inefficiency of the system, and thus plea bargaining has very little role in addressing it. To a limited extent it does, it comes at a very high cost –by trading off the most cherished values of criminal justice in Ethiopia, namely; fairness and accuracy for efficiency.

Most importantly, the experience of Ethiopian courts provides us with empirical evidence that caseload and delays can be effectively managed without plea bargaining. Moreover, the availability of less costly but more legitimate methods such as RTDs, special procedures, indigenous CDRs, guilty plea dispositions render plea bargaining less desirable.

One cannot see plea bargaining in isolation of the legal and political contexts of a nation. In jurisdictions like Ethiopia whose legal institutions tend to be simple, less costly and where there are various modes of dispute resolution, case loads can be manageable.

Under such settings, plea bargaining –which evades and distorts the fact finding process as well as fundamental safeguards jurisdictions like Eth are struggling to uphold– is less likely to be able to serve its intended purposes. On the contrary, it is very likely to entail unintended perverse effects such as wrongful convictions, violations of defendants' rights, abuse or power and corruption which weaken the credibility and effectiveness of the justice system thereby impinging on its purposes. ■

The Right to Political Party Membership in Ethiopia: On the Freedom to Join and Resign

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Abstract

The FDRE Constitution acknowledges the right to freedom of political party membership. Similarly, the Political Parties Registration Proclamation, which regulates the details of political party membership, allows a political party member to withdraw from his/her membership at any time. The form of withdrawal, however, has become contentious. In *Unity for Justice and Democracy Party* -versus- *Blue Party* (a case finally adjudicated by the Cassation Bench of the Federal Supreme Court), the petitioner, claimed that a person cannot be member of another political party without a written withdrawal notice to his/her former political party. The respondent political party, on its part, argued that withdrawal from membership and taking membership in another political party is possible at any time. The points of controversy and the legal framework thereof are examined in this article. An attempt is made to assess relevant principles, international human rights instruments and the experience of other jurisdictions.

Key terms

Freedom of association · Political party · Membership right · Political pluralism · Freedom of choice · Ethiopia

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Introduction

Multiparty democratic federation is enshrined in Ethiopia's 1995 Constitution,[1] in contrast to Ethiopia's former political experience. The reign of Emperor Haile

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Selassie was notable for not allowing political parties,[2] while the military regime that followed led to the establishment of a one-party system. The Workers Party of Ethiopia (WPE) was the only political party that was legally recognized.[3] The Constitution of the Peoples Democratic Republic of Ethiopia (PDRE) of 1987 stated that WPE shall be guided by Marxism-Leninism, and considered it as the vanguard political party dedicated to serve the interests of the working people.[4] Although the right to association was provided for in the PDRE Constitution,[5] political associations and political parties other than the WPE were made impracticable.

After the seizure of state power by the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), the idea of multiparty democracy[6] was embodied in the 1991 Charter of the Transitional Government of Ethiopia (the Charter) which provided for human and democratic rights and freedoms based on the Universal Declaration of Human Rights.[7] Particularly, the right to unrestricted political participation and the right to organize political parties were provided for.[8] Following the Charter, political parties' registration proclamation was proclaimed to provide for the details of multiparty political association.[9]

After the adoption of the FDRE Constitution, multiparty political democracy and political pluralism, though with limitations,[10] have continued to be among

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[1] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, (hereinafter called FDRE Constitution).

[2] Kassahun Berhanu (2003), "Party Politics and Political Culture in Ethiopia" in M.A. Mohamed Salih (ed.), *African Political Parties: Evolution, Institutionalisation and Governance*, (London, Sterling and Virgina: Pluto Press), p. 117, (hereinafter called Kassahun).

[3] Ibid.

[4] The Constitution of the Peoples Democratic Republic of Ethiopia Proclamation No. 1 of 1987 (12th September 1987) Vol. 47, No. 1, *Negarit Gazeta* (Addis Ababa), Article 6(1).

[5] Id., Article, 47(1)

[6] Kassahun, *supra* note 2, p. 119.

[7] *Transitional Period of Ethiopia Charter* No.1, generally see Article 1.

[8] Id., Article 1 (a)(1).

[9] Political Parties Registration Proclamation, Proc. No. 43 of 1993 (April 27, 1993) 52nd Year, No. 37 *Negarit Gazeta* (Addis Ababa) (now repealed). This proclamation endorses the right to unrestricted political participation and the right to organize political parties as provided for in the Charter (cited *supra* note 7) and provides for the right to form or join a political party and the right to withdraw from political party membership at any time. *See* the preamble, Article 4(1), 16 and 20.

[10] The multiparty system in Ethiopia is said not to have been formally established in practice, *inter alia*, because of the hegemonic character of the ruling party, EPRDF, thereby narrowing down the political landscape for opposition parties. *See* for example, Multiparty System - In Ethiopian Case:

the fundamental features of the Ethiopian state. The FDRE Constitution acknowledges human and democratic rights, which include the right to association and the right to vote and to be elected.[11] The right to freedom of political association guarantees individuals the right to freedom of political party membership thereby allowing individuals to establish or join to a political party of their free choice. It is also natural that the freedom to establish or join to a political party carries the other side of the coin –the right to resign (withdraw) from membership.

In the federal arrangement in Ethiopia, the power to legislate on issues relating to elections and political parties is given to the federal government.[12] Accordingly, the House of Peoples Representatives has proclaimed laws one of which is the Revised Political Parties Registration Proclamation.[13] This Proclamation regulates the details of political party membership. It provides that every Ethiopian has the right to form or to be a member of a political party[14] except that judges, members of the Defense Force and members of the Police Force cannot be members of a political party unless they leave their work.[15] The Proclamation also provides that a political party member may withdraw from his/her membership at any time.[16] Although this stipulation may seem to lack

<https://www.academia.edu/16782612/MULTIPARTY_SYSTEM_IN_ETHIOPIA?auto=download> accessed on 14/06/2017, pp. 17-20. The plurality electoral system currently used in Ethiopia also contributes for the non-accommodative and non-inclusive nature of the political system. *See* Getachew Assefa W., "Electoral System and Political Pluralism in Ethiopia: A Case for Reform" in Gedion Timotheows and Helen Fikre (eds.), *The FDRE Constitution: Some Perspectives on the Institutional Dimension*, Ethiopian Constitutional Law Series, Vol. VI., pp. 6-33. The Government seems to admit that the political space has been narrow for the opposition political parties and a reform in electoral system has been taken as an issue of priority to reform. While addressing the joint session of the House of Peoples Representatives and House of Federation (for the new year of 2009 E.C. on 10 October 2017), the president of the FDRE stated that the government is committed to reform the electoral system to replace the plurality system with a more representative system. Whether these official statements would come to fruition is yet to be seen. *See* for example, Tsegai Berhane (PhD), "Proportional Representation vis-à-vis Democracy: the Case of [would be] Ethiopian Electoral System?" <http://www.tigraionline.com/articles/ethiopia-electoral-system.html> accessed on 14/06/2017.

[11] FDRE Constitution, *supra* note 1, Article 31 and 38.

[12] Id., Article 51(15) and 55(2)(d).

[13] Revised Political Parties Registration Proc. No. 573/2008 (24th September 2008) 14th Year, No. 62 *Federal Negarit Gazeta* (Addis Ababa), (hereinafter called Political Parties Registration Proclamation).

[14] Id., Article 4(1).

[15] Id., Article 58 (1) and (2).

[16] Id., Article 31(3).

adequate clarity, it does not seem to require any condition or formality; it rather allows a political party member to withdraw at any time.

The form of withdrawal has, however, become a bone of contention. An example for this is a membership and candidacy controversy between *Unity for Justice and Democracy Party* and *Blue Party*, a controversy arose relating to the 24th May 2015 Ethiopian election. The case was finally decided by the Cassation Bench of the Federal Supreme Court in *Unity for Justice and Democracy Party* -versus- *Blue Party*.[17] The issue of controversy was whether a political party member can withdraw from her/his membership and take membership in another political party without notifying the party of his/her previous membership in writing.

This article examines the existing legal frameworks related with political party membership rights in Ethiopia. It does not address all issues related to the freedom of political party membership, and focuses on freedom of political party membership with due attention to the freedom to join and resign. An attempt is made to examine relevant principles and provisions of international human rights instruments and, the experience of other selected jurisdictions. I argue that the provisions in the relevant laws related to political parties and election, and particularly the Political Parties Registration Proclamation do not require a written withdrawal notice as the sole procedure upon withdrawing from political party membership.

On the one hand, political party members can resign from their previous membership at any time without any condition or formality, and take membership in another political party of their choice. To this end, any political party member who is known to have taken membership in another political party shall be assumed to have terminated his/her previous membership upon her/his will. On the other hand, this article discusses the schemes of avoiding the possible challenges of simultaneous political party membership by which individuals may accept simultaneous nomination as candidates for election by more than one political party.

The first section of the article highlights the issues raised in the *Unity for Justice and Democracy Party* -versus- *Blue Party* case, followed by Section 2 which deals with general considerations on the role of political parties and, relevant basic principles and provisions of international human rights instruments. The third section examines the experience of Germany, Israel, Canada and Kenya. The last section discusses the relevant provisions of Ethiopian laws followed by concluding remarks.

[17] *Unity for Justice and Democracy Party v. Blue Party*, (Federal Supreme Court: Federal Supreme Court Cassation Decisions, Vol. 18, 421-435, Miyaziya 28, 2007 E.C.), (hereinafter called *Unity for Justice and Democracy Party v. Blue Party*).

1. *Unity for Justice and Democracy Party* v. *Blue Party*: An Overview

The litigation in *Unity for Justice and Democracy Party* -versus- *Blue Party* commenced in Amhara Region Western Gojjam Zone Daga Damot Wereda (District) Constituency Grievance Hearing Committee. Unity for Justice and Democracy Party (the applicant) petitioned to the Committee that Ato Girma Bitew, Ato Meles Zeleke, W/ro Yirgedu Tadege and Ato Yihune Tilahun, whom the respondent presented as candidates to *Daga Damot* Constituency for the 5th National election of 24th May 2015, have been members of the applicant till the time they were registered as candidates of the respondent and, requested their dismissal from candidacy. The Committee ruled that the above named candidates are members of the applicant, and it rejected their election candidature under the respondent.

The Blue Party (the respondent) appealed to the Grievance Hearing Committee in the Branch Office of the National Electoral Board of Ethiopia in Amhara Region, which confirmed the decision of the lower committee. The respondent still dissatisfied, appealed to the Supreme Court of Amhara Region. The Court confirmed the decisions of the Committees stating that the respondent did not present evidence to prove that the candidates it presented for the election have withdrawn from their previous membership in accordance with the by-laws of the applicant and have been its members having waited for the time test required for full membership according to its by-laws.

The respondent lodged its petition to the Cassation Bench of Amhara Regional Supreme Court. The Regional Cassation Court (by majority decision) ruled in favour of the respondent. The majority ruling reasoned, *inter alia*, that the above named candidates –although were the members of applicant– have the right to withdraw from their membership and be members and candidates of the respondent at any time. The court ruled that upon registration as members of the respondent, it should be assumed that they have resigned from their previous membership in the applicant.

The applicant lodged its petition to the Cassation Bench of the Federal Supreme Court. It claimed the candidates presented by the respondent for the election were its members. It contended that the respondent cannot present them as candidates for election without making sure that they have given notice of their resignation to the applicant. The respondent argued that the right to vote and be elected is a constitutionally recognized right, and in effect, every individual who fulfils the requirements can voluntarily be a member of any political party.

Both parties relied on the provisions of the Political Parties Registration Proclamation to support their respective claims. According to the applicant a person cannot be registered as a member and nominated as election candidate of another political party without a written withdrawal notice to the political party in which he/she was a member. The respondent on the other side argued that withdrawal from membership is possible at any time and, a political party shall, in its by-law, not limit that right. The respondent added, individuals shall not be forced to remain members of a political party without their will under the pretext that they have not formally withdrawn from it.

The Federal Supreme Court Cassation Bench held that a member of a political party cannot withdraw from his membership and be a member and election candidate of another political party without presenting a written withdrawal notice to the political party in which he/she had membership. The court's detailed reasoning includes its reliance on the experience of developed democracies, particularly mentioning a case from Israel.

2. General Considerations on Political Party Membership

2.1 The role of political parties as political associations in democracy

Human rights can be either civil or political. Civil rights include freedom of speech, religion and movement; and the right to employment, education, privacy, access to justice, due process, property ownership and non-discrimination.[18] Political rights include the civil rights of free speech, voting, etc., and, *inter alia*, refer to one's ability to participate in government, i.e., to vote and to hold public office, to criticize government, and to advocate change.[19] Civil rights are universal political rights and oftentimes limited to citizens,[20] while Human rights have been the interest of all democratic systems. However, human rights provisions cannot be effective unless they are accompanied by enforcement mechanisms. To this end, different constitutions and laws have, in addition to the embodiment of human rights, include provisions for the separation and limitation of state power, due process of law and independent judiciary[21] for the implementation of human rights.

Political association enables people to come together and reflect their political views that enhance their shared values and enforce their political rights; and political parties are fundamental in these pursuits.[22] Political parties are

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[18] K. Lee Lerner, *et al* (eds.) (2006), *Human and Civil Rights: Essential Primary Sources* (Detroit, New York, San Francisco, New Haven, Conn, Waterville, Maine, London and Munich: Thomson Gale), p. 295.

[19] Ibid.

[20] Ibid.

[21] George Kateb (2011), *Human Dignity* (Cambridge, Massachusetts and London: The Belknap Press of Harvard University Press,), p. 28.

[22] Peter Burnell (2004), *Building Better Democracies: Why political parties matter?* (Westminster Foundation for Democracy), p. 3.

manifestations of citizens' right to politically associate.[23] Direct forms of democracy such as referendums, initiatives and community town-hall meetings can serve limited role in the determination of policies for and the governance of mass societies.[24] Therefore, political parties are indispensable in modern representative democracy.[25] In a nutshell, political parties are necessary:

> to build and aggregate support among broad coalitions of citizens' organizations and interest groups; to integrate multiple conflicting demands into coherent policy programs; to select and train legislative candidates and political leaders to provide voters with choices among governing teams and policies; and, if elected to office, to organize the process of government and stand collectively accountable for their actions in subsequent contests.[26]

A multiparty system accommodates political parties with different views, and it is more representative than other party systems.[27] Multiparty system allows multiple political parties to compete with their alternative policies in the interest of people. For a genuine multiparty democratic system, however, the strength of the competing parties is also important.[28] In the absence of democratic political culture, "[m]ultiparty election exercises conducted on a seemingly competitive basis can serve as smokescreen for perpetuating the power of turncoat 'democrats'."[29] Strong competitive parties and fair and ground leveled completion should thus exist[30] in multiparty elections.

2.2 Freedom of political party membership: basic principles

The central foundation for the functioning of political parties is the right to freedom of association[31] which is also related with the rights of freedom of

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[23] OSCE/ODIHR (2011), *Guidelines on Political Party Regulation*, Adopted by the Venice Commission at its 84th Plenary Session Venice, 15–16 October 2010 (Warsaw/Strasbourg: Office for Democratic Institutions and Human Rights (ODIHR)), p. 20.

[24] Pippa Norris (2005), *Political Parties and Democracy in Theoretical and Practical Perspectives: Developments in Party Communications* (National Democratic Institute for International Affairs), p. 3.

[25] Ibid.

[26] Id., pp. 3-4.

[27] Anastasija Malachova (Nov. 21, 2012), "Does a Multi-party System Lead to "More" Democracy?" <http://www.e-ir.info/2012/11/21/does-a-multi-party-system-lead-to-more-democracy> accessed on 23/01/2017.

[28] Michael Johnston (2005), *Political Parties and Democracy in Theoretical and Practical Perspectives: Political Finance Policy, Parties, and Democratic Development* (National Democratic Institute for International Affairs), pp. 1-3.

[29] Kassahun, *supra* note 2, p.129.

[30] Ibid.

[31] OSCE/ODIHR and Venice Commission (October 2010), Guidelines on Political Party Regulation, Adopted by the Venice Commission at its 84th Plenary Session (Venice: 15-16 October 2010), p.8. (hereinafter called Venice Commission Guidelines).

expression, assembly,[32] and the right to vote and be elected. The Venice Commission[33] has adopted principles that need to be considered in designing a political party legislation. Of these principles, five are very significant to understand that political party membership is voluntary in nature and it cannot be limited except for justifiable purposes, hence relevant to discuss them here.[34]

a) The principle of the right of individuals to associate

This principle underlines that "the right of individuals to associate and form political parties should ... be free from interference."[35] Moreover, this principle requires association with political parties to be voluntary in the sense that individuals shall not be "forced to join or belong to any association against their will".[36] The principle of protecting the right to politically associate also requires political parties to be free from undue interferences[37] because it becomes impractical to protect the individual rights of political party members without protecting political parties from undue interferences.

b) The principle of the state's duty to protect individual right of free association

According to this principle, it is the duty of states to enact laws that are necessary for the practical exercise of the right of citizens to freely associate and

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[32] Ibid.

[33] The European Commission for Democracy through Law –commonly known as the Venice Commission as it meets in Venice–is the Council of Europe's advisory body on constitutional matters. The Commission has 61 member states: the 47 Council of Europe member states, and 14 other countries (Algeria, Brazil, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA). Its role is to provide legal advice to its member states; help states wishing to bring their legal and institutional structures in line with European and international standards in the fields of democracy, human rights and the rule of law; work for the dissemination and consolidation of a common constitutional heritage in conflict management; and provide emergency constitutional aid to states in transition. Its individual members are university professors of public and international law, supreme and constitutional court judges, members of national parliaments and civil servants designated for four years by the member states, but they act in their individual capacity. *See* "The Venice Commission of the Council of Europe" <http://www.venice.coe.int/WebForms/pages/?p=01_Presentation> accessed on 31/07/2017.

[34] The other principles are the principle of non-discrimination, the principle of equal treatment, the principle of good administration of legislation pertaining to political parties, the principle of the right to an effective remedy for violation of rights and the principle of accountability. *See* Venice Commission Guidelines, *supra* note 31, pp. 9-11.

[35] Id., p. 9.

[36] Ibid.

[37] Ibid.

form political parties.[38] States also have the responsibility to refrain from interference and to make sure that the laws prohibit interference of non-state actors.[39] Moreover, in cases of violations against the right to association, states are required to provide sufficient remedies to ensure that the violations cease.[40]

c) The principle of legality

According to the principle of legality, any limitation on the right of individuals to freely associate should be expressly articulated in a constitution or parliamentary legislation.[41] Such limitations should be the result of well studied legitimate justifications necessary for a democratic order but not of partisan political decisions.[42] This requires the constitution and parliamentary acts of states to respect the right of association found in relevant international human rights instruments,[43] and political party legislations to be clear thereby indicating what activities are unlawful –including the sanctions in cases of violations.[44] To help individuals and political parties be aware of their rights and the limitations thereof, political party legislations are required to be adopted only after having passed through open debates and public review.[45] According to this principle, frequent changes made with respect to party laws may be seen as resulting from political whim rather than satisfying public interest.[46] While law needs to change with changing social reality, changes in law, including party laws, unwarranted by necessitating reality may be considered arbitrary.

d) The principle of proportionality

According to the principle of proportionality, limitations imposed on the rights of political parties must be proportional to the specified purposes they are intended to achieve.[47] The restrictions should be prescribed by law and at the same time necessary for the development of democratic society.[48] Failing to meet such criteria, they cannot be deemed proportionate. The quote "you must not use a steam hammer to crack a nut, if a nutcracker could do"[49] depicts the

[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Id., pp. 9-10
[44] Id., p. 10
[45] Ibid.
[46] Id., p. 9
[47] Id., p. 10
[48] Ibid.
[49] R. V. Goldstein (1983), quoted in The Focus, "The principle of proportionality and the concept of margin of appreciation in human rights law", Basic Law Bulletin, Issue 15 – December 2013, p. 1.

need for proportionality. Limitations should thus be imposed only if they have purposes that cannot be achieved otherwise.[50]

e) The principle of political pluralism

Political pluralism refers to the existence and enhancement of diverse political views. According to this principle, the aim of political party legislations should be facilitating a pluralistic political environment[51] and citizens should be able to receive a variety of alternative political viewpoints.[52] In order for individuals to be able to exercise their freedom of choice, they shall be offered real choice.[53] In other words, citizens shall not be given only deliberately restricted choices –in such a manner that indirectly limits their freedom of choice. Therefore, laws pertinent to regulating political parties should be carefully designed to create a political environment conducive to political pluralism[54] whereby various political associations having different views will be available so that citizens can freely choose among competing policy platforms.

2.3 International human rights instruments pertaining to freedom of political party membership

The Universal Declaration of Human Rights provides "Everyone has the right to freedom of … association"[55] and "No one may be compelled to belong to an association".[56] The International Covenant on Civil and Political Rights also provides for the right to freedom of association.[57] The same holds for the regional human rights instruments, such as the ones that are adopted in Europe and Africa.

Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) acknowledges the right to peaceful

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[50] For more on proportionality, *see,* for, example Tsegaye Rregassa, "Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia,", *Mizan Law Review*, Vol. 3, No.2, September 2009, pp. 313-316; Jill Marshall (2009), "Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights", *International Studies in Human Rights*, Volume 98, (Leiden and Boston: Martinus Nijhaff Publishers) pp. 38-42; and Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007), 57 *University of Toronto Law Journal*.

[51] Venice Commission Guidelines, *supra* note 31, p. 10.

[52] Ibid.

[53] Ibid.

[54] Ibid.

[55] Universal Declaration of Human Rights (1948), Article 20(1).

[56] Id., Article 20(2).

[57] International Covenant on Civil and Political Rights (1966), Article 22(1).

assembly and freedom of association,[58] and forbids restrictions except in cases necessary to protect national security, public safety or the rights of others.[59] Subject to the special nature of their work, however, the Convention allows member states of the European Union to restrict the exercise of these rights by members of the armed forces, members of the police or members of the state administration.[60] The right to peaceful assembly and association are also provided in the Charter of Fundamental Rights of the European Union (the Charter).[61] Particularly, the Charter recognizes the contribution of political parties in the expression of the political will of citizens[62] and hence it acknowledges the right to form or join to political parties.

Likewise, the African Charter on Human and Peoples' Rights (ACHPRs) provides "a normative framework for the African regional human rights system".[63] It, *inter alia*, states that everyone has the right to lawful association[64] and assembly.[65] In addition to the (ACHPRs), the African Charter on Democracy, Elections and Governance (ACDEG) has been adopted to enhance electoral democracy in Africa[66] by promoting adherence to universal principles of democracy; regular, free and fair elections for democratic change of governments; and establishment of conditions necessary for transparent and participatory system of government with free access to information including freedom of press.[67]

It is particularly provided that African states signatory to the ACDEG are required to strengthen political pluralism by recognizing the role, rights and responsibilities of political parties,[68] and by giving opposition political parties legal status under their national laws.[69] With the view to enhance multiparty

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58 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (4.XI.1950) (as amended by Protocols No. 11 and No. 14Rome)) Article 11(1).

59 Id., Article 11(2).

60 Ibid

61 The Charter of Fundamental Rights of the European Union (2000/c 364/01), Article 12(1)

62 Id., Article 12(2).

63 Tikikel Alemu (2007), "The African Charter on Democracy, Elections and Governance: A Normative Framework for Analysing Electoral Democracy in Africa", LL.M Thesis (Faculty of Law, University of the Western Cape) 'unpublished,' p. 16.

64 African Charter on Human and Peoples Rights (1981), Article 10.

65 Id., Article 11.

66 Richard Lee (19th January 2012), "New era for democracy in Africa," <http://www.osisa.org/hrdb/regional/new-era-democracy-africa> accessed on 03/10/2017; Stacy-Ann Elvy (2013), "Towards a New Democratic Africa: The African Charter on Democracy, Elections and Governance" *Emory International Law Review* [Vol. 27] p. 47.

67 African Charter on Democracy, Elections and Governance (adopted on 30 January 2007), Article 2(1), (3) and (10).

68 Id., Article 3(11)

69 Ibid.

elections, states are required to ensure that parties and candidates contesting in election have fair and equitable access to state controlled media.[70] The African Commission on Human and Peoples' Rights has also passed a resolution that recognizes the right for the existence of various political parties and the right to a pluralist democracy.[71]

The international human rights instruments highlighted in this section show that political party membership is a basic right which is required to be exercised freely and cannot be limited except in cases justified to protect public interest and the right of others, if these cannot be served without compromising this basic right. For these international human rights instruments to take effect, national human rights institutions are required to incorporate the principles and relevant clauses of the charters and conventions into national laws and implement them.

This envisages "the dissemination of information" and the active involvement of state and non-state actors such as NGOs and civil societies, parliamentarians, judiciary, the legal profession at large and political parties.[72] Particularly, states are required to enact political party laws which define political parties, and stipulate the substantive and procedural requirements to be recognized as political party, the activities that political parties can engage in, norms to be followed by political parties, the sanctions against political parties that do not follow the laws, and details of political financing.[73]

The extent to which the principles and provisions of international human rights instruments are incorporated in domestic laws and the level of their application may vary within jurisdictions. The next section discusses the comparative experience in selected countries regarding the issue of whether political party members who intend to withdraw from their membership and take membership in another political party are required to submit a written withdrawal notice to their former political party.

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[70] Id., Article 17(3).

[71] African Commission on Human and Peoples' Rights (2011), ACHPR/RES.184 (EXT.OS/IX) 2011: Resolution on Electoral Processes and Participatory Governance in Africa, p. 2.

[72] *See* Permanent Forum on Arab-African Dialogue on Democracy and Human Rights (2010), *The African Charter on Democracy, Elections and Governance: The Role of National Human Rights Institutions* (NHRIs) (Cairo: UNESCO) p. 12; and Patrick J. Glen (2012), "Institutionalizing Democracy in Africa: A Comment on the African Charter on Democracy, Elections and Governance" *African Journal of Legal Studies* 5, p. 172.

[73] Jean-Benoit Pilet, *et al* (2012, *Criteria, Conditions and Procedures for Establishing a Political Party in the Member States of the European Union* (European Parliament, Directorate General for Internal Policies), pp. 56-57.

3. Comparative Experience: Germany, Israel, Canada and Kenya

3.1 The German experience

Germany is referred to as the “heartland of party law”.[74] Its Political Parties Act of 1967 embodies comprehensive and detailed provisions that serve as a model for many national party laws.[75] Biezen and Borz classify the process of party constitutionalization in Europe into five waves, and they categorize the German case under the first wave.[76] The German Basic Law acknowledges the role of political parties in the expression of public will and the free association of political parties. It provides that “[p]olitical parties shall participate in the formation of the political will of the people. They may be freely established.”[77]

Details pertaining to political parties in Germany are regulated by federal laws.[78] Scholars classify the European journey of political party regulation with party laws into three phases and, the first phase includes Germany.[79] The German party law acknowledges political parties as integral to the free democratic basic order.[80] It states that “political parties shall participate in forming the people’s political will in all fields of public life ...”.[81] It defines political parties as:

> ... associations of citizens which, on a continuing basis or for a longer period of time, wish to influence the development of informed political opinion at the federal level or in any of the *Länder* and to participate in representing the people in the German *Bundestag* or a *Land* parliament (*Landtag*).[82]

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[74] Ingrid van Biezen and Gabriela Borz (2009), “The Place of Political Parties in National Constitutions: A European Overview” *The Legal Regulation of Political Parties working paper* 01/09, p.2 (hereinafter called The Place of Political Parties).

[75] Fernando Casal-Bértoa, *et al* (March 2012), “Party Law in Comparative Perspective” *The Legal Regulation of Political Parties Working Paper* 16/12, p. 5 (hereinafter called Fernando Casal-Bértoa, *et al*).

[76] The first wave covers the years from party constitutionalization in Iceland in 1944 to that of Germany in 1949. For the five waves of party contitutionalization, *see* The Place of Political Parties, *supra* note 74, pp. 11-15.

[77] Basic Law for the Federal Republic of Germany, (As at Nov. 2012), Article 21(1).

[78] Id., Article 21(3).

[79] While the study of constitutionalization of political parties in Europe is classified in five waves of development, the regulation of political parties with party laws is studied in three phases. According to the study of political party regulation with party laws in Europe, the first phase includes the enactment of party law of Germany in 1967, that of Finland in 1969 and that of Australia in 1975. For the three phases of party law development, *see* Fernando Casal-Bértoa, *et al*, supra note 75, pp. 3-6.

[80] Political Parties Act of 24 July 1967, last amended by the Ninth Act amending the Political Parties Act, of 22 December 2004 (Federal Law Gazette I 2004), Article 1(1).

[81] Id., Section 1(2).

[82] Id., Section 2(1).

The German party law has provisions that deal with membership and its termination. It provides "only natural persons may be members of a political party,"[83] and "persons who, by judicial decision, have been deprived of their right to stand for election or their right to vote, may not be members of a political party." Party statutes are required to contain provisions including, *inter alia*, procedure of joining and leaving the party[84] and rights and duties of members.[85]

According to the German party law, political party members may terminate their membership at any time and without a written notice to the political party of their membership. It is provided that "a member shall be entitled at any time to end his/her party membership with immediate effect".[86] This provision seems to deal with the time element without expressly addressing the issue of form, and hence there can be an argument that this does not necessarily imply that a written notice may not be requested from a withdrawing political party member.

However, this author argues that a political party member may express her/his intention to withdraw not solely by a written notice. Other means of withdrawal such as taking a new membership in another political party or even orally declaring that s/he is no more a member should suffice without the need for written notice. So, the express provision as to time seems to have (within it) an implicit meaning as to form entitling a political party member to resign from membership even without a written resignation notice. The fact that a written withdrawal notice is not expressly provided as a requirement in the law also supports this view.

3.2 The Israeli experience

Simultaneous political party membership is a criminal offense in the Israeli law.[87] The criminalization of simultaneous membership in more than one political party does not seem to mean, however, political party members cannot leave their membership and join another party without a written notice to the party they previously were members.

An issue of debate in the Israeli system is party-splitting in the parliament (Knesset) after election. Those who support strong party-discipline and oppose party-splitting –after a seat is secured in the Knesset– argue that "Knesset members who leave the faction in which they were elected or decide to form a splinter group are betraying the voters' trust," and "the mere existence of an

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83 Ibid.
84 Id., Section 6(2).
85 Id., Section 6(2) and (3).
86 Id., Section 10(2).
87 Zvi Ofer and Brenda Malkiel (October 2011), *Reforming Israel's Political System: Recommendations and Action Plan* (The Forum for Political Reform), p. 18.

option to break away accords individual MKs numerous opportunities to threaten party cohesion, coalition longevity and government stability".[88] Those who oppose strong party-discipline and support splitting, on their part, argue "MKs are supposed to serve the public not only through their respective parties but out of loyalty to what they perceive as the public interest," and "MKs must act according to their conscience, even if loyalty to their principles leads them to leave their factions."[89]

To strike a balance, effort has been made to make splitting in the Knesset difficult by imposing certain threshold conditions since 1991.[90] Among these conditions was the requirement of at least one-third of the faction's members departing.[91] And this stringent condition has been amended to provide that "if at least seven MKs resign from a faction, even if they do not constitute one third thereof, no major sanctions will be imposed."[92] The amendment was opposed and its repeal has been recommended.[93]

The Constitution of Israel does not prohibit a political party member who is not in the parliament (Knesset) from terminating his/her political party membership without written notice. The relevant provision reads:

> A Knesset member seceding from his faction and failing to tender his resignation as a Knesset member in close proximity to his secession, shall not be included, in the election for the next Knesset, in the list of candidates submitted by a party that was represented by a faction of the outgoing Knesset; This provision does not apply to the splitting of a faction under the conditions prescribed by law.[94]

This provision requires an MK seceding from his/her political party (in order to be included in the list of candidates in the next election by a political party having a sit in the outgoing Knesset) to tender his/her resignation to the Knesset, not to the political party from which s/he is seceding. This provision may seem as if an MK seceding from his faction is required to tender his/her secession to the political party of her/his membership. However, this interpretation cannot be valid if the provision is understood in light of its title and expression. The title of this provision is about the restriction on the candidacy of Knesset members.[95]

[88] Id., p. 19.
[89] Id., p. 20.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Israel's Constitution of 1958 (with Amendments through 2013) <http://www.constituteproject.org/constitution/Israel_2013.pdf> Article 6A(a).
[95] Ibid. *See* the title of the provision. It reads "Restriction on the candidacy of a Knesset member seceding from his faction."

Similarly, the expression in the provision "... failing to tender his resignation as a Knesset member ..." shows that the resignation notice is required to the Knesset.

The latter interpretation is in line with the legislative purpose of the provision that can be understood from its legislative history. Such restriction on MKs constitutes an anti-defection law in order to prevent non-ideological defection in the Knesset by which MKs who defect (from their membership in one political party to another political party) due to a promise for a safe seat in the next Knesset will be forced to resign.[96] This does not, however, indicate the intention to require a withdrawing political party member to present a written notice to the political party from which s/he is withdrawing.

An MK who resigns from political party membership without documenting resignation to the Knesset, cannot be nominated as candidate in the coming election by a political party having a seat in the outgoing Knesset, unless at least seven Knesset members split from the political party having a seat in the Knesset. This is meant to prevent solicited party-splitting in the Knesset and avoid government failure.

Owing to problems that result from Israel's electoral system,[97] small and medium sized political parties have got prominence in making and breaking coalitions leading to instability in government.[98] The anti-defection law is thus meant to address this challenge. However, these anti-defection remedies do not seem to require political party members (who intend to withdraw from their membership) to present a written notice to the political party of their membership. Moreover, political party members cannot be prohibited from withdrawing and taking membership in another political party merely because they have not –in writing– notified their withdrawal from the former political party.

3.3 The Canadian experience

The Canadian Charter of Human Rights and Freedoms acknowledges the right to freedom of association.[99] Since the 1990s, Canadian national politics has

[96] *See* Csaba Nikoleyni and Shaul Shenhave, "In Search of Party Cohesion: The Emergence of Anti-Defection Legislation in Israel and India" paper prepared for delivery at the Annual Meeting of the American Political Science Association, Toronto, Canada, 3-6 September 2009 (hereinafter called In Search of Party Cohesion).

[97] *See* for example, Alex Bain (February 2011), "Israel's Flawed Electoral System: Obstacle to Peace and Democracy" Middle East Institute Policy Brief No. 32, p.4-5.

[98] Ibid.

[99] The Canadian Charter of human Rights and Freedoms, <http://publications.gc.ca/site/archive-

taken a full-fledged multi-party system,[100] and as of 2007 there were fifteen registered political parties.[101] In order for a political party to be recognized and participate in an election, it needs to be registered with the Chief Electoral Office after having applied for registration at least sixty days before the issuance of the notice of election.[102] A party applying for registration is required to present documents including "the names and addresses of at least [two hundred fifty] electors and their signed declarations that they are members of the party and that they support its application for registration".[103] The Canada Elections Act, does not, however, regulate the details of political party membership. Political parties determine these issues in their constitutions.

According to the Constitution of the Liberal Party of Canada, an applicant who, *inter alia*, while s/he is a member of the Liberal Party, has not publicly declared his/her intention to partake in an election as a candidate of a party other than the Liberal Party can be a member.[104] Similarly, the Conservative Party of Canada provides that every citizen or permanent resident of Canada, who, among other requirements, "is not an individual holding a membership in another federal political party" can be a member.[105] This requirement is also provided in the Constitution of the New Democratic Party of Canada.[106]

From these political party statutes, it is possible to understand that simultaneous political party membership is impossible and a person cannot be simultaneously nominated for an election by more than one political party. However, none of these Canadian political parties regulates the details of

archived.html/?url=http://publications.gc.ca/collections/collection/CH37-4-3-2002E.pdf> Section 2(d).

[100] Jay Makarenko (Jun 1, 2010), "Political Parties and the Party System in Canada: History, Operation and Issues," <http://mapleteafweb.com/features/political-parties-and-party-system-canada-history-operatio-and-issues> accessed on 11/06/2016.

[101] Chief Electoral Officer of Canada (2007), *The Electoral System of Canada* (Public Enquiries Unit, Elections Canada, 2nd Ed.) p. 9.

[102] Chief Electoral Officer of Canada (2007), *The Electoral System of Canada* (Public Enquiries Unit, Elections Canada, 4th Ed.) p. 30.

[103] Id., p. 31.

[104] The Liberal Party of Canada, Constitution: As adopted and amended at the Biennial Convention on November 30 and December 1, 2006, further amended at the Biennial Convention in Vancouver on May 2, 2009, and at the Extraordinary Convention on June 18, 2011, and ratified by the National Board of Directors on July 9, 2011 <www.liberal.ca/2010/05/lpc-2009-constitution-en.pdf> Section 4 & 9.

[105] Conservative Party of Canada, Constitution: As amended by the delegates to the National Convention on November 2, 2013, as consolidated by the National Constitution Committee and approved by National Council <www.conservative.ca/media/documents/constitution-en.pdf> Section 4.

[106] Constitution of the New Democratic Party of Canada, Effective April 2013 <www.xfer.ndp.ca/2013/constitution/2013-CONSTITUTION-E.pdf> Article 3.

resignation, and they do not put a requirement that a member intending to resign should present a written withdrawal notice.

This trend is also followed by the Constitution of the South Africa's African National Congress (ANC). The Constitution of the ANC does not provide for details of resignation, rather it provides, "Any member who joins a political organisation or party other than the ANC or a party in alliance with the ANC shall be automatically expelled …".[107] Therefore, membership in another political party suffices for automatic expulsion from the previous political party, and this shows that members cannot be prohibited from the *de facto* termination of their previous membership by taking new membership in another political party without being obliged to submit a prior written notice to the political party of their previous membership.

3.4 The Kenyan experience

Kenya has reintroduced multiparty politics since 1991, and as of March 2005 there were fifty registered political parties.[108] The Constitution of Kenya provides for the right to freedom of association, and a multiparty political system.[109] The Kenyan Political Parties Act provides that political parties can be formed subject to law, and every Kenyan citizen can, subject to law contest for an election in a political party of her/his membership.[110] Political parties need registration to run as political parties.[111] As criteria for registration, a political party needs to have a constitution which shows, *inter alia*, the name of the political party including any abbreviation, logo, symbol and party colours; the objectives of the political party and the requirements of admission to and resignation from membership.[112]

The Kenyan Political Parties Act which prohibits simultaneous membership in more than one political party[113] provides details about resignation from membership. It provides that a political party member who intends to resign

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[107] "African National Congress Constitution (ANC)" in National Democratic Institute (2011), *A Compilation of Political Party Statutes*, (Washington, DC), Section 4.19(b).

[108] Centre for Governance and Development (March 2005), "Political parties to be funded by the state" CGD Policy Brief, p. 1.

[109] National Council for Law Reporting, Republic of Kenya (2010), "The Constitution of Kenya" in National Council for Law Reporting, Republic of Kenya (2010), *Laws of Kenya* (Rev. Ed.), Section 36, 81_{ff}, 91 and 92.

[110] National Council for Law Reporting, Republic of Kenya (2012), "Political Parties Act, 2012," in National Council for Law Reporting, Republic of Kenya (2012), *Laws of Kenya* (Rev. Ed.), Section 3(1) and (2) (hereinafter called Kenyan Political Parties Act)

[111] Id., Section 4(1).

[112] Id., *see* the Second Schedule attached to the Act.

[113] Id., Section 14(4) it reads "A person shall not be a member of more than one political party at the same time."

shall give a prior written notice to the political party or to the clerk of the House of Parliament, if the member is a Parliament member or to the clerk of the county assembly, if the member is a county assembly member.[114] On the other hand, the Kenyan Political Parties' Act has provided for other facts by which voluntary resignation from political party membership can be established by a presumption than a written notice. It provides that a political party member who forms or joins to another party, or in any way publicly advocates the formation of another party or the ideologies, interests or policies of another party "shall be deemed to have resigned from the previous political party".[115]

What is to be understood is that it suffices to establish the presumption that the previous membership has terminated. The value of written withdrawal notice is apparent when a political party member simply joins or establishes another political party without notifying the political party of his/her previous membership. In such cases, confusion and controversy could be created whether the political party member can take membership in another political party without a written resignation notice to the former political party. The Kenyan Political Parties' Act has, however, validly avoided the potential confusion and controversy by clearly providing for other grounds for presuming withdrawal from political party membership other than a written withdrawal notice.

Therefore, the prohibition of simultaneous membership in more than one political party under the Kenyan Political Parties' Act does not mean that a member of a given political party cannot withdraw from her/his membership and be member of another political party unless written withdrawal notice is submitted to the former party. Particularly, if it is known that s/he has been a member of another political party, the presumption is that s/he has resigned from his/her previous political party membership.

4. Issues Related to Freedom of Political Party Membership in Ethiopia

4.1 Freedom of political party membership

The FDRE Constitution recognizes the right to freedom of political party membership. The Constitution ensures the right to freedom of association for any lawful purpose.[116] This includes the right to association for political purposes and hence it is the foundation for the freedom to form or join a political party. Similarly, it ensures the right to vote and be elected by providing that everyone has the right to be member to and be elected into a position in

[114] Id., Section 14(1) (a) to (c).

[115] Id., Section 14(5). It provides "… notwithstanding the provisions of subsection (1) or the provisions of any other written law …"

[116] FDRE Constitution, *supra* note 1, Article 31.

organizations such as labour unions, civic organizations, employers or professional associations and, this includes the right to membership to political organizations -i.e. political parties- provided that s/he meets the specific admission requirements.[117]

On the other hand, the Constitution provides that sovereignty of Ethiopia's Nations, Nationalities and Peoples and the right of individuals to participate in the conduct of public affairs are expressed either by direct participation or through elected representatives.[118] Moreover, it is provided that political power is assumed and government is led by a political party or coalition of political parties having the highest number of seats in the House of Peoples' Representatives.[119] These constitutional provisions recognize the instrumentality of political parties for the working of representative democracy and hence reinforce the right to wilful political party membership.

The details of these constitutional rights are regulated by other subordinate laws. In the federal arrangement in Ethiopia, the power to legislate on issues relating to elections and political parties is given to the federal government.[120] Accordingly, the House of Peoples Representatives has proclaimed three laws: the Electoral Law,[121] the Political Parties Registration Proclamation,[122] and Electoral Code of Conduct of Political Parties Proclamation.[123] These proclamations regulate the details regarding the rights to political party membership and participation in elections. They pledge to achieve the national goal of establishing a democratic system of government with power held only by those who are elected in an open, free, fair and genuinely competitive secret ballot.[124]

These laws are aimed at giving practical effect to the constitutional right to freedom of political party membership and other electoral rights. To this end, it has been provided in the Political Parties Registration Proclamation that every Ethiopian has the right to form or to be a member of a political party except that judges, members of the Defense Force and members of the Police Force cannot

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[117] Id., Article 38(2) to (4).
[118] Id., Article 8(3) and 38(1).
[119] Id., Article 56 and 73(2).
[120] Id., Article 51(15) and 55(2)(d).
[121] Electoral Law of Ethiopia Amendment Proc. No. 532/2007 (25th June 2007) 13th Year, No. 54 *Federal Negarit Gazeta* (Addis Ababa) (hereinafter called Electoral Law).
[122] Political Parties Registration Proclamation, *supra* note 13.
[123] Electoral Code of Conduct of Political Parties Proc. No. 662/2009 (28th August 2009) 15th Year, No. 8 *Federal Negarit Gazeta* (Addis Ababa) (hereinafter called Electoral Code of Conduct)
[124] Electoral Law, *supra* note 121, see the Preamble and Art. 5; Political Parties Registration Proclamation, *supra* note 13, *see* the Preamble and Electoral Code of Conduct, *supra* note 136, *see* the Preamble.

be members of a political party unless they leave their work.[125] The freedom of political party membership is also reinforced by the provision in the Electoral Law that any government employee, except a judge, a policeman/policewoman or soldier may run for election as a private candidate or a member of a political organization.[126]

The Political Parties Registration Proclamation also provides for the substantive and procedural requirements for the formation of political parties. Political parties may be country-wide or regional.[127] A political party can be formed as country-wide political party if "it has at least [one thousand five hundred] founding members".[128] Of these, "at least forty percent" are required to be residents of one regional state and the other remaining members are required to be "residents of at least four" regional states fifteen percent in each region.[129] For a regional political party to be formed, it needs to have "at least [seven hundred fifty] founding members" and of these "more than sixty percent" should be residents of the regional state in which the party is registered to run.[130]

To participate in elections, a political party is required to be registered in the National Electoral Board (the Board) and acquire a legal personality.[131] Application for registration –signed by the leadership of the party– is required to be presented to the Board accompanied by its memorandum of association, its political program, its by-laws, names and addresses of its leadership and auditor (with documents which show that the leaders of the party are elected in a general assembly).[132] Before registering a political party, the Board issues a notice that invites any opposition to be presented within fourteen days.[133] Where the Board finds reasons to refuse registration of a political party, it gives its written decision, and the party whose registration is not accepted can petition to the Federal High Court within fourteen days of the notice of refusal of registration.[134]

The Political Parties Registration Proclamation has specified political parties and institutions that are ineligible to be registered as political parties. Political parties formed for unlawful purposes such as preaching war and hatred and

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[125] Political Parties Registration Proclamation, *supra* note 13, Article 4(1) cum. Article 58 (1) and (2).

[126] Electoral Law, s*upra* note 121, Article 47 (1)(a) and (3).

[127] Political Parties Registration Proclamation, *supra* note 13, Article 4(2).

[128] Id., Article 5(1) (a)

[129] Id., Article 5(1) (b)-(d)

[130] Id., Article 6(1) (a) and (b)

[131] Id., Article 7(1) and (2).

[132] Id., Article 8(1) and (2)(a)-(g) and Article 12.

[133] Id., Article 9(2) and (3).

[134] Id., Article 9(9) and (10).

subverting the constitutional order or having foreign nationals as their members cannot be formed and registered.[135] Similarly, commercial or industrial associations or organizations such as trade unions, professional associations, self-help associations, religious organizations and social associations like *iqub* and *idir* are ineligible to be registered as political parties.[136]

After a political party is formed and duly registered, having fulfilled the substantive and procedural requirements, it can admit members according to its by-laws. Members of a political party, therefore, include the founders and other members admitted after its formation.[137] It is expected that individuals choose the political party of their membership after having examined party programs and policies. To this end, the law provides that membership to political party cannot be transferred by succession or by any other manner to another person and is limited to the member in person.[138]

It is understood from the provisions of the Constitution and the other proclamations highlighted above that the freedom to political party membership has been guaranteed and, no one can be forced to join or belong to any political association against her/his free will. It is, however, to be noted that the freedom to join to a political party also involves the other side of the coin –i.e. the freedom to withdraw from membership. The effectiveness of the right to political party membership is determined not only based on the provisions for the freedom to join, but are also based on the provisions for procedures, conditions and formalities of withdrawal from membership. Thus, unjustified withdrawal procedures adversely affect freedom of membership.

4.2 Freedom to withdraw from political party membership

4.2.1 Termination of membership: expulsion and withdrawal

The Political Parties Registration Proclamation provides for the termination of political party membership in two ways. These are disciplinary expulsion[139] and voluntary withdrawal.[140] The Proclamation provides that any member of any political party may be expelled from membership according to the party's by-laws.[141] And, a member so expelled and who alleges that her/his expulsion is in violation of the party by-laws can lodge an appeal to the Federal High Court within three months from the date of the notification of such expulsion.[142]

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[135] Id., Article 10.
[136] Id., Article 11.
[137] Id., Article 31(1).
[138] Id., Article 31(2).
[139] Id., Article 30(1).
[140] Id., Article 31(3).
[141] Id., Article 30(1).
[142] Id., Article 30(2).

The law, on the other hand, provides that "a member of a political party may at any time withdraw from his membership".[143] Although this provision entitles a political party member the right to leave membership at any time, it does not clearly provide for the detail procedures and forms of withdrawal. Particularly, a question arises whether withdrawal is impossible unless a withdrawing member gives notice in writing to the political party. This author argues that the answer to this question seems to be in the negative.

Although the phrase "at any time", in Article 31(3) of the Political Parties Registration Proclamation seems to make reference to time, and not form, it does not require *any condition* or *any formality*. This is because if we attach any formality or condition, withdrawal becomes impossible unless formalities or conditions are met. Likewise, the law does not expressly provide for the requirement of a written withdrawal notice. This entitles a political party member to express her/his intention to withdraw not only by written notice, rather by other ways – such as acquiring a new membership in another political party as in the case of *Unity for Justice and Democracy Party* v. *Blue Party* in our discussion.

What reasonably is understood from this is that the express provision in the law as to time has a message implied within it as to form which entitles a political party member to withdraw even without a written notice. Therefore, a political party member cannot be prohibited from leaving membership and taking new membership in another political party on the account of failure to notify the political party of her/his previous membership in writing.

In *Unity for Justice and Democracy Party* -v.- *Blue Party*, the requirement of written notice, as stated earlier, has been a point of contention. In this case, the Cassation Bench of the Federal Supreme Court has decided that a political party member cannot withdraw from his membership and be a member and election candidate of another political party without a written withdrawal notice to the political party of her/his previous membership. The court stated that a political party cannot admit former members of another political party as its members and nominate them as election candidates without making sure that they have withdrawn from their previous political party membership upon a written notice. The court, while so ruling, opines that this violates the peaceable relationship between political parties on the one hand and the required loyalty of members to the political party of their membership on the other. The court also stated that this is in violation of the legal requirements to participate in election and the right of the electorate (public) to have informed choices. Section 4.2.2 examines the requirement of a written withdrawal notice in light of the Cassation Bench's premises.

[143] Id., Article 31(3).

4.2.2 The requirement of written withdrawal notice and related issues

a) *Interparty relations and their members: reciprocal rights and duties*

Peaceful interparty relation is required for the development of a democratic political culture. To this end, it is provided that political parties are required to obey the electoral laws and the electoral code of conduct.[144] Particularly, political parties are required to make all possible efforts to have continuous communication with other parties.[145] To enhance the peaceable relationship between political parties, joint political parties' council is also established.[146] Similarly, election campaigns are required to be conducted without contravening the Constitution and other laws, by respecting the rights of other parties, and without the use of defamatory, inflammatory and violent languages and materials.[147] Moreover, to strengthen their role in electoral democracy, political parties can form a union,[148] a front[149] or a coalition.[150] These legal provisions are meant to facilitate peaceful interparty relations based on mutual respect whereby political parties will be able to effectively achieve their role of presenting alternative views to the electorate.

The basic rights and duties of political party members are provided by law. Accordingly, political party members have the right to democratic participation in decision-making and to be elected for positions in the political party.[151] They have also the duty to pay membership dues, the duty to observe party by-laws and the duty to fulfil the admission and election requirements set by the political parry according to party by-laws.[152]

A question relevant here is whether a political party can –in its by-laws– require written notice from a member who wants to leave the party. A political party is free to regulate its internal affairs in its by-laws. It, particularly, has the freedom to determine "the procedures of adopting and amending its political programs and by-laws", the admission requirements of members and details of membership rights and duties.[153] Party by-laws cannot, however, abridge the rights of a member guaranteed by the law, or relieve a member from a duty imposed on citizens.[154] Party by-laws are also required to be consistent with the

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[144] Electoral Code of Conduct, *supra* note 123, Article 7.
[145] Id., Article 16.
[146] Id., Article 16 and 20-22.
[147] Id., Article 11; *see* also Electoral Law, *supra* note 121, Article 58.
[148] Political Parties Registration Proclamation, *supra* note 13, Article 32.
[149] Id., Article 34.
[150] Id., Article 35.
[151] Id., Article 28.
[152] Id., Article 29 and 15. *See* also FDRE Constitution, *supra* note 1, Article 38(2)
[153] Id., Article 15(1) &16 and FDRE Constitution, *supra* note 1, Article 38(2)
[154] Id., Article 15(2).

rights and duties of the political party members provided in law.[155] One of the rights of political party members, as argued earlier, is the right to withdraw at any time without necessarily being required to submit a written withdrawal notice. Hence, it is not legal for a political party to provide for a mandatory requirement of withdrawal notice if a member opts to give an end to his/her membership.

Therefore, a political party member can withdraw from his membership and be a member of another political party without a written withdrawal notice to the political party of her/his previous membership. In effect, a political party can accept former members of another political party as its members without the need to ask whether the individuals (it is accepting as members) have notified the political party of their previous membership in writing. This cannot be understood as violation of the duty to have peaceful interparty relationship. Nor can the acts of withdrawing party members (without written notice) be considered as violation of party by-laws.

At this juncture, it is important to see the requirement for a written withdrawal notice and the legal effect of its non-observance in light of the interests of both the political party (from which a member is withdrawing) and the withdrawing member. Political parties have interest in updating data about their members who have sustained their membership, and those who have left. This enables political parties to update their register and to effectively communicate with their members.[156] Thus the only viable interest of a political party in requiring a written notice from its withdrawing members can only be updating data regarding members. On the one hand, the political party member has the right to free political association and particularly the right to withdraw from political party membership which shall not be limited except for reasonably acceptable purposes.

Seen from the practical viewpoint, political parties can know the members who have withdrawn without necessarily requiring a mandatory written withdrawal notice. Especially, in cases where a political party member is found to have taken new membership in another party, this is sufficient expression that s/he does not want membership in the former political party. For example, in *Unity for Justice and Democracy Party* v. *Blue Party*, the petitioner had already known that its former members have taken new membership in another political party -i.e. the respondent- by the simple fact that they were nominated and registered as election candidates of the respondent. This is sufficient notice for the purpose of knowing that its members have withdrawn their membership, and

[155] Id., Article 15(3) &31(4).

[156] *See* Michael Chege (2007), *Political Parties in East Africa: Diversity in Political Party Systems,* International Institute for Democracy and Electoral Assistance (IDEA) p. 47.

thus the requirement of a written withdrawal notice under such settings does not have practical significance.

b) *Issues related to candidature in election*

The Electoral Law embodies certain requirements that apply for private candidates, political party nominees and political parties that participate in an election. Accordingly, any person (a private candidate or a political party nominee) who wants to campaign in an election should be an Ethiopian National, "versed with the language of the Regional State or area of his/her intended candidature", aged at least twenty-one years and regularly residing or working in the area of her/his candidature for two years immediately preceding registration.[157]

In addition to the aforementioned requirements, a private candidate is required to present endorsement signatures of one thousand eligible voters who are certified residents of the constituency of her/his candidature.[158] Similarly, in order for a political party to compete in an election it needs to be duly registered and present a qualified nominee.[159] Even though party nominees are exempted from the requirement of presenting endorsement signatures of one thousand qualified electors, evidence of their nomination including evidence of their consent for the nomination "along with details of candidature" is required to be presented to the Electoral Board.[160]

The phrase "details of candidature" (understood in light of its context) relates to candidature and the manner in which political party candidates are elected. This envisages the presentation of evidence to show that candidates are elected in a democratic manner with due participation of political party members as provided in the FDRE Constitution and in the Political Parties' Registration Proclamation.[161] This is meant to develop intraparty democracy.

The Electoral Law, on the other hand, provides that political party nominees and private candidates registered for an election can withdraw from election.[162] Particularly, it is provided in the Electoral Law that "A political party candidate who has withdrawn from the election ... shall notify his decision in writing to the political party that nominated him".[163] Whether or not this provision can be

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[157] Electoral Law, *supra* note 121, Article 45(1) and (2).
[158] Id., Article 45(3).
[159] Id., Article 46(1)
[160] Id., Article 46(2) & (3).
[161] FDRE Constitution, supra note 1, Article 38(3) and Political Parties Registration Proclamation, supra note 13, Article 28, 15(1)(b), (d), (e) and (i).
[162] For the withdrawal and replacement of candidates, *see* Electoral Law, *supra* note 121, Article 54.
[163] Id., Article 54(2).

construed –by analogy– to require a political party member who withdraws from his/her membership to notify the political party of her/his membership in writing can be an issue.

However, there is a difference between a political party nominee withdrawing from an election and a political party member withdrawing from her/his membership. A political party candidate, as opposed to a member not nominated as a candidate for election, represents the political party which nominated her/him and competes in the election. In this regard, the purpose why the Electoral Law requires a political party candidate who withdraws from an election to notify the political party that has nominated her/him in writing is to enable the political party whose nominee has withdrawn to nominate a substitute candidate for the election.[164] On the contrary, however, in the case of a political party member withdrawing from his/her membership, there is no interest of nominating a substitute candidate. Thus, there is no need for a withdrawing member to submit a written withdrawal notice to the political party of his/her previous membership.

c) *The right of the electorate (public) to have informed choice*

One of the purposes of a multiparty election is to enable citizens to exercise their constitutional rights to vote and be elected[165] in the context of multiple alternatives and free choice. For this to be achieved, there should be sufficient communication between the electorate and political parties or private candidates contesting in an election. To this end, there are mechanisms provided for in the Electoral Law. These include conducting election campaigns and the use of distinctive symbols and designations.

The Electoral Law provides that every candidate –who has been given candidature Identification Card– can conduct election campaigns in a peaceful and democratic manner respecting the Constitution and relevant laws until "two days before" the polling date.[166] It is also provided that political organizations and their supporters shall have "equal access to state owned mass media including radio, TV and newspapers".[167] Particularly, candidates are entitled to have "access to free airtime on the state-owned media".[168] For these rights to materialize, Government organs have the obligation of creating conducive conditions.[169]

[164] Id., Article 54(2) cum 54(4).
[165] Id., Article 5; see also Electoral Code of Conduct, *supra* note 123, Article 5.
[166] Id., Article 58(1)-(5).
[167] Id., Article 59(1).
[168] Id., Article 59(2).
[169] Id., Article 60.

To avoid confusion about symbols and designations, political parties and candidates in an election campaign are required to use distinctive symbols.[170] Political parties are also prohibited from imitating, stealing, disfiguring or destroying the symbols of other political parties.[171] Moreover, it is provided that the designation, emblem and flag of a political party shall not be similar or shall not create confusion with that of other political parties or commercial, social or international organizations.[172]

If these legal requirements are duly observed, political parties and candidates will be able to sufficiently present their policy alternatives to the electorate, and the public will be able to have sufficient information so that it can decide whom to vote for without any confusion. The legal regime thus clearly facilitates informed choice, and a political party member's withdrawal from her/his former political party without written notice cannot create a problem with respect to the informed decision of the electorate.

4.3 The possible challenges of simultaneous political party membership

The foregoing analysis shows that political party members have the right to withdraw from membership and take new membership in another political party of their choice at any time even without written notice to the political party of their previous membership. However, there is the need to *caveats* against simultaneous party membership. If political party members are given the right to withdraw from their membership at any time without written notice and take membership in another political party, this may be an incentive for simultaneous membership. This calls for a mechanism to deter simultaneous membership without unduly hindering the freedom to join to and withdraw from political party.

The fact that a political party member has withdrawn from his/her previous membership and taken new membership in another political party without a written notice to the political party of her/his previous membership does not mean s/he has been a member simultaneously to more than one political party. An individual can be said to have taken membership in different parties simultaneously if s/he accepts simultaneous nomination by more than one political party. In the eyes of reasonable political system, in fact, we assume that individuals choose a political party of their membership having examined the political party's policies as established in political party programs and intraparty democracy as stipulated in party by-laws. We can thus assume that a reasonable person may not be a member of and accept simultaneous nomination as a

[170] Id., Article 52.
[171] Electoral Code of Conduct, supra note 123, Article 12.
[172] Id., Article 27 (1) & (2)

candidate by two political parties for an election. But, if this occurs due to a desire to secure seat in parliament, this will be illegal and of no effect.

Once it is agreed that acceptance of simultaneous nomination amounts to simultaneous political party membership and so illegal, the next issue then becomes how this risk can be prevented and remedied. Two mechanisms can be recommended to avoid simultaneous political party membership without limiting the freedom of political party members to resign from their previous membership at any time and take membership in another political party.

The first mechanism is the development of verified and updated register of political party members. The experience of other jurisdictions shows that provisions in the party laws require membership rolls of political parties to be cross-checked in specified time intervals. In Israel, for example, the registrar of political parties is entrusted with this task, and a coding technology system has been recommended –to respect the privacy of individual political party members.[173] Similarly, political parties in Kenya are required to keep the register of their members at their head office and at each county office.[174] The Kenyan Registrar of Political Parties can also require political parties to present all records, including the register of members, and take copies thereof.[175] More importantly one of the functions of the Kenyan Registrar of Political Parties is to verify –and make publicly available– the list of all members of political parties.[176] These procedural requirements enable political parties to identify previous members who have taken new membership in another political party.

The only objective of the Political Parties Registration Proclamation in Ethiopia in requiring political parties to report to the Electoral Board is to make sure that the required number of political party members is complied with.[177] This seems to be inadequate and the law needs to be amended because political parties should be required to keep updated register of their members and submit such reports to the Board in specified time intervals. At the same time, the Board is expected to be empowered to keep verified register of all political party members and make these records known to the public. This will enable political parties to have sufficient information about their members and especially identify the ones that have taken new membership in another political party, and thereupon correct their records and decide whom to nominate as candidate for elections.

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[173] Reforming Israel's Political System, *supra* note 87, p. 18.
[174] Kenyan Political Parties Act, *supra* note 110, Section 17(1)(a).
[175] Id., Section 18(1) and (2).
[176] Id., Section 34(d).
[177] Political Parties Registration Proclamation, *supra* note 13, Article 19(1)(a). The required number of members, as already seen earlier, is one thousand five hundred for country-wide parties and seven hundred fifty for regional parties.

The second mechanism can be the inclusion of clear provisions in the Electoral Law which provide for the cancellation of both nominations if an individual is found to have accepted simultaneous nomination by more than one political party for a single election. The Electoral Law provides that a political party can nominate only one candidate for a single council seat at a constituency.[178] It also provides "Any person shall be nominated as a candidate in one constituency only".[179] From these provisions, it is understood that a political party cannot nominate more than one candidate in a constituency. Similarly, a person cannot run for an election as a candidate in two or more constituencies. However, the law does not embody provisions against simultaneous nominations. Therefore, it needs to be revisited to include a clear provision that simultaneous nomination leads to cancelation from candidature in the election.

Concluding Remarks

The FDRE Constitution acknowledges freedom of political party membership. The details of political party membership are regulated by the Political Parties Registration Proclamation. This Proclamation endorses the constitutional right to freedom of political party membership and provides for the details of membership rights and duties. One of the rights of a political party member is that s/he can withdraw from her/his membership at any time.

The form of withdrawal, however, seems to be far from clear and has become a point of disagreement. An example for this is *Unity for Justice and Democracy Party* v. *Blue Party*, a case finally decided by the Cassation Bench of the Federal Supreme Court. In this case, the petitioner, Unity for Justice and Democracy Party claimed that a person cannot be registered as a member and be nominated as election candidate of another political party without a written withdrawal notice to the political party where s/he has been a member. The respondent, Blue Party on the other side argued that previous membership cannot bar a person from membership in another party, because withdrawal from membership is possible *at any time*.

The Political Parties Registration Proclamation does not provide for the requirement of written withdrawal notice. It rather entitles political party members with the right to withdraw from membership *at any time*. Accordingly, political party members can express their intention to withdraw from their membership in different ways other than a written notice of withdrawal. Particularly, once it is known that a member of a political party has taken new membership in another political party, s/he shall be deemed to have terminated

[178] Electoral Law, *supra* note 121, Article 46(4).
[179] Id., Article 56(1).

her/his previous membership upon her/his will. This is in line with the provisions of the FDRE Constitution and international human rights instruments providing for the freedom of association generally, and freedom of political party membership, in particular. This is also supported by the comparative experience of other jurisdictions. Therefore, disallowing new membership in another party on the account of failure to notify the political party of previous membership is an unjust restriction against the full-fledged exercise of the freedom of political party membership.

However, such full-fledged exercise of the freedom of political party membership may be an incentive for individuals to assume simultaneous membership and accept simultaneous nomination as candidate of more than one political party in an election. To avoid this challenge –without limiting the freedom of political party members (to resign from their previous membership at any time and take new membership in another political party)– amendments to the existing laws are recommended. Such amendments in the Political Parties Registration Proclamation is expected to require updated register of political party members and the submission of such reports to the Board in a specified time interval. The Board, at the same time, can be empowered to keep verified register of all political party members and make these records known to the public. This enables the political parties to update their records and to decide whom to nominate as candidate for elections accordingly.

Moreover, the inclusion of clear provisions in the Electoral Law that allow the cancelation of simultaneous nomination is necessary. Such provisions enable the cancellation of all nominations if an individual is found to have accepted simultaneous nomination by more than one political party for an election. This will indeed be a disincentive against acceptance of simultaneous nominations by more than one political party in an election. ■

COMMENT

Legal Issues regarding the NBE Guideline on Diaspora-Owned Shares in Banks

Nemo dat qui non habet **(No one gives what he/she doesn't have)**

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Abstract

This comment examines the legality of Guideline No. FIS/01/2016 issued by the National Bank of Ethiopia (on November 1st, 2016) regarding the relinquishing of shares in banks owned by foreign nationals of Ethiopian origin. It is argued that at the time of the auction, an Ethiopian born foreign national remains to be the owner of the share unless it is proved that ownership is acquired fraudulently or with criminal intention. One can only sell what he/she/it owns, and, the owners of the shares (to be relinquished in accordance with the NBE Guideline) are clearly the shareholders in whose name the shares were registered, and in effect, they are entitled to the premiums obtained during the transfer of shares by auction. If the initial acquisition of shares is considered improper, '*two wrongs don't make a right*' and thus, the proper procedures for redeeming or repurchasing of shares under the Commercial Code should have been pursued upon the exit of the shareholders, in the absence of which the path taken by the NBE Guideline constitutes an act of sequestration, expropriation or forced purchase.

Key terms:

NBE 2016 Guideline · Shares in banks · Shares in insurers · Diaspora · Ethiopian born foreign nationals · Ethiopia

1. Background

I read a report by Menna Asrat on the Fortune Newspaper published in February 2017 about the bid put out by Awash Bank regarding shares owned by foreign nationals of Ethiopian origin whose certificates were surrendered to the Bank in

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compliance with the November 2016 Guidelines of the NBE.[1] It is to be recalled that I have aired my views on the way forward on this matter in an Article on Fortune Volume 17 No. 849 which was published on August 7, 2016.

The NBE Guidelines –which appeared three months later– broke the silence and eased some of the restrictions and ordered such 'shareholders' to return the certificates and collect share investment at par value with dividends with a cut-off date of 30th June, 2016. The report indicated that the shares floated accordingly for sale by auction are so enormous with a par value constituting close to 1% of the paid up capital of the Bank.

I understand that many other commercial Banks were bidding for the right time to follow suit with Awash Bank and float such shares for grab to the public. Looking at the matter very closely some important legal issues come to mind in respect to the right of shareholders in general and those covered by Proclamation No.270/2002 in particular.

Some of the legal issues related with the NBE Guideline regarding the directive on shares owned by foreign nationals of Ethiopian origin include following:

a) Who are the owners of the shares at the time of sale?
b) What is the import of returning the shares under directive issued by the NBE in November 2016
c) Who has the right to transfer the shares to third parties?
d) Are the banks within their right to market the shares? and,
e) If they do, could such transfer be legally tenable or entail liability on the seller and/or the buyer.

2. The owner of the shares at the time of sale

The legal issues mentioned above must be examined in light of the relevant law to ward off 'invasion of property right' or the semblance thereof. To begin with the basic laws that relate to this matter are, among others:

- the Civil Code,
- the Commercial Code,
- Proclamation No. 591/2008 which was enacted to amend the Establishment law of the National Bank,
- Proclamation No. 592/2008 providing for Banking Business in Ethiopia, and,
- Proclamation No. 270/2002 governing the rights of foreigners of Ethiopian origin, the Investment law, as well as the statues of the Bank that conducts the auction.

[1] Guideline No. FIS/01/2016, "Manner of Relinquishing Shareholding of Foreign Nationals of Ethiopian Origin in a Bank or an Insurer", November 1, 2016.

In its section on Goods, the Civil Code provides that all goods are either movable or immovable. Accordingly objects with material existence which can move themselves or be moved by man including securities to bearer are termed corporeal chattels falling in the category of movable goods. Article 1204 of the Civil Code defines ownership as the *widest right* that may be had on corporeal chattel. The elements of such rights are expressed in terms of the three bundles usually described as *usus, fructus* and *abusus*. These rights are duly embodied in our law (under Article 1205 of the Civil Code) as rights to use, exploit or dispose the property as the owner thinks fit.

In principle, transfer of such chattels is effected by virtue of law or in pursuance of agreement entered into by the parties. Currencies and security to bearers are acquired in good faith and there is no strict modality for their transfer. As a matter of fact, bearer shares are the exception in Ethiopia, and shares issued by companies in the financial sector are all registered shares. In short, Ethiopia is yet to move to the era of dematerialization of shares, which abandon physical shares in favour of electronic format.

The Commercial Code provisions on the transfer of shares are consistent with corresponding provisions of the Civil Code. It is a self evident truth that both the investment law as well as the banking proclamation reserve the financial sector to domestic investors and bars foreigners from participating in those areas. Many thought that the application of these restrictions (that were made by Proclamation No. 270/2002) are waived to the Ethiopian 'diaspora' who hold the 'yellow' card.

The law reserves to the National Bank the power to approve but not to register the statutes of Banks and Insurance companies and also to issue license upon formation. All the Financial Institutions that are now poised to auction shares acquired by foreign nationals are duly operational, having completed approval, registration and licensing requirement by all those concerned including the National Bank.

The supervisory authority vested on the NBE over such entities, nowhere authorizes the NBE to deprive shareholders of their ownership right. Assuming for the moment that Proclamation 270/2002 is irrelevant *albeit* the principle of '*lex posterior derogate priori'* or that it is imprecise, it is important to ask whether the November 2016 Guideline issued by the NBE constitutes *ultra vires* and thus subject to challenge before the competent courts.

The above laws fall short of providing for a situation where such foreigners are found to have invested in compliance with the prospectus of the Banks or with the awareness of the founders of the Bank. In light of the above the answer to the first issue is that the shareholder is not legally divested of its ownership right and remains owner of the share at the time of auction, and even after that unless it is manifestly proved that ownership is acquired fraudulently or with criminal intention of violating the law.

Naturally it is not for the owners to prove absence of criminal intention, rather it is for the challenging party, be it the prosecutor or the NBE to establish it. If such criminal intention is proved, it may be argued that the ownership was invalid *ab initio,* and unenforceable dating back to the time of its acquisition. Even then correcting such an illegality is the job of the courts and not that of administrative body.

3. Anomalies in selling shares that the seller does not own; and options that could have been pursued

Assuming that foreign nationals of Ethiopian origin are subject to additional restrictions beyond that indicated in Proclamation No. 270/2002, the NBE Guideline may serve as a wakeup call to the banks and to such shareholders to correct and adjust their relationship in accordance with the law, immediately or as soon as practicable. The Guideline is imprecise on the detail of divesting the shareholders of their ownership right. Nor does it indicate that the Bank should redeem or repurchase the shares from the owners. It leaves the ownership right in 'void' between the time of surrendering of the certificate by the owners and selling of the shares to the highest bidder.

That sounds as anomaly because the shareholders are –on the one hand– divested of their ownership right, and on the other hand, the Bank that markets the shares is not the owner of the shares thereby acting without the will and consent of the owners. We therefore face a situation where the *Bank is selling shares which it does not own* nor is legally empowered *–as agent–* to effect the transaction.

In my view, this unnecessary complication is brought about as a result of complete disregard of the law and simple common sense. To begin with, the Bank can only transfer shares either as an owner or as an agent of third party. Agency emanates from a grant of power by a third party and it is not something which could be assumed or taken for granted. The bank was neither the owner nor agent of the shares that it offered for sale. As an entity devoid of rights –as an owner or agent– on the shares it has no right which is transferable. As a result, the transferee can neither have a better right for the simple reason that 'he/she who does not hath cannot give' which is the rendition of the age old Latin maxim '*nemo dat qui non habet'*.

One easy way out could have been to negotiate a term for the transfer of shares with the owners, failing that to resort to the redemption procedure of the Code and obtain a resolution to redeem or repurchase the shares at a fixed price and have the shares transferred to the Bank, and proceed to auction them, if need be. I fully understand both redemption and repurchase are novel concepts even though they have been on the law book since 1960. But it does not hurt to try/apply them.

Even if one assumes that the acquisition of shares by such persons is wrong, one could also argue that the procedure followed by the guideline to dispose the shares is equally wrong. And obviously, *no two wrongs make a right*. So the better option would have been to allow the owners to transfer the shares and quit, or to comply with the relevant provision of the Commercial Code and secure the exit of the shareholders by a resolution that allows the Bank to redeem/repurchase the shares. Other measures including those prescribed by the Guideline sound as disguised sequestration, expropriation or forced purchase, with implications of invasion of property right, which are without basis under the law.

As stated above, the right to transfer shares, emanates from the ownership right recognized under the law and confirmed by the statutes of the Bank that was approved by the NBE. However, the records do not indicate that such authority has been granted to the parties in question, or that the owner is legally divested of his ownership right or that he/she has transferred his/her right to third parties or that the banks have acquired ownership right over the shares.

4. The issue of premiums and recent court cases

An issue arises whether the Banks are within their right to auction the shares and appropriate the premium to themselves or NBE. The age old principle about ownership states that 'one cannot give what he has not'. Transfer is a give and take process. In that process, one needs to give in order to receive. And you give what you have and receive an amount of equivalent value from the other party. If you don't have a valid right on the item, the transferee will not have a better right either. Such transactions could be done by non-owner third parties if such parties are duly authorized to execute the deal. Otherwise, the right rests with the owners, and no one has a right to snatch away this right except by court of law. So, as long as the banks are not duly empowered by the owners, or acquire ownership right, they have no right either to sell or appropriate the premium to themselves or to that of third party.

If the sellers or those who auction the shares are without power or valid right to effect the transaction, then the transaction becomes defective to the point of being invalid and may be challenged as invasion of right before a court of law within ten years of the contract. The effect of such challenge is wide ranging affecting the legality of the contract, the recovery of lost profits and premiums and entailing compensation to the victim of the transaction. The question is therefore whether this is a risk with a likely chance of happening.

This comment is already on the wall with two decisions handed down recently (October 23, 2017 in File No. 249097, and 249098) by the 4th Civil Bench of the Federal 1st Instance Court in *re* Sophia Bekele -*versus*- United Bank and NBE, and a 2nd case between the same plaintiff and United Bank and

NBE. The plaintiff falls to the category of persons affected by the NBE Guideline. Shares in the United Bank and United Insurance which she acquired by inheritance were allegedly offered for auction at the behest of the defendants and she was only allowed to collect the par value as at 30th June 2016. She was not allowed to collect the premiums or gains made on the disposal of the shares. Sophia took up the gauntlet and headed to the court to vindicate her right. The court ruled directing her to dispose her shares within two months and collect the proceeds, and in the event she defaults to do so within the given period, the court allowed defendants to dispose the shares and pay the proceeds to the plaintiff less the expenses incurred in processing the sale.

Concluding remarks

There have been various views on the November 2016 NBE Guideline and its implications. For example, the following was a reflection that I received from a colleague who read the initial draft of this comment:

> "… our economy benefits a lot from the remittance of our Ethiopian-born relatives who reside abroad, and we, on the contrary, deny them the right to own shares in banks. The Golden Rule of '*don't do unto others what you don't want others do unto you*' should have informed such directives [toward respecting the rights and benefits of] the diaspora in whose name we have designated a square in Addis …"

This comment is not meant to deal with the substantive aspects and the legitimacy of the transfer *per se*, because it becomes beyond the scope of this comment. However, issues such as who owned the shares during the auction, and whether a bank (which is neither an owner nor an agent) *can sell the shares that it does not own* should have been considered. And apparently, the shareholders should have been the beneficiary of the premiums, i.e. the gains beyond the par value of the shares upon transfer by auction. ■

COMMENT

Major Differences between the Revised 'Federal' and SNNP Regional State Family Codes

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Abstract

There are two sets of family codes currently applicable in Ethiopia, the Revised Family Code and the family codes of regional states. These sets are compatible on numerous issues of family matters, and are also different on few issues. This comment outlines the major differences between the RFC with that of the SNNP Regional State Family Code. This comment indicates eight areas where the two codes have differences. The RFC has omitted the notion of betrothal whereas the SNNP regional state family law contains detail rules that govern it. Moreover, the RFC is silent regarding marriage celebrated in the cities where the RFC is applicable (i.e. Addis Ababa and Dire Dawa) while the SNNP Regional State Family Code does not apply to marriage celebrated outside the SNNP regional state. There is also variation between the RFC and the SNNP regional state family codes concerning relations in consanguinity and affinity, assessment of compensation following dissolution of marriage, proof of marriage, conditions to claim maintenance as well as salary and pension.

Key terms

Betrothal · Consanguinity · Affinity · Assessment of compensation · Proof of marriage · Maintenance · Salary and pension

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List of acronyms:

CCI	Council of Constitutional Inquiry
HoPR	House of Peoples' Representatives
RFC	Revised Family Code
SNNP	Southern Nations, Nationalities and Peoples

Introduction

The issue whether family law is a federal matter or an issue of a regional state has been a point of argument among academics and office holders.[1] The Constitution expressly states the exclusive and concurrent power of the federal and the state governments, and leaves the residual powers for the state.[2] According to the Constitution, all powers that are not expressly given to the federal government or States alone or concurrently to the federal government and the States are reserved to the States.

However, it should be noted that regional states may not have legislative power over residual powers in general because the Constitution limits the residual power of regional states to the enactment of civil laws.[3] The federal government may enact civil laws when the House of Federation considers it essential for employing uniform law that can be used to establish and sustain one economic community.[4] This ambiguity in residual power arrangement has prompted debate on the role of the federal and the regional governments in the enactment of family law.[5] The other point of ambiguity relates to the enumeration of few basic essential conditions of marriage (consent and equality of the spouses) in the Constitutions of federal and regional states. Nevertheless, the Constitutions at federal and regional state levels, for example, fail to specify marriageable age and other issues, leaving these to be determined by subsequent

[1] The application of the Prime Minister's office to check whether the HoPR has the competence to enact a federal family code applicable nationwide is an example for this.

[2] Article 51, 52 and 55 of the FRDE Constitution.

[3] Id., Article 55(6) .

[4] Ibid. The FDRE Constitution does not enumerate those matters that fall under the phrase "to establish and sustain one economic community". Nor does it mention various legal concepts included under such phrase.

[5] As Assefa states:

"[a] petition was submitted from the Prime Minister's office to the HoF seeking its advice as to whether the HoPR has the competence to enact a federal family code applicable nationwide. If it has a competence, to what extent would this affect autonomy of the states to make laws on the same subject? The CCI investigated briefly Articles 52(1), 55(6) and 62(8) and ruled that enacting a family code is a state power on two counts. First, the enactment of a family code is intertwined with the culture, tradition, and religion of society. It is an aspect of diversity that needs regional protection. Second, reserve power belongs to the states and such power is not expressly granted to the federal government. This normally belongs to the states. But it briefly noted the importance of Article 55(6) although it stressed that it is not relevant to the issue at hand as the federal Constitution outlines the minimum standards under chapter three, the supremacy clause of Article 9 sub 2, 62 sub 1 and 84 sub 2 as enough safeguards in case the states enact family laws that contradict those minimum guarantees."

Assefa Fiseha (2006). *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*. (Netherlands: Wolf Legal Publisher) p. 338.

legislation.[6] However, the question as to whose mandate it is to regulate such details by legislation is controversial.

States can enact family law as long as this power (as an exclusive or concurrent task) is not expressly stated as the mandate of the federal government or the states.[7] As a result, family law matters are within the domain of regional state powers, and it is pursuant to this power that most regional states have enacted their own regional family codes.[8] In this regard, a petition was submitted from the Prime Minister's office to the HoF to check whether the HoPR has the competence to enact a federal family code applicable nationwide. On the basis of this request, the Council of Constitutional Inquiry (CCI) examined the pertinent provisions of the Constitution and ruled that enacting a family code is a matter that is left to the regional states.[9]

Yet, there is a 'Revised Family Code' (RFC)[10] enacted by the HoPR in addition to the family codes of regional states. This law defines its subjects and the scope of its applicability. Paragraph 5 of the RFC's preamble provides that the territorial applicability of the RFC is restricted to those administrations that are directly accountable to the federal government. The law is applicable only in Addis Ababa and Dire Dawa city administrations. The above discussion shows the existence of two laws, which regulate the same subject matter, but having different territorial applicability. While the RFC applies in Addis Ababa and Dire Dawa, the regional states have enacted regional family laws, which are applicable in their respective territories.

These sets of laws are compatible with most of the rules that regulate family matters. However, there is some variation between the family laws at the federal and state levels. The following sections deal with the issues that have variation with the Revised Family Code in the context of SNNP regional state family code. The comment focuses on betrothal, impediment to marriage, proof of marriage, assessment of compensation, salary and pension.

1. Betrothal

Betrothal is an agreement whereby the fiancé and the fiancée agree to conclude marriage.[11] It is, therefore, different from simple promise of marriage. If the

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[6] *See* for example, Articles 34 (1) of the FDRE Constitution, Article 34(1) of the SNNP, Amhara and Tigray regional constitutions.

[7] Articles 51, 52 (2) and 55 of the FDRE Constitution.

[8] Tilahun, Teshome, (2001) *Ethiopia: Reflection on the Revised Family Code of 2000,* (unpublished paper).

[9] Assefa Fiseha, *supra* note, 5, p. 338.

[10] Proclamation No. 213/2000, Revised Family Proclamation, Federal Negarit Gazeta, Extraordinary Issue, No. 1/2000, Addis Ababa, 4 July 2000.

[11] Article 1(1) of the SNNP Regional State Family Code.

agreement of betrothal is consistent with the usage of the place where it is celebrated, it has binding effect. Even though betrothal was embodied in Articles 560 to 576 of the 1960 Code of Ethiopia, it is omitted under the RFC, whereas the SNNP regional state family code contains detail rules that govern it.[12] The reason behind the omission of betrothal in the RFC is most likely because betrothal is not a precondition to marriage, and betrothal does not take the conclusion of marriage for granted.[13] Tilahun states that:

> "the institution of betrothal is not found in the [Revised Family Law]. The reason advanced by the drafter for so doing was that in view of the Ethiopian diversity, the wishes of retaining betrothal in the law as a uniform practice would not serve meaningful purpose".[14]

Although betrothal does not necessarily lead to conclusion of marriage, it is still an important cultural component in many parts of the country. Regional family codes thus embody betrothal. The SNNP regional state family code defines betrothal as an agreement between fiancé and fiancée to conclude marriage in the near future.[15] This agreement is based on exclusive mutual consent of the future spouses.[16] Traditionally, betrothal was mostly arranged between the families and often accompanied by an exchange of property and the formation of alliances. The SNNP regional state family code embodies a reform in this regard and the families of the betrothed couple may give consent to the betrothal although it does not change the agreement between the fiancée and fiancé.[17]

The SNNP regional state family code envisages the conclusion of marriage within a year following betrothal. It is to be noted that a fiancé or fiancée cannot arbitrarily break his/her promise to marry, and the one who arbitrarily abandons his/her plan to marry is obliged to pay compensation.[18] The compensation involves moral and material damages.[19] The extent and amount of material compensation will be decided based the evidence produced whereas, (in contrast to the Civil Code[20]), the maximum amount of moral compensation is Ten

[12] Id., Article 1 to 10.

[13] መሃሪ ረዲኢ. (2002)፣ የተሻሻለውን የቤተሰብ ሕግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች. ቅጽ. 1 2ኛ እትም ገፅ. 13

[14] Tilahun, Teshome, *supra* note, 8, p 6.

[15] *See* Article 1(1) of the SNNP [15] *See* Article 1(1) of the SNNP Regional State Family Code Family Code.

[16] Id., Article 1(2).

[17] Ibid.

[18] Id., Article 8.

[19] Ibid.

[20] *See* Article 2116(3) of the Civil Code. According to the Civil Code, as a rule, moral harm which affects one's feeling may not be made good by way of damages unless there is clear stipulation to this effect. Even in the existence of clear stipulation in the law that necessitates moral damage to be compensated in monetary terms, the Civil Code limits the

Thousand Birr.[21] Even though the regional family code is silent with regard to the determination of material compensation, it can be decided based on the financial cost incurred by the victim of the cancellation of betrothal.

2. Marriage celebrated outside the Region

Family has been understood as an essential element to wholesome human life[22] and is believed to be the cradle of human society. It is "of great legal interest because of the decisive role it has historically played in raising and socialization of children and in the mutual economic support of its members."[23] Marriage, one of the essential means to form a family, is found practically in all human societies, "without which there would be neither civilization nor progress."[24] Every state thus embodies laws that recognize and regulate marriage. The laws determine the factors involved in the validity of the marriage. As a rule, "a marriage which is valid under the law of the State where it is entered into will be likely recognized as valid by another State".[25]

However, there is also a possibility that marriage, which is valid under the law of the state where it is entered into, may not be recognized as valid by another state. This could happen if marriage is voidable as a matter of public policy in the second state.[26] In other words, marriage may not be recognized as valid in the place where spouses live even if it was valid under the laws of the state in which it was concluded. For instance, "in countries where bigamy is prohibited, polygamous marriages may be regarded as null and void even though this is recognized as valid in the state in which the marriage is celebrated".[27] In a state where polygamy is barred as a matter of public policy, the bigamous spouses are not entitled to the legal protections accorded to legal wives under such law.[28]

In the context of Ethiopia, the RFC and the SNNP regional state family code give recognition for marriage celebrated outside the country. Both family codes

maximum amount of moral compensation to be awarded for the victim not to exceed One Thousand Ethiopian [Birr].

21 Article 8(4) SNNP state Family Code.

22 Bruce W. Frier & Thomas A.J. McGinn (2004), *A Casebook on Roman Family Law*, published by Oxford University Press, New York, p. 3.

23 Ibid

24 Shoshana Grossbard-Shechtman (2003), "Marriage and the Economy in the Shoshana", A Grossbard-Shechtman (ed.) *Marriage and the Economy: Theory and Evidence from Advanced Industrial Societies*, Cambridge University Press, Cambridge, p. 1.

25 Barbara Stark (2005), *International Family Law: An Introduction*, Ashgate Publishing Limited USA p. 17.

26 Ibid.

27 Ibid.

28 Ibid.

recognize marriage celebrated abroad, in accordance with the law of the place of celebration, so long as it does not contravene with public moral.[29] Although the RFC and the SNNP regional state family code have similar provisions on marriage celebrated abroad, they have variation with regard to marriage celebrated in different parts of Ethiopia. The RFC remains silent regarding marriage celebrated outside the cities where the RFC is applicable. On the other hand, the SNNP regional state family code states that marriage celebrated outside the regional state but within Ethiopia in accordance with the law of the place of celebration shall be valid in the region so long as it does not contravene public morality of the SNNP regional state.[30] According the SNNP regional state family code, there is a possibility that marriage celebrated outside the territory of the SNNP regional state (in one of the eight regional states of Ethiopia including Addis Ababa and Dire Dawa city administrations) may not be recognised as valid marriage. This shows that the regional state has the authority to determine the validity of marriage based on the grounds of public morality, even though it is validly concluded in other regional states and city administrations where they were celebrated.

For instance, marriage between an uncle and a niece or an aunt and a nephew is voidable as a matter of public policy in the SNNP regional state and it is prohibited and voidable under the SNNP regional state family code. Hence, such marriage shall not be recognized in SNNP regional state if it is allowed in any of the regional states.

3. Sources of relationship by consanguinity and affinity

Marriage has been subject to the regulatory intervention of the government,[31] which through the legislator, *inter alia*, prescribes marriageable age, the procedure for entry and exit from marriage and the rights and obligations arising from the marital relation.[32] More importantly, the family law sets out the essential conditions the future spouses need to comply with, otherwise called prerequisites for a valid marriage. These prerequisites to a "marriage fall into three categories: eligibility, consent and formalities requirement."[33] The *eligibility* criteria determine who is qualified to enter into marriage.[34] Most

[29] *See* Articles 5 and 15(1) of the Revised and the SNNP regional state family codes respectively.

[30] Article 15(2) of the SNNP Regional State Family Code reads: "Marriage celebrated outside the Region in accordance with the law of the place of celebration shall be valid in Region so long as it does not contravene public moral."

[31] Sanford N. Katz (2011), *Family Law in America*, Oxford University Press, New York, p. 35.

[32] Ibid.

[33] Stark, *supra* note, 25 26, p. 15

[34] Ibid.

countries impose limits based on laws on consanguinity and may prohibit close relatives from marrying. However, "the idea of 'close relatives' has different meanings in different cultures".[35] The law lists those individuals who are prevented from marrying due to their being in the prohibited degrees of relationship.[36] The most commonly prohibited relationships are those between direct lineal kin (for example, parents and children) and between siblings. Generally speaking, there are two types of prohibited degrees, and they clearly reflect the question 'who can marry whom?' The first category of prohibited degrees of relation is relation that arises from consanguinity, that is, relationships by blood. The second category of prohibited degrees of relation arises from affinity, which is created by marriage. If the partners are within the prohibited degrees of relationship, they are not allowed to establish conjugal relation.

There is variation between the RFC and the SNNP regional state family codes with regard to the regulation of family relationship. The RFC indicates that relationship by consanguinity shall be of no effect beyond aunt and uncle in the collateral line.[37] However, the SNNP regional state family code extends the degree of relationship by consanguinity, in the collateral line, to seven generations (degrees).[38] Unlike the RFC, the SNNP regional state family code gives effect for relationship by consanguinity in the collateral line, which goes beyond aunt and uncle. Even if it is not culturally expected to occur in Ethiopia, marriage between cousins in Addis Ababa or Dire Dawa, for example, does not violate Article 8(2) of the Revised Family Code, while such marriages are prohibited in SNNP regional state.

Bonds of affinity derive from marriage as stipulated under both the RFC and the SNNP regional state family code. Under both laws, the bond of affinity exists in the direct line, between a person and the ascendants or descendants of his spouse.[39] This bond also exists between a person and the collaterals of his/her spouse. The RFC limits the bond of affinity in the collateral line to a sister of one's wife, or a brother of one's husband.[40] However, SNNP regional

[35] Ibid.

[36] Me Rodgers (2004) Understanding Family Law, Cavendish limited Publisher, Great Britain, p. 16.

[37] *See* Article 8 of the Revised Family Code.

[38] *See* Article 18(2) of the SNNP Regional State Family Code. According to the SNNP Regional State Family Code, the degree of relationship by consanguinity in the collateral line shall be calculated by counting seven generations in the two lines starting from the common ancestors and by adding the two series of degrees.

[39] Article 9(1) of the Revised Family Code and Article 19(2) of the SNNP Regional State Family Code.

[40] Article 9(2) of the Revised Family Code.

state family code extends affinal kinship to third degree in the collateral line.[41] This shows that marriages in Addis Ababa and Dire Dawa city administration between a man and the aunt of his ex-wife (whom he has divorced), and a woman and the uncle of her ex-husband do not violate Article 9(2) of the Revised Family Code, while such marriages are prohibited in SNNP regional state. Hence, this constitutes another difference between the two codes.

4. Grounds and mode of compensation

Marriage is assumed to be a long-lasting union between a man and a woman.[42] However, the dissatisfaction of one of the spouses suffices to terminate the marital relation. It can be dissolved solely by one of the spouses with the concurrence of a court. Divorce is the legal dissolution of a marriage [43] which could be fault based or no-fault divorce. Under no-fault divorce, there is no need to establish fault.[44] On the other hand, when divorce is fault-based, a spouse is required to assert that dissolution is sought due to fault committed by the other spouse.[45]

In Ethiopia, several regional states incorporate no-fault divorce.[46] This means a spouse who seeks divorce is not obliged to prove the occurrence of fault and to whom the fault is attributed. Although mentioning the occurrence of fault is not a compulsory requirement, a spouse who states the occurrence of fault and consequently sustains damage due to the fault committed by the other spouse can claim compensation. In this regard, both the RFC and SNNP regional state family codes are compatible, because under both codes, the court may, where justice so requires, order compensation if the cause of divorce is imputable to one of the spouses.[47] Thus, the spouse, who sustains damage due to the fault of the other spouse, is entitled to appropriate remedy, which corresponds to the nature of a fault committed by the other spouse. However, the RFC does not

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[41] *See* Article 19(2) of the SNNP regional state Family Code. It should be noted that the SNNP regional state family law is silent how the degree of affinal relation in the collateral line can be calculated. But, one can take, *mutatis mutandis*, the rule that is used to calculate the degree of relationship for consanguinity. The degree of relationship shall be calculated by counting third generations in the two lines starting from the common ancestors and by adding the two series of degrees

[42] Cohen Lloyd (1987), "Marriage, Divorce, and Quasi Rents"; Or, "I Gave Him the Best Years of My Life", *The Journal of Legal Studies*, Vol. 16, No. 2, p. 267.

[43] Id., p. 274.

[44] Ibid.

[45] Ibid.

[46] *See* Articles 77(3) &81(3) of the Revised Family Code; Article 86(3) &90(2) of the SNNP Regional State Family Code; Article 88(3) & 92(2) of the Amhara Regional State Family Code.

[47] Article 93(4) SNNP Regional State Family Code.

indicate the kinds of damage that may entail legal liability and its corresponding modes of compensation.

In contrast, the SNNP regional state family code states the types of harm that justify legal liability and the mode of compensation. The SNNP regional state family code requires the spouse who claims compensation to prove the occurrence of fault recognized as fault that entails liability under the law and prove that the fault is attributable to the other spouse. For the purpose of compensation, the SNNP regional state family code, associates fault with violation of personal obligations of spouses.[48] Personal obligations of spouses are the reciprocal rights and duties of the spouses[49] that are unique to and stem from the institution of marriage, which are expected to be carried out by the spouses, while they are in matrimony. These obligations cannot be set aside by the agreements of the spouses;[50] and they include the obligation to support, respect and assist, obligation to cohabit, obligation to owe fidelity, and the obligation of joint management of the family.[51] Failure to comply with these personal effects of spouses amounts to fault, which causes legal liability.[52]

For the purpose of the family code of the SNNP Regional State, the occurrence of fault shall be judged against the violation of personal effects of marriage. Unlike the RFC, the SNNP regional state family code classifies faults that emanate from violation of personal effects of marriage into two categories. The *first* category of fault arises from failure to carry out obligation to support, respect and assist.[53] The *second* category arises when one of the spouses fails to carry out his/her obligation to cohabit without good cause or/and if he/she violates fidelity to the other spouse.[54] Both categories of fault entitle the aggrieved party to different remedies that are determined based on the type of fault committed by the spouses, and the nature of the fault is considered in assessing compensation. The remedies may be monetary compensation or awarding of a higher portion from common property.[55] Under the first category of fault, a victim spouse is entitled to monetary compensation that does not exceed ten thousand Birr. The court may award higher portion of property to the victim from the common property if the second category of fault is committed.[56]

[48] Id., Article 94(2).
[49] *See* Article 42(2) of the RFC and Article 51(2) of the SNNP Regional State Family Code.
[50] Articles 58(2), 61(2), 62(2) of the SNNP Regional State Family Code.
[51] Id., Article 58(2) to 65.
[52] Id., Article 94(2).
[53] Id., Article 94(2) (a).
[54] Id., Article 94 (2) (b).
[55] Id., Article 95.
[56] Id., Article 95(3).

5. Proof of marriage

A spouse, who alleges that s/he has valid marriage with a given person, has to prove its existence, and must ascertain the same with appropriate evidence. Both the RFC and SNNP regional family codes recognize certificate of marriage as a conclusive evidence of marriage.[57] In the absence of marriage certificate, both family codes allow marriage to be proved by the *possession of status* of spouses.[58] The codes provide that if "it is difficult to prove marriage by producing the certificate of marriage due to the fact that the marriage has not been registered or such register has been lost, it shall be proved by the possession of status of spouses".[59]

However, the laws take different positions on the types of evidence that can be produced as proof marriage by possession of status. The RFC merely mentions the possibility to prove the conclusion of marriage through possession of status without indicating the type of evidence. There is no express or implied prescription regarding the type of evidence which can be inferred from the RFC. On the other hand, the SNNP regional state family code specifically requires marriage to be proved –in the absence of certificate of marriage– through possession of the status of spouses by producing *four witnesses who have attended the celebration of the marriage*.[60] This can be interpreted as requiring the witnesses to prove their presence during the marriage celebration.

6. Salary and pension

Divorce not only changes the legal status of spouses but also terminates financial relations that exist between them. Although personal effects of marriage automatically end when the court pronounces divorce, pecuniary effects of marriage are yet to be determined by court. This leads to liquidation of property. The first task of liquidation of property is identifying the common and personal property of spouses.[61] The mere fact of marriage does not affect the rights of property owners, or the right to continue acquiring property for the use and benefit of the individual spouse. This right to individual property applies if

[57] Article 94 of the Revised Family Code and Article 106 of the SNNP Regional State Family Code.
[58] Article 95 of the Revised Family Code and Article 107 of the SNNP Regional State Family Code.
[59] Ibid.
[60] Article 109 (1) (2) of the SNNP Regional State Family Code.; (Emphasis added)
[61] Nigussie Afesha (2016), "Legal and Practical Aspects of Post-Divorce Issues with Particular Emphasis on Liquidation of Property and Compensation in SNNPR Courts: A Case Study", *Proceedings of the 37th Annual Research Review Workshop*, April 29-30 2016, pp. p 26.

spouses can show sole legal or beneficial title. On the remaining property, the law takes the presumption that all property shall be deemed to be common property even if it is registered in the name of one of the spouses.[62]

Therefore, spouses are expected to list-out their personal and common properties along with the evidence that proves their claims. There might be disagreement in listing which property is personal and common property of the spouses. After several years of marriage, it may be difficult to ascertain who owned what before marriage.[63] In the event of such disagreement, two considerations can be used, i.e. (a) the time when, and (b) the way how the property was acquired.

Property, which a spouse had before or at the time of concluding the marriage, remains his or her personal property.[64] Property, which a spouse has acquired during marriage through gifts or inheritance, also remains individual property.[65] Moreover, personal property made by the contract of spouses remains their respective personal property.[66] Furthermore, property acquired by onerous title during marriage shall also remain personal property provided that the property is approved by court to remain personal property of such spouse.[67]

On the other hand, all properties acquired by either spouse during the marriage, with exceptions of gifts and inherited property, are marital property, regardless of the name that is designated as owner or property.[68] Such common property of the spouses includes all forms of property or income gainfully acquired by the spouses either separately or together in the course of their marriage. These include the fruits or income derived from the goods they own personally or jointly or derived from personal effort.[69]

Although the RFC does not specifically answer whether salary is common property, one can justifiably infer that salary is regarded as common property of the spouses while the spouses are in the marriage. This is because the RFC provides that all income derived by personal efforts of the spouses or from their common or personal property shall be common property of the spouses.[70] With regard to pension, the contribution of the employee deducted from salary can be regarded as common property of the spouses, at least, while they are married. Since pension benefits are received upon retirement, divorce that predates

[62] Article 72(1) of SNNP Regional State Family Code.
[63] Nigussie Afesha, *supra* note, 61, p. 26.
[64] Article 66 of SNNP Regional State Family Code.
[65] Ibid.
[66] Id., Article 51(1).
[67] Id., Article 67.
[68] Contrary reading of Article 66 *cum* 72(1) of SNNP Regional State Family Code.
[69] Article 71(1) of SNNP Regional State Family Code.
[70] Id., Article 62(1).

retirement can raise the issue whether the claim of the other spouse over the pension benefits ceases upon divorce. In this regard, Wondwossen states:

> It is appropriate now to examine whether pension benefits should be part of the property to be divided as a consequence of divorce, and how the valuation is to be made. Generally, the amount to be deposited to the Civil Service Fund, from which retirement pensions are paid, is ten percent of the salary of the public servant. The public servant contributes four percent, and the remaining six present is contributed by the employer. In so far as the employee contribution is made during the marriage, there is no doubt that the four percent contributed each month is a marital property. This is because the contributed money is part of the salary, which is a common property of spouses[71]

Wondwossen's argument gives recognition to the pension contribution deducted from a spouse's salary. However, the law seems to have given priority to administrative efficiency rather than equity. The RFC and the SNNP regional state family codes provide straightforward solution for this. According to both laws, salaries and pensions of the spouses shall not, upon divorce, be partitioned between the spouses, and they shall rather remain personal property of the spouses who derive the income and in whose name the pension is deposited.[72] As a result, they are not subject to partition during the divorce proceedings.[73]

7. Impediment to irregular union

The capacity to marry relates to the question: "who can marry and whom?".[74] Such capacity requirements regularly specify minimum age and appropriate conditions of mental and physical health. This often prohibits, for instance, incestuous marriages or polygamy.[75] Hence, most states impose limits based on their laws on consanguinity and age, and may prohibit between close relatives or by persons under eighteen years of age.[76] Such requirements are not specifically stipulated with regard to irregular union.

It is argued that the preconditions to valid marriage are applicable to irregular union. The RFC, which states the preconditions for valid marriage, does not indicate the applicability of such requirements for irregular union[77] other than

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[71] Wondwossen Demissie, (2007), "Implementation problems of the Revised Family Code", *Berchi* (Annual Journal of EWLA), Issue 6, pp. 1-52, p. 13.
[72] Article 104 (1) of the SNNP Regional State Family Code .
[73] Ibid
[74] Frier & McGinn, *supra* note 22, p. 26
[75] Ibid.
[76] Stark, *supra* note, 25, p. 15.
[77] *See* Articles 6 to 16 cum 98-106 of the RFC.

raising the issue of affinity.[78] The RFC clearly stipulates that an irregular union will not create any bond of affinity between the man and the relatives of the woman, and the same holds true between the woman and the relatives of the man. However, the relationship of affinity could be an impediment to irregular union. According to the RFC, it is imprecise whether consanguinity impedes irregular union. Nevertheless, it can be argued that if affinity is an impediment to irregular union, for stronger reason, consanguinity should also constitute an impediment to irregular union.

In this regard, the SNNP regional state family code clearly puts additional preconditions to irregular union. The SNNP regional state family code acknowledges the applicability of *some of the preconditions to valid marriage* for irregular union as well.[79] The SNNP regional state family code states that the provisions concerning impediments to marriage, which are related to age limit and prohibited degrees of relationship are also applicable in the case of an irregular union.[80] By logical extension, the SNNP family law excludes the applicability of the other validity requirements of marriage to irregular union.

8. Maintenance

There is mutual obligation on family members to maintain one another.[81] In this regard, Wondwossen states that "the obligation to supply maintenance exists between spouses, relatives by affinity and relatives by consanguinity".[82] The notion of maintenance also illustrates unequal status of individuals in society.[83] Maintenance is an amount of monetary support paid to the financially dependent individual based on a number of factors.[84] The purpose of maintenance is to prevent financial and social hardship and disruption that may be encountered by a financially dependent person. The court may order maintenance if a person does not have enough income, property, or both to support his/her reasonable

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[78] Article 100(2) of the SNNP Regional State Family Code.

[79] Id., Article 114.

[80] Ibid.

[81] Frier & McGinn, *supra* note, 22, p. 3.

[82] Wondwossen Demissie, supra note 71, p. 13.

[83] This can be inferred from the precondition required by law (to claim maintenance). In this regard, Article 201 of Revised Family and Article 216 of the SNNP Regional State Family Code provide that "[t]he obligation to supply maintenance shall not exist unless the person who claims its fulfillment is in need and not in a state of earning his livelihood by his work." There is discrepancy between the Amharic and English version of Article 216 of the SNNP Regional State Family Code. The Amharic version reads: "ቀለብ የመስጠት ግዴታ ተፈፃሚ የሚሆነው ቀለብ ጠያቂው ሠርቶ ለመኖር አስፈላጊ የሆነ ገቢ ለማግኘት አቅም የሌለው ወይም የመሥራት አቅም ቢኖረውም ሥራ ለማግኘት ያልቻለና በችግር ላይ የሚገኝ ሲሆን ብቻ ነው።"

[84] Article 202 of the Revised Family Code and Article 216 of the SNNP Regional State Family Code.

needs, or if the claimant is unable to support him/herself by his/her labour or work. Reasonable needs are measured not by a community's or society's poverty level in general, but by the standard of living the claimant has during the filing of the claim.

The RFC imposes an obligation to supply maintenance between persons who are related either by consanguinity or affinity. The SNNP regional state family code also shares the same notion. The RFC sets two conditions to claim maintenance: the claimant must prove that he/she is needy, and must also prove that he/she is not in a state of earning livelihood by her/his work. Pursuant to the RFC, a person who is needy but in a state of earning her/his livelihood by her/his work is not eligible to claim maintenance.

The SNNP state family code, embodies these conditions of maintenance stipulated in the RFC, and further includes one more possibility to claim maintenance. Pursuant to the SNNP state family code, the claimant can claim maintenance so long as s/he is needy irrespective of whether s/he is in a state of earning her/his livelihood by her/his work. According to the SNNP family code, a person who is needy but in a state of earning her/his livelihood by her/his work is eligible to claim maintenance.[85]

Concluding remarks

In Ethiopia, there are two sets of family codes, which have different territorial applicability. It is not because the FDRE Constitution assigns concurrent powers for the two codes. Rather, this is duly caused by the distribution of power enshrined in the Constitution with regard to family law. As discussed in the sections above, the two family codes have different territorial scope of applicability.

As highlighted in this comment, there are certain major differences between the RFC and the SNNP regional state family code. Although these laws are compatible with regard to most rules that regulate family matters, there are matters in which the two codes are at variance and at times inconsistent in terms of content. The differences –as indicated above– include betrothal, impediment to marriage, proof of marriage, maintenance, and assessment of compensation following divorce. Such variation can be inevitable and appropriate where it is caused by the divergence of the realities at the regional state level. However, some of the variations such as the mode and standard of proof for irregular union could have had harmony between the two family codes. ■

[85] *See* the Amharic version of Article 216 of the SNNP Regional State Family Code.

Mandatory Compensation to Commercial Agents upon Termination of Agency under Ethiopian Law

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Abstract

The Ethiopian Commercial Code recognizes mandatory compensation if agency agreement for an *indefinite period of time* is terminated due to the fault of the principal; and the Draft Commercial Code is likely to maintain this approach. This comment examines the status and functions of a commercial agent as well as the compensation due to the agent upon the termination of the commercial agency. I argue that there should be *mandatory compensation* upon the termination of agency relations for both definite and indefinite period of time unless the agency relation is terminated due to the fault of the agent that justifies termination of a contract. This is justified by comparative experience in the legal regimes of Germany, France, Britain, the European Union, Turkey and some international conventions on agency relations.

Key terms

Commercial Agency · Compensation · Indemnity ·Agent · Principal

Introduction

The academic discourse (in transactional agency law) regarding mandatory compensation upon termination of a commercial agency is underway for the last few decades. Many scholars believe that a commercial agent should be entitled for compensation/indemnity if the principal terminates the relation without fault on the part of the agent. Their *first justification* is that the agent, through his/her/its efforts, has contributed goodwill for the business of the principal that enables the principal to benefit even after the termination of the agency.

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Therefore, termination without compensation may be considered as unlawful enrichment for the principal.[1] The *second justification* relates to the expense the agent might have incurred in the interest of the business of the principal (before the agency agreement is terminated) and the expected commission the agent would have earned had the relation continued. Termination of agency relations, therefore, may cost the agent the investments he/she has made in expectation of future commission.[2] Mandatory payment is also justified by the need to protect the commercial agent (usually considered as the weaker party) in the face of a stronger principal.

One of the arguments against mandatory payment is that the principal may shift the cost to the agent for the mandatory payment, and this creates compliance cost. Opponents of mandatory payment also argue that the agent may not be the weaker party in some circumstances and may exacerbate the problem of information asymmetry between the agent and the principal.[3] The UK Chamber of Commerce, for example, argued that the agent may be more powerful since the principal hires an agent because it lacks the capability to operate by itself.[4] But, the view of the majority is that the agent is a weaker party and needs legal protection.

Mandatory compensation/indemnity for termination of agency agreements is adopted in various continental legal systems after the legislation of the European Council Directive on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents 653/1986. The same holds true in Britain. However, in most of the states in the United Sates, there is no statutory law that recognizes mandatory compensation.[5]

The Ethiopian Commercial Code also provides for mandatory compensation if a principal terminates an agency agreement *for indefinite period* of time '*without good cause.*' The new Draft Commercial Code also retains the provision by changing '*good cause*' to '*force majeure*'. The team of National Experts employed by the Addis Ababa Chamber of Commerce and Sectoral Associations has recommended against revision of the provision.[6]

[1] Aaron N. Wise (2010), *Sales agency Relationships under United States Law*, a short guide for the foreign Business person. Available at: <http://www.eurojuris.net/sites/eurojuris.net/files/sales_agency_termination-other_problems_under_us_law--tc__00145021_.pdf> . Last visited, March 3, 2017, p5

[2] Ibid.

[3] QI Zhou (2014), 'Limits of mandatory rules in contract law: an example in agency law', *Northern Ireland Legal Quarterly* Vol. 65, No.4, pp.357-69, p. 358-359.

[4] Id., p. 361.

[5] Wise (2010), *supra* note 1, p. 4.

[6] Addis Ababa Chamber of Commerce and Sectoral Associations (2009), 'Position of the Business Community on the Revision of the Commercial Code of Ethiopia. Available at:

This comment examines the legal debate in relation to mandatory compensation to commercial agents upon termination, and it discusses viable options. The first two sections highlight the features of agency relations and briefly discuss the legal status, powers and duties of commercial agents under Ethiopian Law in comparison with laws of other countries and some international conventions. The third section analyses mandatory compensation upon termination of agency agreements under Ethiopian law.

1. Agency as Tripartite Relation

Business activities may be conducted by creating direct networks, or using intermediaries or licensing others to produce and sell products.[7] Commercial agency is one of the intermediary mechanisms for a trader in order to penetrate a new market or boost existing business. A principal trader may prefer to trade within an area through a commercial agent for it may be more affordable than opening a branch; or the principal may want to benefit from the expertise and/or experience of the agent in a certain location.

Commercial agency is usually a tripartite relation among a businessperson, a commercial agent and a third party. Agency relation, therefore, includes the internal relationship between the agent and the principal, and the external relationship which involves the principal and the third party as well as the relation between the agent and the third party. Through agency relationships, the principal benefits from the performance of the agent and is willing to take liabilities.[8] But, there are doctrinal disagreements as to what agency relations should include; and, in different legal systems, scope of agency relations varies.

In legal systems like Germany, Italy and Sweden, agency contracts are concerned only with the external relations (i.e the relation between the agent and third party as well as the relation between the principal and the third party); and the relation between the agent and the principal is excluded from the concept of agency.[9] Likewise, the Convention on Agency in the International Sale of

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<http://www.ethiopianchamber.com/Data/Sites/1/psd-hub-publications/position-of-the-business-community-on-the-revision-of-the-commercial-code-of-ethiopia.pdf>. Last visited, march 3, 2017.

[7] Robert T. Jones (1972), 'Practical Aspects of Commercial Agency and Distribution Agreements in the European Community', *The International Lawyer*, Vol. 6 No.1, pp. 107-127, pp. 107-127.

[8] Eric A. Posner (2000), 'Agency Models in Law and Economics', The Law School of University of Chicago John M. Olin Law & Economics. Working Paper No. 92 (2d Series), Available at: <http://www.law.uchicago.edu/files/files/92.EAP_>. Last visited, December 21, 2016 , p. 4.

[9] Ali Aljasmi (2015), 'Choice of law in respect of agency relationships in the European Union and the united Arab Emirates', A thesis submitted for the degree of Doctor of

Goods (1983) regulates only the external relation.[10] The Hague Convention in Relation to Agency, on the other hand, includes the relation between the agent and the principal within the scope of agency relations.[11] Others like the EU Directive, British statutory law and the French Commercial Code regulate only the internal relation (the relation between the agent and the principal).[12]

In Ethiopia, the Commercial Code has provisions concerning the relation between the principal and the commercial agent. The Code does not define agency. Nor does it contain provisions that govern the relation between the principal and the third party or the relation between the agent and the third party. This is because agency is one of the few transactions that are regulated under both the Civil Code and the Commercial Code, with the latter, *inter alia*, dealing with special contracts as envisaged under article 1676(2) if the Civil Code. Provisions of the Civil Code shall thus apply on issues which are not covered under relevant Commercial Code provisions.

Article 2199 of the Civil Code defines agency as "a contract whereby a person, the agent, agrees with another person, the principal, to represent him and to perform on his behalf one or several legally binding acts." This provision considers agency as a relation between the agent and the principal, and there are few provisions in the Civil Code that expressly deal with the relation between the agent and the third party, and the relation between the principal and the third party. With regard to tripartite relations, Article 2233 of the Civil Code states that "the legal relations of principal, agent and third parties" shall be subjected to articles 2179-2198 which deal with general provisions of agency law.

2. Legal Status, Powers and Duties of Commercial Agents

Agency law regulates both intra-firm governance and inter-party transactions.[13] In relation to inter-party relations, agency law regulates the tripartite relation

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Philosophy Department of Law, University of Essex. Available at: <http://repository.essex.ac.uk/16227/1/Final%20version%20Thesis_%20Law.pdf> Last visited, December 23,2016, p. 91

[10] The Convention on Agency in the International Sale of Goods, 17 February 1983, Geneva, Article 1(3).

[11] Aljasmi (2015), *supra* note 9, p. 91.

[12] Ellen Eftestøl-Wilhelmsson (2006), 'EC agency law and intermediaries in shipping', *Legal Studies Research Paper Series Paper,* No 11. 141-178.Available at: <http://ssrn.com/abstract=1948526>. Last visited, September 3, 2016, p. 143, French Commercial Code, (as updated Until 03/20/2006) article L 134 -1 & the following, British Commercial Agents (Council Directive) Regulations 30537/1993,

[13] George M. Cohen (2000), 'The Collusion Problem in Agency Law', *University of Virginia School of Law Legal Studies Working Papers Series,* Working Paper No. 00-2. Available at: <http://papers.ssrn.com/paper.taf?abstract_id=198909>. Last visited, September 3, 2016, p. 3.

among the principal and the agent, the agent and third party as well as the principal and third party. Also called transactional agency law, it tries to facilitate transactions by "deterring" disagreements between the three parties and resolving them in case dispute occurs.[14] Its basic principle is that a businessperson "who wants to conduct his business through another person should benefit from the result and should not escape from the liability" thereof.[15]

Classical agency law used to focus on the protection of the principal from the acts of an agent who is empowered to change the legal position of the principal in his actions. Accordingly, agency was considered as a fiduciary relation in which the principal needs protections.[16] Modern agency law, on the other hand, tends towards the protection of the agent, who is usually considered to be the weaker party, *vis-à-vis* a stronger principal.

Domestic laws and international/regional agreements in relation to commercial agency define a '*commercial agent*' rather than '*commercial agency*'. Article 1(2) of the European Convention on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents, for example, defines a commercial agent as "… a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of … the 'principal', or to negotiate and conclude such transactions on behalf of and in the name of that principal."

Under Ethiopian law, the status, powers and duties of commercial agents are embodied in two separate legal instruments: the Commercial Code and the Commercial Registration and Business Licensing Proclamation 980/2016. Article 44(1) of the Commercial Code defines a commercial agent as "a person or business organization, not bound to a trader by a contract of employment and carrying out independent activities, who is entrusted by a trader with representing him permanently in a specified area and dealing or making agreements in the name and on behalf of the trader."

2.1 The legal status of agent and principal in commercial agency, and the issue of citizenship

There is almost a consensus as to the legal status of the principal as trader in commercial agency relations. But, there are divergent views regarding the legal status of the agent. In some legal systems like Turkey, the legal status of the

[14] Ibid.

[15] Paula J. Dalley (2011), 'A Theory of Agency Law', *University of Pittsburgh Law Review,* Vol. No. 72, pp. 495- 547, p. 497.

[16] Wilhelmsson (2006), *supra* note 12, p. 142.

agent as a trader is not clear.[17] In the French Commercial Code, both principal and agent are traders.[18]

Under the Ethiopian Commercial Code, both the commercial agent and the principal are traders.[19] In the Commercial Registration and Business Licensing Proclamation 980/2016 too, the agent should be "*carrying out independent Business activity.*"[20] Therefore, unlike an agent under the Civil Code, commercial agency under Ethiopian law is a trade activity and a commercial agent is a trader that needs commercial registration and licensing to operate in Ethiopia.[21]

At present, international/regional agreements focus on the specific transaction rather than the legal status of the agent. Under the European Council Directive on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents (653/1986), UNIDROIT, Convention on Agency in the International Sale of Goods (1983), and the Hague Convention on the Law Applicable to Agency (1978), there is no requirement for the agent to be a trader. It is not even necessary for the agent to be a professional agent.[22] Rather, the agent may be trader or non-trader, and may act professionally or occasionally. But, since commercial agency is an income generating professional activity with profit as its sole objective, it is justifiable that the Ethiopian Commercial Code treats commercial agent as a trader.

In UAE's commercial agency law, commercial agency is reserved for nationals.[23] There is no blanket prohibition of foreigners from engaging in commercial agency in Ethiopia. But, shipping agency services are reserved only

[17] Under the ex-Turkish Commercial Code, an agent had to be a trader. Under the new code, however, there is no express provision. *See* article 11(2) of the new Turkish Commercial Code 6102/2012.

[18] *See* French Commercial Code, Article L 134 -1.

[19] Commercial Code of Ethiopia, 1960, Article 5(19) & 44(1).

[20] *See* Commercial Registration and Business Licensing Proclamation 980/2016 article 2(9). Whereas the Commercial Code uses Trader, the Commercial Registration and Business Licensing Proclamation 980/2016 uses 'businessperson' instead of trader and 'business activity' in lieu of trade activity.

[21] *See* Article 5(19) of the Commercial Code of Ethiopia, 1960, and Commercial Registration and Business Licensing proclamation 980/ 2016.

[22] Aljasmi (2015) *supra* note 9 , p. 20; *See* also article 1 of UNIDRIOT (International Institute for the Unification of Private Law), Article 1 Hague Agency, Art 1(2) of EU Agency Directive.

[23] Howard L. Stovall (2008), 'Recent Revisions to Commercial Agency Law in the United Arab Emirates', *Arab Law Quarterly* Vol. 22, No. 3, p. 310. <Doi:10.1162/157302508X34379 >

for Ethiopian investors.[24] It is also clear that a foreign commercial agent may not (on behalf of a foreign trader) engage in areas of investment reserved for domestic investors. Still, it is not clear whether a foreign commercial agent can engage in areas of investment reserved for Ethiopian nationals as representative of an Ethiopian trader.

2.2 Whether commercial agency solely emanates from contract

Agency relation may emanate from law, judicial decisions or consensual agreements. But, commercial agency is, "a consensual" relation.[25] The relation between the agent and the principal emanates from consensual acts.[26] In the common law legal systems, the consensual act need not be a contract.[27] In the above regional and international instruments too, there is no requirement for contract. What is required is a consensual empowerment, not necessarily a formal contract. Under some domestic jurisdictions and international conventions –like the Convention on Agency in the International Sale of Goods 1983–, the power of the agent may be either express or implied.[28] The Convention, further, provides that "the authorization need not be given in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."[29]

The Commercial Code of Ethiopia and the Commercial Registration and Business Licensing Proclamation 980/2016 use the phrase '*entrusted by a trader/business person/*' without specifying whether mere agreement is enough or whether a full-fledged contract between the two is required. In the Amharic version both laws employ the phrase 'ውክልና የተሰጠው' which may allow us to see the meaning of agency (ውክልና) from the Civil Code. As indicated above, agency under the Ethiopian Civil Code, among others, is a contract, and it can be argued that the relation between a commercial agent and a principal can only be created through a contract.

If commercial agency emanates from a contract, therefore, the agreement between the principal and the agent should fulfil the basic elements of a contract. Regarding the form in which the agency agreement should be made,

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24 Investment Incentives and Investment Areas Reserved for Domestic Investors, Council of Minister Regulation 270/2012, Article 3.

25 Eric Rasmusen (2001), 'Agency Law and Contract Formation', *Harvard Law School Discussion Paper,* No. 323, p. 4. Available at: <http://www.law.harvard.edu/programs/olin_center/> Last visited, October 25, 2016, , p. 4

26 Paula J. Dalley (2011), 'A theory of agency law', *University of Pittsburgh Law Review,* Vol. No. 72, p. 501.

27 Thomson Reuters (2015), USA Restatement (Third) of Agency, Westlaw, p. 4.

28 Convention on Agency in the International Sale of Goods, Articles 1(1) & 9(1).

29 Id., Articles 1(1) & 10.

there are tendencies of differentiating an agency *for mere intermediation* and agency *for the conclusion of contract* or power of agency in which the commercial agent has the *power to bind the principal* through his conduct. In Turkish law, for example, there is a difference in form between the agency to act as intermediary and agency to bind the principal. A commercial agent may not enter into a contract or another obligation that might bind the principal or take delivery of goods for which he personally has not paid or accept payment for goods that he had not personally delivered unless s/he is empowered to do so in a written form, and the same has been registered in the commercial register.[30]

Under the Ethiopian Commercial Code, there is no provision that regulates the form required for commercial agency agreements and there is no distinction between agency to act as intermediary and agency to enter into a binding act in the commercial laws. But, agency provisions in the Civil Code provide that "where the act to be performed by the agent is under the law to be made in a prescribed form, such form shall be complied with in conferring authority upon the agent" and "the agent may not without special authority alienate or mortgage real estate, invest capitals, sign bills of exchange, effect a settlement, consent to arbitration, make donations or bring or defend an action".[31]

2.3 Duration of commercial agency

Unlike agency in civil transactions, commercial agency between an agent and a principal is not confined to a specific activity, and thus needs to create a relatively long lasting relationship between the two. The agency relation may be for a definite or an indefinite period of time. But, it goes beyond a one-time activity. The French Commercial Code, for example, states that the agent should be "permanently entrusted" by the principal.[32] Likewise, the European Council Directive on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents 653/1986 provides that the relation need be a continuous one.[33] The European court of Justice decided that "it is not important whether the agent negotiated one or more contracts so long as he has continuing authority".[34] However, the Convention on Agency in the International Sale of Goods (1983) and the Hague Conference on Private International Law Convention on the Law Applicable to Agency (1978) do not require continuity.

Under Ethiopian law, a commercial agent represents the principal permanently, which seems to mean until it is terminated according to the law or

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[30] *See* Articles 106 & 107 of the Turkish Commercial Code No. 6102/2012.

[31] Civil Code of Ethiopia, 1960, Articles 2180 & 2205 (2).

[32] *See* French Commercial Code, Article L 134 -1.

[33] European Council Directive on the Coordination of the Laws of the Member States relating to Self-Employed Commercial Agents, 653/1986, Article 1(2),

[34] Wilhelmsson (2006), *supra* note 12, p. 145.

by agreement. Yet, commercial agency agreement may be made for a specified period of time, as provided under article 52(1a) of the Commercial Code which reads “agency agreement shall terminate where the period of time for which it was entered into expires”.

2.4 Independence of a commercial agent

A commercial agent acts independently and shall never enter under the audit of the principal.[35] The agent is not an employee who works under the control of the principal. Even if the agent and the principal retain their independent legal personality, the principal may control the acts of the agent in the way of issuing initial and interim instructions.[36] But, the agent may refuse to execute instructions from the principal that may challenge its independent existence. [37]

Under Ethiopian law, a commercial agent is not bound by a contract of employment and is free to manage its own day to day activities. While the agent is an independent actor, it also should carry out all instructions of the principal, inform any dealing he has made on behalf of the principal and send periodic reports about his works.[38] However, there is lack of clarity regarding the nature and extent of instructions that may be issued by a principal to the agent *vis-à-vis* the level of independence a commercial agent is entitled to.

2.5 Location and exclusivity of commercial agency

A commercial agent is usually an exclusive agent empowered to represent the principal within a specific area or in relation with certain customers. Some jurisdictions like the United Arab Emirates (UAE) avoid such exclusive mandates of commercial agents which seem to be inconsistent with anti-monopoly regulations.[39] Others, such as Lebanon, allow exclusivity only for luxurious goods.[40]

Under Ethiopian law, the geographical area in which the agent operates on behalf of the principal need to be specified. Moreover, “unless otherwise provided in the agency agreement, a commercial agent shall be the exclusive

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[35] Yusuf Korun (2013), ‘*Acentenin Hak Ve Borçlari’*, T.C.İstanbul Kültür Üniversitesi Sosyal Bilimler Enstitüsü Yüksek Lisans Tezi. p. 10; Avilable at: <http://acikerisim.iku.edu.tr:8080/jspui/bitstream/11413/734/1/YusufKorunYLtez.pdf> Last visited, December 21, 2016,

[36] USA Restatement law-agency, *supra* note 27, pp. 2-3, 6.

[37] Study Group on a European Civil Code Principles & Research Group on EC Private Law (Acquis Group) (2009), ‘*Definitions and Model Rules of European Private Law’*, European law publishers GmbH, Munich, p. 2340-41.

[38] *See* Article 46 of Commercial Code of Ethiopia 166/1960, Article 46(2a).

[39] Stovall (2008), *supra* note 19, p. 312.

[40] Ibid.

agent of the principal in the area specified in the agreement".[41] Therefore, the principal may not appoint more than one agent within a given geographical area unless the agency agreement with the first agent expressly allows so.

Exclusivity is being challenged in different legal systems from the perspective of competition and consumer protection. In Ethiopia too, the Commercial Registration and Business Licensing Proclamation 980/2016, has prohibited operating "as sole importer or sole distributor" except for some business areas that the Council of Ministers may allow through Regulation.[42] The presumption of exclusivity should be avoided in the absence of contractual agreement to the contrary.

2.6 The purpose and scope of representation

A principal trader may authorize the agent for dealing with third parties. The authority may be to enter into a contract, to negotiate or perform contracts or only to introduce the principal.[43] It does not necessarily have to be the conclusion of a contract on behalf of the principal. Intermediaries (known as introducing agents) –which are authorized only to introduce the principal– are also subject to regulations of commercial agency.[44]

Under Ethiopian law, there is a discrepancy between the Commercial Code and the Commercial Registration and Business Licensing Proclamation 980/2016. Under the Commercial Code, the agent may be entrusted to deal or make an agreement while the Proclamation provides that the agent is empowered to make an agreement.[45] According to the Commercial Registration and Business Licensing Proclamation, a commercial agent should be empowered to make an agreement on behalf of the principal. This may imply that an agent entrusted to introduce a principal or only negotiate agreements on behalf of the principal is not envisaged under the Proclamation.

According to the Commercial Code, on the other hand, an agent may be empowered to negotiate agreements, to make agreements or both to negotiate and make agreements. As the Proclamation focuses on Registration and Licensing, it is not expected to deal with issues of commercial agency in detail,

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[41] Commercial Code of Ethiopia (1960), Article 45.
[42] Commercial Registration and Business Licensing Proclamation 980/2016, Article 38.
[43] Aljasmi (2015), *supra* note 9, p. 23.
[44] Gregor Kleinknecht, 'commercial agency contracts: termination and indemnity in England and Wales' Capitolo Quinto, pp. 94, 95. Available at: <http://www.hunters-solicitors.co.uk/wp-content/uploads/2016/04/Gregor-Kleinknecht-chapter.pdf> Last visited, March 3, 2017.
[45] *See* Article 44 of the Commercial Code of Ethiopia (1960) and Article 2(7) of the Commercial Registration and Business Licensing Proclamation 980/2016.

and thus the provisions of the Commercial Code prevail regarding the scope of a commercial agent's activities.

The Turkish Commercial Code makes a distinction between the power to negotiate and the power to bind the principal. Under the Turkish law, the power to bind the principal should be granted in a written form and should be registered while the power to act simply as an intermediary may be given in any form. As discussed above, there is no such distinction in Ethiopia.

2.7 Some exclusionary rules on the scope of commercial agency relations

Various conventions and domestic laws have exclusionary rules which exclude certain relations from the application of commercial agency laws. For example, commercial agents whose activities are unpaid, commercial agents who operate on commodity exchanges or in the commodity market, etc. are not covered under the European Council Directive on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents 653/1986. Moreover, under the EU Directive, commercial agents for negotiating contract for service are excluded from the application of the directive unless the laws of member states provide otherwise.[46]

Likewise, the Ethiopian Commercial Code provides that there is no commercial agency if there is an employment relationship between the parties.[47] But, if the Ethiopian law further excludes agents regulated under special laws from the scope of the Commercial Code, special regulation would be necessary.

2.8 Agent's act on behalf and in the name of the principal

The will theory and the civil law legal system assert that there is no contract between the principal and the third party if there is no meeting of mind.[48] In the common-law, on the other hand, the agent may bind the principal even if he acts in his name.[49] Under Ethiopian law, the commercial agent should act "*in the name and on behalf of the trader*".[50] By virtue of this phrase, it may be argued that undisclosed agency has no place in commercial agency law of Ethiopia. The Ethiopian Civil Code also provides that if the agent acts on his own behalf, he "shall personally enjoy the right or incur the liabilities deriving from the contract he makes with third parties, notwithstanding that such third parties know that he is an agent."[51]

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[46] Wilhelmsson (2006), *supra* note 12, p. 143.
[47] Commercial Code of Ethiopia, 1960, Article 44.
[48] Rasmusen (2001) *supra* note 25, p 29 & Aljasmi (2015), *supra* notes 9, p. 204
[49] Id., p 189.
[50] Commercial Code of Ethiopia, 1960, Article 44.
[51] Civil Code of Ethiopia 165/1960, Article 2197.

3. Mandatory Compensation upon Termination

3.1 Rationale of mandatory compensation and comparative approaches

The main rationale behind classical commercial agency law was protecting the principal who trusted the agent.[52] Accordingly, most agency rules focus on the obligation the agent has towards the principal. However, recent laws as stated earlier, incline towards the protection of the commercial agent, usually considered to be a weaker party.[53]

One of the schemes in this regard is mandatory compensation upon termination of a commercial agency, and this has evoked extensive academic discourse in commercial agency law. The primary rationale for mandatory compensation is the argument that the agent is the weaker party worth of protection, and commercial agency law should have protection of the weaker party as its primary object.[54] As highlighted in the introduction, there are opponents of this view and they argue that the principal may shift the cost to the agent because the mandatory payment creates compliance cost. They also contend that the agent may not be the weaker party in some circumstances.[55]

There are three approaches in relation to mandatory payments upon termination of commercial agency agreements. These are the *indemnity approach* of the French model, the *compensation approach* of the German model and the British model which *incorporates both the indemnity and the compensation models*. The European Council Directive on the Coordination of the Laws of the Member States Relating to self-Employed Commercial Agents 653/1986 oblige member states to adopt either the indemnity approach or the compensation approach.[56]

Under the French Commercial Code, upon the termination of the agency agreement, "commercial agents shall be entitled to an indemnity for the loss suffered".[57] In the European Council Directive, the agent shall be entitled to an indemnity if "he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers".[58] Indemnity is therefore due for the additional values the business of the principal has gained due to the efforts of the agent. In the British system,

[52] Wilhelmsson (2006), *supra* note12, p. 142.
[53] Study Group on a European Civil Code Principles & Research Group on EC Private Law, (2009) *supra* note 37, p. 1.
[54] Wilhelmsson (2006), *supra* note 12, p 147.
[55] QI Zhou (2014), *supra* note 3, pp. 358-359.
[56] The European Council Directive 653/1986, Article 17.
[57] French Commercial Code, Article L 134-12.
[58] The European Council Directive 653/1986, Article 17.

indemnity is payable if it is agreed upon between the agent and the principal in the agency agreement. [59]

The Compensation approach, on the other hand, takes into account the potential loss the agent faces due to the termination of the agency agreement. Under the British model, compensation shall be paid to the agent if the agency agreement did not contain indemnity clauses and the agency agreement is terminated in circumstances which:

> … deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent; or … have not enabled the commercial agent to amortize the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal.

The *first* condition is linked with the commission –the commercial agent would have acquired had the agency agreement continued– and the benefit the principal gains due to the performance of the agent. The *second* circumstance does not consider the benefit the principal has acquired. It rather focuses on reimbursing the costs incurred by the agent in the interest of the business of the principal.

Generally, mandatory compensation/indemnity is meant to protect the agent. The principal may want to reach customers directly after effective market entry of his products due to the efforts of the agent and may terminate the agency agreement. The agent may also lose investments made in the interest of the activity he had been doing in relation with the work entrusted to him by the principal. The principal may also continue to benefit from the new customers brought by the efforts of the agent even after the termination of the agency. Therefore, the agent needs to be compensated.

3.2 Ethiopian law on compensation upon termination of commercial agency

The Commercial Code provides for compensation upon termination of commercial agency, and it states two c*umulative* conditions that are required for the payment of compensation, namely: *undefined period of time* as the duration of agency and *absence of good cause.* Article 53 reads:

> Where the principal terminates without good cause an agency agreement entered into for an undefined period of time, the agent shall receive fair compensation which shall be fixed having regard in particular to the time for

[59] British Commercial Agents (Council Directive) Regulations 3053/1993, Article 17.

which he acted on behalf of the principal and to the customers introduced or goodwill created or extended by him.

Since goodwill is an important component of any business, commercial agents usually have a certain contribution in the business of the principal.[60] Therefore, "in paying compensation, the principal is buying the agent's patrimonial entitlement rather than redressing future losses".[61] The other argument is that, as discussed above, the agent might have incurred cost in the interest of marketing the business.

Since compensation upon termination is for the goodwill the agent has created or the cost incurred by the agent in relation to the business of the principal, there is no justification for the omission of such compensation (from Article 53 of the Commercial Code) where agency relations for a definite period of time is terminated by the principal *without good cause*. The same reasons (i.e., undue advantage from goodwill created by an agent, and cost incurred by the latter) apply for agents whose agency is unduly terminated before the end of the *definite period* stated in the contract.

In many legal systems, compensation upon termination of the agency agreement is taken as a mandatory statutory provision that obliges the principal to pay irrespective of the causes of the termination. The principal is therefore, required to pay compensation upon termination of the agreement even if the agency is terminated legally.[62] The EU directive, for example, states that indemnity/compensation shall be due even if the agency relation is terminated due to the death, illness, age and infirmity of the agent.[63] But, the agent may not be entitled for compensation/indemnity if the agency agreement is terminated by the principal due to the fault of the agent –that can justify the termination of agency contract under the law– and if the agent willingly terminates the agency agreement without any fault from the principal.[64]

Under Ethiopian law, the agent is entitled to compensation if the principal, as stated above, terminates the agency agreement "without good cause".[65] The phrase '*without good cause*' should be interpreted with caution and the agent should, for example, be compensated if he has not committed fault that has caused the termination of agency. Unless indicative standards of '*good cause*'

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[60] AsmaVranaki (2008), '*Compensation for Commercial Agents', The Modern Law Review* Vol. 71, No. 2 , pp. 271-279.

[61] Id., p. 503.

[62] Wilhelmsson (2006) *supra* note 12, p. 148.

[63] The European Council Directive 653/1986, Article 18 (a & b).

[64] Id., Article 18 (b & c).

[65] Ethiopian Commercial Code (1960), Article 53.

are stated, its definition becomes susceptible to unpredictable and inconsistent judicial discretion.

It is, however, to be noted that the agent deserves compensation only if s/he has enhanced the goodwill of the business and if the principal continues to drive benefits thereof. With regard to cost incurred by the agent who is not entitled to compensation (or indemnity) upon termination of agency, the agent may claim damages under the general law of obligations.

3.3 Amount of compensation

There are two approaches in determining the amount of compensation/indemnity to an agent upon the termination of commercial agency, i.e., the fixed amount approach and determination of the amount based on damage assessments. Many civil law countries like Germany and France have adopted the fixed amount approach. In Germany, for example, the amount of the indemnity is a one-year commission that is determined based on the average of five years commission. The amount of compensation in France is two times the annual average commission the agent used to get during the last three years.[66] Dutch courts may grant up to a one year commission if they find the circumstances equitable.[67] In UK, the compensation/indemnity due for the agent should be calculated taking into account the performance of the agent and the business status of the principal.[68]

Article 53 of the Ethiopian Commercial Code, as stated above, provides that the calculation of the payment should be made taking into account "the time for which he acted on behalf of the principal and to the customers introduced or goodwill created or extended by him." Evaluation of *goodwill* needs clarity and there should be indicative elements, in addition to the general definition embodied in Article 130 of the Commercial Code.

An issue might also arise whether the principal or the new agent should ultimately bear the cost. There are arguments that the cost "should represent the cost of the succeeding agent for purchasing th*e* agency (i.e the goodwill created by the leaving agent)."[69] It seems appropriate that the principal should bear the cost, and there should be supplementary remedies against the succeeding agent.

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[66] Commission of The European Communities (1996), 'Report on the application of article 17 of Council Directive on the Co-ordination of the laws of the Member States Relating to Self-Employed Commercial Agents (86/653/eec)', Brussels, pp. 2-5.

[67] Suzan Lap (2011), 'Commercial Agency Agreement under Dutch Law', in Cristelle Albaric & Marianne Dicksted (eds. 2011), *International Commercial Agency and Distribution Agreements: Case Law and Contract Clauses,* pp. 773-8, Kluwer Law International, the Netherlands.

[68] Zhou,(2014), *supra* note 3, p. 359.

[69] Vranaki (2008) *supra* note 60, p. 274.

Conclusion

The compensation/indemnity to be paid for a commercial agent upon the termination of agency is related with (i) the goodwill of the principal's business toward the creation of which the agent has contributed, (ii) the cost the agent has incurred in the interest of the business, and (iii) the loss of future commission he would have gained had the agency continued. The Ethiopian Commercial Code recognizes mandatory compensation if the principal terminates a commercial agency which is created for an indefinite period of time without 'good cause'. Thus, compensation for the termination of commercial agency –under in the Commercial Code– is a fault-based.

However, the theoretical justification of mandatory compensation discussed in this comment and the transformation of agency law from prime focus on *principal protection* to due attention to *agent protection*, warrant broader mandatory compensation upon termination of commercial agency. Distinction should not be made between definite or indefinite period of the agency contract, as long as the agency relation is not terminated due to the fault of the agent. The law should, however, take into account the benefits the principal continues to earn after the termination of the agency.

Therefore, the Ethiopian commercial agency law should recognize mandatory compensation for the commercial agent upon termination of the agency agreement if (i) the agency agreement is not terminated due to the fault of the agent, and (ii) if the principal continues to operate in the area and continues to derive benefits from the goodwill the agent has brought to the business. On the other hand, compensation should not be expected to be granted if the principal decides to stop working in the area or incurs loss or is declared bankrupt. With regard to the amount of compensation, lessons can be drawn from the good practices of other legal regimes toward fixed amount of compensation based on the duration of the agent's services, the level of consumer attraction, creation of goodwill and the continuity of the principal's benefits after the termination of the agency. ■

COMMENT

Risk Allocation Norms of Civil Construction Contracts in Ethiopia

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Abstract

Risk is any uncertainty in an industry including the construction sector. Claims and disputes arise when risks occur in construction projects. This comment discusses risk allocation under Ethiopian construction law and examines risks in civil construction contracts. The comment highlights the gaps in risk allocation norms under the standard format of construction contract that was issued by the Ethiopian Ministry of Work and Urban Development (MoWUD) in 1994. I argue that MoWUD's principles of risk allocation should be updated so that they can include employer insurance and embody provisions that adequately regulate legal risks which can arise from amendment of laws.

Key terms

Risk · Civil construction contract · FIDIC · MOWUD format · Employer · Contractor

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Introduction

Risk in the construction industry refers to any uncertainty.[1] Whenever risks occur in projects, claims and disputes arise.[2] The modern understanding of risk

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List of Acronyms:

FIDIC Fédération Internationale Des Ingénieurs-Conseils
MoWUD Ministry of Works and Urban Development.

[1] Nael G. Bunni (2003), *Risk and Insurance in Construction* (Spon Press, 2nd ed). pp. 27-52.
[2] Will Hughes, Ronan Champion and John Murdoch (2015), *Construction Contracts Law and Management*, (Routledge, 5th ed), p. 94.

presupposes accountability of subjects or institutions which err in their actions or decisions under conditions of apparent uncertainty.[3] Risk is understood as intentional interaction with uncertainty. Uncertainty is a potential, unpredictable and uncontrollable outcome; risk is a consequence of action taken in spite of uncertainty.[4]

When one thinks about researching risk and related issues, the challenge of which field of study to approach the issue from presents itself. Many of the institutions that humanity has built, could be viewed as a way to address uncertainty, including politics, religion, philosophy, technology, laws, ethics and morality.[5] Therefore, human wisdom has been capable of identifying patterns for uncertainty and developing heuristics.[6] As a result, whenever risk occurs, every discipline devises its own solutions to prevent or minimize it.

Risk is usually recognized and accepted as inevitable and unavoidable in every field of human endeavor.[7] Conversely, there are also proponents of the view that risk can be avoided. Irrespective of such variation in views, identifying risk factors and solutions require advanced knowledge.[8] As Greene notes "any definition of risk is likely to carry an element of subjectivity, depending upon the nature of the risk and to what it is applied. As such, there is no all-encompassing definition of risk."[9]

The Association for Project Management defined risk as "Any uncertain event or set of circumstances that, should it occur, would have an effect on one or more objectives".[10] In light of the elements of the definition given above, risk could be any uncertain event or unpredicted situation, secondly, the said event should at least happen, and finally the effect aspect the risk must have impact on our objectives. Thus, as Association for Project Management notes,

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[3] Karin Zachmann (2014), "Risk in Historical Perspective: Concepts, Contexts, and Conjunctions", in C. Klüppelberg *et al*. (eds.), *Risk – A Multidisciplinary Introduction*, (Springer), p. 3.

[4] Ricardo Antunes *et al* (2015), A Production Model for Construction: a Theoretical Framework, *Buildings* 5(1) 209-228, p. 209.

[5] David Hillson (2006). *The Risk Management Universe: A Guided Tour*, British Standards Institution. p.4.

[6] Ignacio C. Spikin (2013), "Risk Management Theory: The integrated perspective and its application in the public sector", *Estado, Gobierno, Gestión Pública*, Nº21, pp. 89, 126

[7] Ibid.

[8] Brayn S. Shapiro (2005), *Transferring Risks under Construction Contracts* (SHK, Vancouver, BC, Canada), p.2.

[9] Adam Greene(2006), "A Process Approach To Project Risk Management", *Journal of Business Economics and management*, Vol. VII, No. 2, p.17.

[10] Association for Project management (2000), *Project Risk Analysis and Management, A Guide* (APM, 2nd ed.), p. 3.

risk is uncertain event or condition that ultimately affects one of our objectives stipulated in the project plan.[11]

With regard to Ethiopian civil construction laws, the Ministry of Works and Urban Development (hereinafter MoWUD) 1994 format does not expressly define the term risk. However, the format gives a functional definition. From a joint reading of clauses 20, 25, 36 and clause 70(6) of the format, one can understand that risk means any loss, damage or costs associated to a project and it can be mitigated through insurance scheme.

Based on the above definitions, risk has the following features. *First*, risk is characterized by its probability of occurrence and its unknown impact on project objectives.[12] Risk refers to any uncertain situation that jeopardizes the effective performance of projects.[13] *Secondly*, risk is caused by internal or external vulnerabilities.[14] *Thirdly*, risk will have an affirmative or negative effect on construction projects.[15] *Finally*, risk can be avoided through the instrumentality of taking action by anticipation of the events. Risk can be minimized or mitigated after the occurrence of such uncertain situations *via* insurance, assurance or claim settlement.[16]

Disputes in most cases emanate from the allocation of risk in construction projects[17] between the major parties in relation to whether that risk is shared equitably, or whether it is legally imposed, or based on the bargaining power of the parties. This comment makes a comparison between the formats of MoWUD and the Fédération Internationale Des Ingénieurs-Conseils (hereinafter FIDIC). The following sections show that MoWUD has adopted anachronistic principles of risk allocation, which in turn, have to be revisited to incorporate employer insurance and also include provisions as to who bears law amendment risks.

The first section of the comment elucidates the classification of construction risks. Section 2 briefly states the competing views on risk allocation and risk identification. The third section highlights how risk is allocated in the FIDIC format. A brief discussion on the MoWUD 1994 format will be made in the fourth section which is followed by concluding remarks.

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[11] Ibid.
[12] Bryan A. Garner (2009), *Black's Law Dictionary*, (9th Ed., Thomson Reuters) p. 1442.
[13] Edwards Peter J and Bowen Paul A (2007), Construction Risk Management as a Universal Systematic Application, CME 25 Conference Construction Management and Economics 'Past, Present and Future' 16th–18th July 2007 University of Reading, UK Volume 1, p.1345.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Nael Bunni, *supra* note 1, p. 43.

1. Categories of Construction Risks

Various authorities classify construction risks into different categories. However, it is impossible to enumerate all risks which might arise during the development of construction projects.[18] Based on insurance coverage, the Manual on Construction Risks, Damage to the works and Advanced Loss of Profits ('the ALOP Manual'*)*, attempts to classify construction risks into three categories, i.e., Conventional (ordinary) risks,[19] catastrophic (extra-ordinary) risks[20] and risks inherent in the works.[21]

Writers such as Han and Diekmann attempted to classify construction risks into five categories, namely: political, economic, cultural/legal, technical/ construction and other risks.[22] Nael Bunni used a chronological classification which divides risks into –pre-construction; construction; and post-construction phases.[23] There are also others who classify risk into two broad categories, i.e., man-made risks and natural risks.[24]

This comment uses the classification into five categories based on who ultimately bears responsibility. These are: (a) employer risks, (b) contractor risks, (c) sub-contractors risks, (d) third-Party risks, and (e) common risks. The nature of risk in each category is discussed below.

[18] MAPFRE (2012), *Manual on Construction Risks, Damage to the Works and Advanced Loss of Profits* (Alop) Construction Risks, p. 22.

[19] Ibid. According to the Manual, conventional risks are caused by circumstances such as fire, lightening, explosion, theft and bird falling…[sic], and they are covered by insurance, p.22-23.

[20] Ibid. "The most remarkable are those derived from Acts of God (which are foreseeable, although their effects are unavoidable), as well as other risks which are absolutely unforeseeable. For example: winds, storms, hurricanes and cyclones, floods and water-induced damage, earthquake, ground subsidence, landslides and rock falls… [sic]…the fortuitous case excludes the insured's liability [and makes] the insurance company to cover the risks," p. 23-27.

[21] Ibid. "These include the risks due to the activities carried out during the construction stage. Among the infinity of risks which may be present, the most frequent are: defects in workmanship, unskillfulness, negligence and malicious acts (fraud) and errors in calculation or design and employment of defective or inadequate materials."

[22] Han, S. H. and Diekmann, J.E. (2001), "Approaches for making risk based go/no-go decision for international projects", *Journal of Construction Engineering and Management* 127(4), 300-308

[23] Nael Bunni *supra* note 1, p 51.

[24] Peter Edwards & Paul Bowen (2005), *Risk Management in Project Organizations* (Routledge; 1st ed.), pp. 7-16.

a) Employer risks

These types of risk are related with actions, forbearances or negligence by the employer, his or her representatives or other persons/bodies ultimately attributable to the employer (client).[25] If a certain event occurs and such event falls under the ambit of employer risks, then the responsibility is borne by the employer.[26] Employer risk is further classified into *owner's* risk, *engineers* risk and *consultants*' risks.

Owner's risk covers situations such as social and political risks including strike, lock-out, war, civil commotions and disorders.[27] Legal risks are also borne by the owner.[28] Hence, any risk associated with changes or amendment in legislations after the project contract enters into force, will be the responsibility of the employer.[29] Under the Civil Code of Ethiopia, the employer –as the owner of the property– has property risks if the project poses damages to neighbouring property.[30] However the owner can seek contractual compensation from the contractor.

The second sub-category of employer risk is the *engineer's risk*, which is closely associated with damages or risks as a result of the engineer's action or inaction during the supervision of projects.[31] It mostly emanates from losses or damages due to wider roles assigned to him or her by the standard conditions of contract.[32]

Under construction law, the engineer's role includes, but is not limited to the following roles: acting as designer,[33] employer's agent,[34] supervisor,[35] certifier of the works,[36] adjudicator or quasi-arbitrator,[37] and other roles.[38] The role of the

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[25] Zhang Shuibo, Zhang Le & Gao Yuan, "Risk Allocation in Construction Contracts: A Comparison of China's Standard form of Construction Contract and the FIDIC Conditions of Contract for Construction", *Surveyors Times*, p.37

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Ibid.

[30] The Civil Code of Ethiopia, Proclamation No. 165 of 1960, Article 1210 provides: "An owner who makes excavations or works below the surface of his land shall not shake his neighbour's land, expose it to damage or endanger the solidity of the works thereon."

[31] Ibid.

[32] Ibid.

[33] Ministry of Works and Urban Development (MoWUD), *Standard Conditions of Contract For Construction of Civil Works*, (December 1994), Clause 1(l) & (m).

[34] The engineer, as agent, will perform acts of management and administration. *See* Civil Code, Arts 2204 and 2205.

[35] Bunni *infra* note 38, p. 175.

[36] As a certifier, the engineer will prepare payments certificate within 28 days under the FIDIC format , *infra* note 68, Clause 14(13) or within 14 days under the MoWUD format

engineer in the allocation of risks has come under attack both from the employer and contractor for bias. *First*, the contractor accuses the engineer for favouring the employers in relation to with the fee paid by the owner (or the employer); second, there can be tension between the contractor and the engineer if the latter has acted as adviser to the employer prior to construction and may wish to continue this role upon completion of the construction stage, and if he/she is required to consult with the employer prior to making certain decisions.[39] On the other side, the engineer may be accused by the employer for being biased towards the contractor during the administration and execution of the contract in areas such as awarding extensions of time and in determining amounts of claims, etc.[40]

The last sub-category under employer risk would be *consultants' risk*, which is linked to risks caused by poor drawings and advice on the proposed plans of the projects.[41]

b) Contractor's risks

These types of risk result from actions, forbearances or negligence of contractors and their staff during the construction process and the contractor bears responsibility.[42] One example is in the area of economic risks which is often related with the fluctuation of prices of materials, price adjustment, labour and equipment.[43] Principally, in the construction industry, the contractor is duty bound to come up with necessary materials and staff for the completion of the project.[44]

c) Sub-contractors risks

This type of risk arises because sub-contractors might face risks they take over certain specific parts of the construction from the main contractor.[45] The

Clause 48 & 60(3). However, The MoWUD 1994 format requires the engineer to have the specific approval of MoWUD for the execution of his duties in connection with:- Sub-clause 2-1(d): Variations exceeding 10% under Clause 52(3); Sub-clause 2-1 (i) Time Extension under Clause 44 where the cumulative Time Extension granted under the Clause 44 exceeds 25% of the Contract Time.

37 FIDIC, *infra* note 68, Clause 22(2); *See* also MoWUD, *supra* note 33, Clause 67.

38 Nael G. Bunni (2005), *The FIDIC Forms of Contract*, (3rd ed., Blackwell Publishing), pp.155-183

39 Ibid.

40 Ibid.

41 Ibid.

42 Ibid.

43 Ibid.

44 Civil Code, *supra* note 30, Art 2613(1).

45 Michael F. James (1994), *Construction Law* (The Macmillan Press Ltd, 1st ed., 1994), pp. 75-81.

Ethiopian Civil Code recognizes the function of sub-contractors.[46] As the main contractor is usually engaged in two or more projects and works, it will likely find itself working with new and unfamiliar subcontractors.[47] There are various clauses employed and inserted to make sub-contractors responsible to take risks. For example, flow-down clauses illustrate this point.

d) Third party risks

Such risks are associated with encumbrances' created by persons other than the contracting parties. This includes unauthorized entry in the project sites by third parties;[48] and interference by governmental authorities in the performance of the contract.

e) Common risks

Risks shared by the contractor or the employer depending on the merits of the case are common risks. The best examples of common risk are behavioural risks. It encompasses risks sustained due to misconduct if the employer delays handover of the site to the contractor.[49] Other examples include: undue delays in payments, issuance of design drawings or instructions, attendance to tests[50] and failure of the engineer to notify financial arrangements upon request by the contractor, notification of incorrect data to the contractor, and unreasonably withholding permissions or certificates.[51]

Common risks may also relate to the occurrence of natural catastrophes (natural disasters) since the very nature of such risks would potentially affect both parties irrespective of their actions. Such risks necessitate additional time for the completion of projects.

Most international construction contracts adopted either the FIDIC or World Bank format which recognize almost all types of risks such as employer risks, contractor risks, common risks and third party risks. On the other hand, most domestic construction contracts in Ethiopia embrace three types of risks, namely, employer risks, contractor risks and sub-contractor risks.[52] Practically

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[46] Civil Code, *supra* note 30, Art 3201(1)

[47] James T.Dixonand *et al* (2016), *Killer Clauses in Construction Subcontracts: Allocating Risk with Subcontractor Agreements*. p.1 <http://www.lexology.com/library/detail.aspx?g=dc6540a8-c0bb-4b17-8960-c0900319ac2e>, accessed on 7 July 2016

[48] Ibid.

[49] Ibid.

[50] Ibid.

[51] Ibid.

[52] ዮሐንስ እንየው አያሌው፣ በኮንስትራክሽን ውሎች አፈጻጸም ወቅት ለሚስተዋሉ ጉዳቶች ተጠያቂ ማነው? ናሽናል ኮንስትራክሽን መጽሔት፣ ቅጽ 11 ቁጥር 110፣ ሚያዝያ 2008፣ ገጽ 66-67

our construction industry recognizes only three of them; and the concepts of third party risks and common risks seem to be yet nascent in Ethiopia.[53]

2. Competing Views on Risk Allocation and Risk Identification

Almost all construction contracts allocate risks. To this end, there are some choices to be made. For instance, The American institute of architects holds the view that all risks belong to the employer when no other party can either control the risks or prevent the losses.[54] One logical basis for the sharing solution could be to give both parties (employer and contractor) incentive to avoid and mitigate project risks. However, since both parties are adequately motivated for undertaking the project or to enter into a contract, the sharing solution has no appeal other than the spirit of compromise.

The ultimate goal of optimal risk allocation is to promote project implementation on time and on budget with specified quality in the contract, that is to obtain the greatest value of money. Hence, the goal of the employer in general should be to minimize the total cost of risk on a project, i.e. not necessarily the cost of either party.[55] Likewise, the contractor aims at the timely completion of projects.

There are two views on the issue whether risk can be avoided. While the first view regards risk as inevitable, the second considers it as avoidable. The second perspective contends that risk can be avoided by effective anticipation, and actions and decisions such as insurance packages.

The first conception that considered risk as unavoidable gained momentum since the times of Niccolo Machiavelli,[56] but this view meanwhile believed that risk can be minimized and also allocated. According to Machiavelli:

> [a]ll courses of action are risky, so prudence is not in avoiding danger (it's impossible), but calculating risk and acting decisively. Make mistakes of ambition and not mistakes of sloth. Develop the strength to do bold things, not the strength to suffer.

[53] Training Workshop on Construction Law for Owners, Contractors and Engineers organized by the Ethiopian Contractors Association in Collaboration with Conmis Engineering Plc, held at Addis Ababa University Institute of Technology, September 28-29, 2016. In focused group discussion, some of the participants (including project owners and engineers) stated that they did not know about owners/client's risk, contractors risk and sub-contractors risks before the training.

[54] J. B. Grove (1998) , Consultancy Report on Review of General Conditions of Contract for Construction Works for the Government of the Hong Kong Special administration Region, pp.4-7.

[55] Ibid.

[56] Niccolo Machiavelli (1532), *The Prince*, (1961, Penguin Classics), p.84.

Drawing on the inevitability theory of risk, there are four theoretical standards. These are: (i) the *fault Standard*, (ii) the *foreseeability standard*, (iii) the *management standard,* and (iv) the *incentive standard*.

According to the *fault standard*, the cost and time impacts of risks caused or not avoided through the fault of a party should be borne by that party. In other words, he who makes damage shall bear the risks. This common concept runs through most of the construction contracts.[57]

Under the *foreseeability standard*, potential risks should be included in the original contract so that the employer/owner is familiar with such uncertainty. The rationale for this standard is that employers will pay for (un)materialized risk if the contractors are forced to include contingency sums in tenders. This rationale may apply in some circumstances, but the traditionally stiff competitive conditions in the construction industry forces contractors to set aside such contingencies, except for large construction projects.[58] Most conditions of contract include the theme that "a contractor should only price for those risks which an experienced contractor could reasonably be expected to foresee at the time of tender".[59] Therefore, the foreseeability standard could be subject to fair criticism on the ground that uncertainty is introduced.

The *management standard* approach holds that risk belongs to a party who is best able to evaluate and to control (or manage) it because that party will do its utmost to minimize the occurrence and severity of the risk for the good of all parties in the contract. However, the parties' ability to bear the risk should be given proper consideration as absolute control from risk materialization is not manageable.[60] The management standard does not explain the rationale for allocating risks that neither party can evaluate and control. Furthermore, allocation according to ability to manage the risks may not be consistent with well-developed notions of fundamental justice, fairness and equity.

According to the *incentive standard*, risk should be placed on a party most in need of incentive, i.e. presumably the ability to prevent and control them. This is expected to motivate people to play their part. Compensation events or provisions of construction conditions of contract should be examined if they demonstrate this rationale uniformly as contractors and employers are already motivated to avoid and mitigate risk materialization. Both parties lose when a

[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid, "[M]ostly, it is the employer who can reduce risks through pre-construction planning, exploration and design effort, while it is mostly the contractor who can mitigate the effect of an occurred risk during construction. If a risk such as ground conditions is subject to both pre- and post- construction mitigation, the management standard may not provide obvious association rule."

project is impacted by cost, and time overruns regardless of risk allocation, although one may lose more than the other.

In the context of the construction sector, owners, contractors, architects and engineers are required to deal with common recurring project risks which affect all of them in almost every project. As usual, some risks may be common to all projects, and some risks may be unique to particular projects. In this regard, Eybpoosh *et al* observed that in the construction industry, risk identification is usually made at the pre-construction or pre-contract stages, in which very limited data and information are available about the upcoming project condition.[61]

The various risk identification techniques employed in construction projects are checklist, Delphi technique, pondering, brainstorming, diagrams, interview/ expert judgment, nominal group technique, flow charts, root-cause identification, questionnaire, SWOT analysis (strengths, weaknesses, opportunities and threats), case based approach and business impact assessment.[62] With regard to the risk avoidance-non-avoidance debate, it shall not be taken for granted that risk could be inevitable, but at the same time it is also avoidable as well as identifiable.

3. Risk Allocation under the FIDIC Standard Forms of Contracts

The FIDIC produces standard forms of contract for civil engineering construction which are used throughout the world. FIDIC contracts are usually referred to as the international standard.[63] There are important changes between the FIDIC contracts issued in 1987 and 1999. The contract formats issued in 1999 are:

– *Conditions of Contract for Construction* (First Edition, 1999) is known as the Red Book,
– *Conditions of Contract for Plant and Design-Build* (First Edition 1999) called the Yellow Book,
– Conditions of Contract for EPC/Turnkey Projects (First Edition, 1999) also called the Silver Book,

[61] Matineh Eybpoosh, Irem Dikmen & Talat Birgonul (2011), "Identification of Risk Paths in International Construction Projects Using Structural Equation Modeling", *Journal of Construction Engineering and Management*, Volume 137 (12), p. 1165.

[62] Martins C. Garrido and et al (2011), "Risk identification techniques knowledge and application in the Brazilian construction", *Journal of Civil Engineering and Construction Technology,* Vol. 2(11), pp. 242-252.

[63] Standard Form Construction Contracts, p.1, Available at: <www.ibanet.org/.../Default.aspx?...E906.> (Accessed: July 28 2016).

- *Short Form of Contract* (First Edition, 1999) named, the Green Book, and
- others such as *Form of Contract for Dredging and Reclamation Works* "Dredgers Contract" called the Blue Book.[64]

Generally the FIDIC deals with the issues of risk in its three clauses: Clause 17 (risk and responsibility), Clause 18 (insurance) and Clause 19 (*force majeure*). Traditionally, the allocation of risks in construction contracts is based on a sharing between the parties involved, in accordance with the provisions of the contract usually executed between the parties to a construction contract.[65] Such sharing could be agreed upon between the employer/owner and the design professionals/consultants; or it could be between the employer/owner and the main contractor. From the latter agreement, flows another line of risk sharing between the main contractor, on the one hand, and sub-contractors, suppliers, manufacturers, insurers and others, on the other.[66]

Although the terms used in clause 17(1) of FIDIC's Red Book are "indemnities" and baffling sequence,[67] the contents of the provision advance the purposes of risk allocation.[68] Clause 17(1)(a) allocates risk to the contractor due to failure in contractor's design. Clause 17(1)(b) renders the contractor liable to the risk when there are design defaults or any negligence, wilful act or breach of the contract by the contractor, the contractor personnel, their respective agents or workers whose fault is attributable to the contractor. On the other hand, the FIDIC clause 17(1) second paragraph makes the employer liable for all claims, damages or losses –including bodily injury attributable to any negligence, wilful act or breach committed by him/her and affiliates.[69]

Moreover, the joint reading of clauses 17(3) and 17(4) oblige the employer to bear risks other than losses or damages that are attributed to the contractor. Thus, clause 17(3) indicates the grounds whereby employer risks become applicable, such as war and rebellion.[70] However, the FIDIC format under Clause 17(3), while advancing the checklist of employer's risks, upholds conditional

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[64] Ibid.

[65] Lukas Klee (2015), *International Construction Contract Law*, (John Wiley & Sons, Ltd, 1st ed), p. 331.

[66] *Supra* note 38, at 9.

[67] Nael G. Bunni (2001), *FIDIC's New Suite of Contracts* -Clauses 17 to 19 Risk Responsibility, Liability, Indemnity, Insurance and Force Majeure, the International Construction Law Review -ICLR, Vol. 18: 3, p.1.

[68] Fédération Internationale des Ingénieurs-Conseils (FIDIC), 1999, *Conditions of Contract for Construction*, 1st ed, 1999, The Red Book. Clause 17.1, Indemnities: "The contractor shall indemnify and hold harmless the employer, the employer's personnel and their respective agents against and from all claims, damages, losses and expenses…."

[69] Ibid.

[70] Id., FIDIC. Clause 17(3).

standards for cases that fall under (c), (d), (f) and (g). For instance, the occurrence of riots, commotion or disorder within the country by persons other than the contractor's personnel and other employees of the contractor and subcontractors could be the risk of the employer. *A contrario* reading of the same indicates that if riots, commotion and disorder occur as a result of contractor's act, employees of the contractor or subcontractors, then the risk shifts to the contractor.

Seppala considers employer's risks that are embodied in Sub-clause 17(3) as contractual risks to be borne by both the contractor and employer.[71] Sub-clause 17(3) allocates risks in advance and allows exception under clause 17(3)(f) through contractual engagement.

The FIDIC format clearly sets out the consequences of employer risks.[72] The first effect relates to rectifying losses or damages that the contractor incurs based on the reports by engineer. The second effect is related with the first, i.e. if the contractor due to rectifying the losses suffers delay and in turn incurs cost, the contractor is entitled to require claims as per clause 20(1) of the FIDIC format.

Clause 18 deals with insurance, which is another scheme of risk allocation. "Construction insurance is a practice of exchanging a contingent claim for a fixed payment to protect the interests of the parties involved in a construction project".[73] The clause begins by defining the term 'insuring party' to mean the party responsible for effecting and maintaining the insurance specified in the relevant sub-clause. The beneficiary or insuring party might be different in various policies or sometimes both the contractor and employer might buy an insurance policy.

Clause 18(2) is relevant regarding tasks of the contractor or the employer. When each premium is paid, the insuring party shall submit evidence of payment to the other party and also whenever evidence or policies are submitted, the insuring party shall also give notice to the engineer.[74] The insurance under FIDIC format covers all losses or damages, excluding those cases that are listed as employer risks under Clause 17(3).

The FIDIC format under clause 18(2)(e), lists out cases of risk that are not covered by insurance. For instance, part of work which is defective due to

[71] Christopher Seppala (2000), FIDIC's New Standard Forms of Contract - Force Majeure, Claims Disputes and Other Clauses, ICLR Vol. 17 :2, p..231

[72] FIDIC, *supra* note 68, Clause 17(4).

[73] Junying Liu, Bingguang Li & Jiong Zhang, Insurance and construction project risks: a review and research agenda, p.2. Available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.549.689&rep=rep1&type=pdf

[74] FIDIC, *supra* note 68, Clause 18(1), para, VIII.

designing or materials or workmanship, which is lost or damaged, or which has been taken over by the employer (save the extent that the contractor might be liable for the loss or damage and goods that are not in the country). Parties should thus take note of the terms of the insurance policy entered with the insurer (insurance companies.)

The FIDIC provision that deals with *force majeure* is clause 19. The FIDIC allows *force majeure* to be invoked in exceptional circumstances. FIDIC's format embodies four conditions that are required to invoke force majeure. *First,* the situation or the matter at hand should be beyond the control of the party that invokes force majeure. *Secondly*, "parties could not reasonably have provided against" such occurrence "before entering into the contract". *Thirdly*, after the incident occurred, parties could not reasonably have avoided or overcome it, and finally the situation is not substantially attributable to the other party.[75] The FIDIC format illustratively lists cases of force majeure.[76] The above four conditions are cumulative.

The FIDIC format delineates the implication of force majeure which may enable the contactor to claim for costs incurred in relation to it,[77] which may also allow the employer to at least seek optional termination and release.[78] Upon the occurrence of force majeure, if performance is impossible, then both parties are released from obligation by law.[79]

4. Ministry of Work and Urban Development Standard Conditions of Contract (1994): Risk allocation norms

The Ethiopian construction industry is regulated by civil construction law and public construction law –also called procurement law.[80] The regulatory organs in charge of actively implementing these laws are respectively the MoWUD and the Ministry of Finance and Economic Development. The MoWUD has issued the 1994 standard conditions of contract for civil works. The power and

[75] Id., Clause 19(a-d).
[76] Id., Clause 19(1).
[77] Id., Clause 19(4).
[78] Id., Clause 19(6).
[79] Id., Clause 19(7).
[80] Tecle Hagos Bahta (2009), "Adjudication And Arbitrability of Government Construction Disputes", *Mizan Law Review* Vol. 3 No.1, March 2009, p.1; *See* also ሚካኤል ጉንታ የኮንስትራክሽን ውል ገጽታዎች፣ የኢትዮጵያ ጠበቆች የሕግ መጽሔት፣ መግቄ 1 ቁጥር 1 ሚያዚያ 1998 ገጽ 143

mandate of the MoWUD with regard to works of construction contracts is now transferred to the Ministry of Construction.[81]

In July 1959, format conditions of contract were prepared by Ministry of Urban Development and Housing (MoUDH) entitled 'General *Conditions of Construction Contracts*'.[82] Nearly three decades after the first format, the second format titled *Standard Conditions of Contract for Construction of Civil Works Projects* was endorsed by Building and Transport Construction and Design Authority (BaTCoDA) in December 1987.[83] The *third* format was *The Standard Conditions of Contract for Construction of Civil Works Projects* issued by MoWUD in December 1994.[84] There was also another draft format titled '*General Conditions of Contract and Tender Procedure Document'* prepared by MoWUD in 1995 which was not put into effect.[85]

With regard to public procurement, the format titled '*General Conditions of Contract for the Procurement of Works'* was issued by the Public Procurement Agency (PPA) in January 2006. This format is used for international and national competitive bidding and the amended format (PPA 2011) is the most recent document that is used for procurement of public/government construction contracts. This comment focuses on the 1994 MoWUD format with particular attention to its risk allocation provisions.

Since its advent in 1994, the MoWUD format is used by MoWUD (currently called the Ministry of Construction), and the format applies for private parties who want to be bound by it. Procurement laws apply for government construction contracts both at the federal and state levels.[86] In general, standard conditions of contract are agreements whose terms are binding to parties who sign it.[87] They cannot be easily changed, even by courts.[88]

Clause 20 to clause 25 of the MoWUD format directly or indirectly deals with risks such as, responsibility for risks and insurance. Clause 34(6) generally

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[81] Definition of Power and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 916/2015, *Federal Negarit Gazette*, 22nd Year No. 12, Addis Ababa, 9th December, 2015, Art 27(2).

[82] Getaneh Gezahegen (2011), *Assessment of Conditions of Contract Problems in Ethiopian Construction Industry*, A Thesis Submitted to School of Graduate Studies in Partial Fulfillment of the Requirements for the Degree of Master of Science in Civil Engineering, Addis Ababa University (Unpublished), p. 47.

[83] Ibid.

[84] Ibid.

[85] Ibid.

[86] Interview with Mr. Endalew, Legal Expert at the legal directorate, Ministry of Construction, 6 February 2017.

[87] Civil Code, *supra* note 35, Art. 1731.

[88] Ibid, Art. 1763.

deals with incidents, and clause 70(7) refers to change in legislation. The Contractor will take full responsibility for the care of the project works from the commencement of the works until the date stated in the certificate of completion for the whole of the works.[89] So, the MoWUD format stressed that contractors bear the obligation of due diligence and care for the works until the date of completion. The engineer issues a certificate of completion in respect of any part of the permanent work; thereafter, the contractor shall cease to be liable for the care of that part of the permanent work, and in effect, the responsibility for the care of that part shall pass to the employer.[90] Accordingly, the risks are transferred from the contractor to the employer upon issuance of certificate.

During the period of the contractor's responsibility (for the care of any outstanding work which he/she has to undertake), the contractor bears all risks for any damage, loss, or injury other than the exceptions that fall under force majeure.[91] The contractor shall be responsible for the completion the permanent works in good order and as per the engineer's instructions.[92]

Unlike the FIDIC format discussed above, the MoWUD format allowed insurance mechanisms only for the contractors.[93] The insurance may be made between an insurer and the contractor in terms approved by the employer.[94] I argue that the MoWUD format in that regard seems unduly limited because it envisages only contractors as parties to insurance policies, and the terms of the insurance policy to be covered are very narrow in scope.

Moreover, the MoWUD format lacks provisions dealing with legal and law related risks, unlike the FIDIC format.[95] During the performance of projects there may be changes in legislation. For instance, a new law might be enacted that allows the contractor's employees to get better provident fund or medical service, and the issue as to who bears these legal risks would arise. The MoWUD format is silent and fails to answer such questions. However, the MoWUD format acknowledges changes in price due to law enactment.[96]

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[89] MoWUD format, *supra* note 33, Clause 20(1).
[90] Ibid.
[91] Id., Clause 20(2).
[92] Ibid.
[93] Id,, Clause 21.
[94] Ibid.
[95] FIDIC, *supra* note 68, Clause 13(7).
[96] MoWUD, *supra* note 33, Clause 70(1)(b): If "the said rates of wages and other emoluments and expenses are increased or decreased by any Act, Statute, Decree, Regulation and the like after the said date of bid pricing, then the net amount of the increased or decreased of the emoluments and expenses shall after due consultation with the Employer and the Contractor, be determined by the Engineer and shall form an addition or deduction as the case may be to or from the Contract Price and be paid to or allowed by the Contractor accordingly."

According to the interviews that this author has conducted on the practice of risk allocation using the MoWUD format especially on risk provisions, most projects are held under the leading role of the contractors. The interviews with contractors revealed that the majority of them rarely use the MoWUD format.[97]

This author has also distributed questionnaires and used purposive sampling taken from individual contractors and private limited companies. This was neither meant to conduct survey nor intensive field research. The purpose was to merely gather some data that can give descriptive insights, which is far from generalization.

Out of 24 individual contractors who answered the questionnaires to the question on how far they use the risk provisions of the MoWUD 1994 format, 17 (70.8%) of them replied they did not use it at all, and there were respondents who even did not know about it. 4 respondents (16.6%) replied that they frequently use the MoWUD format for civil projects.

The respondents who used the MoWUD format were asked to state the problems, if any, encountered during the implementation phase. Three out of the four respondents who frequently used the format stated that issues of price adjustment and changes of legislation (i.e., legal risks) cause controversy, while one individual contractor stated that he did not face any problem.

This author had also purposively approached 13 companies that work as contractors and consultants. 8 companies (61.5%) replied that they did not even know about the existence of the format, while 5 companies (38.5%) have intermittently used the format for civil works.

Concluding remarks

The views on the definition of risk range from the inevitable presence of risk thereby recognizing risk as inevitable and unavoidable to views of risk as avoidable through anticipation accompanied by proactive decisions and actions. This comment has highlighted the various categories of risk that require their identification. In the context of construction projects, risk identification (as highlighted above) may involve various techniques.

The two standard conditions of contract, discussed in the comment, i.e., the MoWUD format (1994), and the FIDIC format (1999) embody provisions that deal with risks. Critical examination of the Ethiopian standard conditions of contract prepared (in 1994) by the Ministry of Works and Urban Development

[97] Interview with Beha Construction PLC, Office Engineer Ms. Abinet Haile on 7 November 2016, Addis Ababa, "She added that most of the projects currently undertaken by their company are governmental construction projects" and as "the client is government, they frequently use Public Procurement Agency (PPA) 2011 format." Other four respondents made similar statements.

(MoWUD) in light with the FIDIC format shows that there are major issues that remain untouched. The first deficiency relates to law amendment risks as well as issues of price adjustment. The second problem in the Ethiopian MoWUD format is that the clause that deals with insurance only obliges contractors.

The MoWUD format should thus be revised to incorporate issues such as price adjustment in the event of legal risks, i.e., changes in legislation. Moreover, the obligation regarding insurance should not be limited to contractors. In the domain enhancing awareness about and the implementation of the MoWUD format, the Ministry of Construction, as a principal regulatory organ, should take the lead in creating awareness for the stakeholders especially contractors, consultants, engineers and lawyers so that the format can be used in most future projects.

Index: Mizan Law Review

Vol. 1, No. 1 (June 2007) to Volume 10, No. 2 (December 2016)

DOI http://dx.doi.org/10.4314/mlr.v11i2.10

1. Subject Index: Peer-Reviewed Articles (2007-2016)

Aron Degol & Abdulatif Kedir	Administrative Rulemaking in Ethiopia: Normative and Institutional Framework Vol. 7, No. 1 (September 2013), 1-28 http://dx.doi.org/10.4314/mlr.v7i1.1	Administrative Law
Hailegabriel G. Feyissa	The Role of Ethiopian Courts in Commercial Arbitration Vol. 4, No. 2 (Autumn 2010), 297-333 http://dx.doi.org/10.4314/mlr.v4i2.63090	Alternative Dispute Resolution
Fekadu Petros	Underlying Distinctions between ADR, *Shimglina* and Arbitration, Vol. 3, No. 1 (March 2009), 105-133 http://dx.doi.org/10.4314/mlr.v3i1.54008	Arbitration, ADR
Tecle Hagos	Adjudication and Aribitrability of Government Construction Contracts Vol. 3, No. 1 (March 2009). 1-32 http://dx.doi.org/10.4314/mlr.v3i1.54005	Arbitration, Construction contracts
Worku Yaze Wodage	Operation and Effect of Presumptions in Civil Proceedings: An Inquiry into the interpretation of Art 2024 of the Ethiopian Civil Code Vol. 4, No. 2 (Autumn 2010), 258-296 http://dx.doi.org/10.4314/mlr.v4i2.63089	Civil Procedure
Seyoum Yohannes Tesfay	The Normative Basis for Decision on the Merits in Commercial Arbitration: The Extent of Party Autonomy Vol. 10, No. 2 (December 2016), 341- 365 http://dx.doi.org/10.4314/mlr.v10i2.3	Commercial Arbitration
Fekadu Petros	Emerging Separation of Ownership and Control in Ethiopian Share Companies: Legal and Policy Implications Vol. 4, No. 1 (March 2010), 1-30 http://dx.doi.org/10.4314/mlr.v4i1.57147	Commercial Law
Getahun Seifu	Revisiting Company Law with the Advent of Ethiopia Commodity Exchange (ECX): An Overview Vol. 4, No. 1 (March 2010), 102-141 http://dx.doi.org/10.4314/mlr.v4i1.57150	
Hailegabriel G. Feyissa	Ethiopian Law of International Carriage by Air: An Overview Vol. 5, No. 2 (December 2011), 215-245 http://dx.doi.org/10.4314/mlr.v5i2.2	

Hussein Ahmed Tura	Overview of Corporate Governance in Ethiopia: The Role, Composition and Remuneration of Boards of Directors in Share Companies Vol. 6, No. 1 (June 2012), 45-76 http://dx.doi.org/10.4314/mlr.v6i1.2	Commercial Law
Endalew Lijalem Enyew	The Doctrine of Piercing the Corporate Veil: Its Legal and Judicial Recognition in Ethiopia Vol. 6, No. 1 (June 2012), 77-114 http://dx.doi.org/10.4314/mlr.v6i1.3	
Harka Haroye	Competition Policies and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law Vol. 2, No. 1 (January 2008), 33-51 http://dx.doi.org/10.4314/mlr.v2i1.55619	Competition Law
Hailegabriel G. Feyissa	European Influence on Ethiopian Antitrust Regime Vol. 3, No. 2 (September 2009), 271-287 http://dx.doi.org/10.4314/mlr.v3i2.54012	
Seyoum Yohannes Tesfay	Eritrea-Ethiopia Arbitration: A 'Cure' Based on Neither Diagnosis nor Prognosis Vol. 6, No. 2 (December 2012), 163-199 http://dx.doi.org/10.4314/mlr.v6i2.1	Conflict Resolution, Arbitration
Assefa Fiseha	Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation Vol. 1, No. 1 (June 2007), 1- 32 http://dx.doi.org/10.4314/mlr.v1i1.55611	Constitutional Law
Tsegaye Regassa	Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level Vol. 3, No. 1 (March 2009), 33- 69 http://dx.doi.org/10.4314/mlr.v3i1.54006	
Nigussie Afesha	The Practice of Informal Changes to the Ethiopian Constitution in the Course of Application Vol. 10, No. 2 (December 2016), 366- 399 http://dx.doi.org/10.4314/mlr.v10i2.4	
Tessema Elias	Gaps and Challenges in the Enforcement Framework for Consumer Protection in Ethiopia Vol. 9, No. 1 (September 2015), 83-107 http://dx.doi.org/10.4314/mlr.v9i1.3	Consumer Protection

Lantera Nadew	Void Agreements and Voidable Contracts: The Need to Elucidate Ambiguities of their Effects Vol. 2, No. 1 (January 2008), 91-109 http://dx.doi.org/10.4314/mlr.v2i1.55621	Contracts
Tsehai Wada	Abortion Law in Ethiopia: A Comparative Perspective Vol. 2, No. 1 (January 2008), 1-32 http://dx.doi.org/10.4314/mlr.v2i1.55618	Criminal Law
Wondwossen Demissie Kassa	Examining Some of the *Raisons d'être* for the Ethiopian Anti-terrorism Law Vol. 7, No. 1 (September 2013), 49-66 http://dx.doi.org/10.4314/mlr.v7i1.3	
Worku Yaze Wodage	Criminalization of 'Possession of Unexplained Property' and the Fight against Public Corruption Vol. 8, No. 1 (September 2014), 45-83 http://dx.doi.org/10.4314/mlr.v8i1.2	
Wondwossen Demissie Kassa	The Scope of Definition of a Terrorist Act under Ethiopian Law: Appraisal of its Compatibility with Regional and International Counterterrorism Instruments Vol. 8, No. 2 (December 2014), 371-405 http://dx.doi.org/10.4314/mlr.v8i2.4	
Worku Yaze Wodage	Burdens and Standards of Proof in Possession of Unexplained Property Prosecutions Vol. 8, No. 1 (September 2014), 1-44 http://dx.doi.org/10.4314/mlr.v8i1.1	Criminal Law & Procedure, Evidence
Alemu Meheretu	The Proposed Plea Bargaining in Ethiopia: How it Fares with Fundamental Principles of Criminal law and Procedure Vol. 10, No. 2 (December 2016), 400- 429 http://dx.doi.org/10.4314/mlr.v10i2.5	Criminal Law and Procedure
Simeneh Kiros Assefa	The Principle of the Presumption of Innocence and its Challenges in the Ethiopian Criminal Process Vol. 6, No. 2 (December 2012). 273-310 http://dx.doi.org/10.4314/mlr.v6i2.4	Criminal Procedure
Hanna Arayaselassie Zemichael	The Standard of Proof in Criminal Proceedings: the Threshold to Prove Guilt under Ethiopian Law Vol. 8, No. 1 (September 2014), 84-116) http://dx.doi.org/10.4314/mlr.v8i1.3	Criminal Procedure, Evidence

Kinfe Micheal Yilma & Halefom Hailu Abraha	The Internet and Regulatory Responses in Ethiopia: Telecoms, Cybercrimes, Privacy, E-commerce, and the New Media Vol. 9, No. 1 (September 2015), 108-153 http://dx.doi.org/10.4314/mlr.v9i1.4	Cyber Law
	The Internet and Ethiopia's IP Law, Internet Governance and Legal Education: An Overview Vol. 9, No. 1 (September 2015), 154-174 http://dx.doi.org/10.4314/mlr.v9i1.5	
Mussie Mezgebo Gebremedhin	Procrastination in Recognizing the Rights of Domestic Workers in Ethiopia Vol. 10, No. 1 (September 2016), 38-72 http://dx.doi.org/10.4314/mlr.v10i1.2	Employment Law
Elias N. Stebek	Dwindling Ethiopian Forests: The 'Carrot' and 'Stick' Dilemma Vol. 2, No. 2 (July 2008), 255-286 http://dx.doi.org/10.4314/mlr.v2i2.55625	Environmental Law
Mulugeta Getu	Ethiopian Floriculture and Its Impact on the Environment Vol. 3, No. 2 (September 2009), 240-270 http://dx.doi.org/10.4314/mlr.v3i2.54011	
	Accommodating the Interests of Developing Countries in the Climate Change Regime: Lessons from the Ozone Layer Regime Vol. 6, No. 1 (June 2012), 1-44 http://dx.doi.org/10.4314/mlr.v6i1.1	
Eghosa Osa Ekhator	Protection of the Environment and the International Salvage Convention, 1989: An Assessment Vol. 10, No. 1 (September 2016), 73-99 http://dx.doi.org/10.4314/mlr.v10i1.3	
ተስፋዬ አባተ አበበ	የስሚ ስሚ ማስረጃ (Hearsay Evidence), Vol. 6, No. 1 (June 2012) 115-144 http://dx.doi.org/10.4314/mlr.v6i1.4	Evidence
ፊልጶስ ዓይናለም	De facto Divorce (Amharic)/ ሳይፋቱ ፍቺ፤ Vol. 2, No. 1 (January 2008), 110-136 https://www.ajol.info/index.php/mlr/article/view/145459	Family Law
Tsegaye Regassa	Learning to Live with Conflicts: Federalism as a Tool of Conflict Management in Ethiopia – An Overview Vol. 4, No. 1 (March 2010), 52-101 http://dx.doi.org/10.4314/mlr.v4i1.57149	Federalism

Beza Dessalegn	The Right of Minorities to Political Participation under the Ethiopian Electoral System Vol. 7, No. 1 (September 2013), 67-100 http://dx.doi.org/10.4314/mlr.v7i1.4	Federalism
Nigussie Afesha	The Federal-state Intergovernmental Relationship in Ethiopia: Institutional Framework and its Implication on State Autonomy Vol. 9, No. 2 (December 2015), 341-368 http://dx.doi.org/10.4314/mlr.v9i2.4	
Legesse Tigabu Mengie	Federalism as an Instrument for Unity and the Protection of Minorities: A Comparative Overview: Ethiopia, India and the US Vol. 10, No. 2 (December 2016), 265- 295 http://dx.doi.org/10.4314/mlr.v10i2.1	
Tecle Hagos Bahta	Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia Vol. 5, No. 1 (Spring 2011), 105-140 http://dx.doi.org/10.4314/mlr.v5i1.68771	Foreign Arbitral Awards
Tsega Andualem Gelaye	Protection of the Right to Freedom of Assembly under Ethiopian Law: Gaps and the Way Forward Vol. 10, No. 2 (December 2016), 296- 340 http://dx.doi.org/10.4314/mlr.v10i2.2	Freedom of Assembly
Elise Nalbandian	The Challenges Facing African Court of Human and Peoples' Rights Vol. 1, No. 1 (June 2007), 75-89 https://www.ajol.info/index.php/mlr/article/view/145452	Human Rights
Khushal Vibhute	The 2007 International Convention against Disappearance: Some Reflections Vol. 2, No. 2 (July 2008), 281-310 http://dx.doi.org/10.4314/mlr.v2i2.55627	
Tsegaye Regassa	Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia Vol. 3, No. 2 (September 2009), 288-330 http://dx.doi.org/10.4314/mlr.v3i2.54014	
Gedion Timothewos	Freedom of Expression in Ethiopia: The Jurisprudential Dearth Vol. 4, No. 2 (Autumn2010), 201-231 http://dx.doi.org/10.4314/mlr.v4i2.63087	

Adem Kassie Abebe	Human Rights under the Ethiopian Constitution: A Descriptive Overview Vol. 5, No. 1 (Spring 2011), 41-71 http://dx.doi.org/10.4314/mlr.v5i1.68768	Human Rights
Belachew Mekuria Fikre	Blasphemy in a Secular State: Some Reflections Vol. 7, No. 1 (September 2013), 29-48 http://dx.doi.org/10.4314/mlr.v7i1.2	
Elias N. Stebek	WTO Accession in the Ethiopian Context: A Bittersweet Paradox Vol. 1, No. 1 (June 2007), 90-118 http://dx.doi.org/10.4314/mlr.v1i1.55616	International Trade
Tilahun Esmael Kassahun	Ethiopia's WTO Accession and Financial Services Liberalization: Striking the Balance between Trade Liberalization and Domestic Policy Space Vol. 6, No. 2, (December 2012), 200-240 http://dx.doi.org/10.4314/mlr.v6i2.2	
	Trade Facilitation in Ethiopia: The Role of WTO Accession in Domestic Reform Vol. 8, No. 1 (September 2014), 145-189 http://dx.doi.org/10.4314/mlr.v8i1.5	
Martha Belete Hailu	Regional Economic Integration in Africa: Challenges and Prospects Vol. 8, No. 2 (December 2014), 299-332 http://dx.doi.org/10.4314/mlr.v8i2.2	
Martha Belete Hailu & Tilahun Esmael Kassahun	Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration Vol. 8, No. 1 (September 2014). 117-144 http://dx.doi.org/10.4314/mlr.v8i1.4	International Trade and Investment
Tilahun Weldie Hindeya	Unilateral Trade Sanctions as a Means to Combat Human Rights Abuses: Legal and Factual Appraisal Vol. 7, No. 1 (September 2013), 101-125 http://dx.doi.org/10.4314/mlr.v7i1.5	International Trade, Human Rights
Elias N. Stebek	Eastern Nile at Crossroads: Preservation and Utilisation Concerns in Focus Vol. 1, No. 1 (June 2007), 33- 59 http://dx.doi.org/10.4314/mlr.v1i1.55613	International Water Law

Takele Soboka Bulto	Between Ambivalence and Necessity in the Nile Basin: Occlusions on the Path towards a Nile Basin Treaty Vol. 2, No. 2 (July 2008), 201-228 http://dx.doi.org/10.4314/mlr.v2i2.56149	
Dereje Zeleke Mekonnen	From Tenuous Legal Arguments to Securitization and Benefit Sharing: Hegemonic Obstinacy – The Stumbling Block against Resolution of the Nile Waters Question Vol. 4, No. 2 (Autumn 2010), 232-25 http://dx.doi.org/10.4314/mlr.v4i2.63088	
Tadesse Kassa Woldetsadik	Anglo-Ethiopian Treaty on the Nile and the Tana Dam Concessions: A Script in Legal History of Ethiopia's Diplomatic Confront (1900- 1956) Vol. 8, No. 2 (December 2014), 271-298 http://dx.doi.org/10.4314/mlr.v8i2.1	International Water Law
	The Grand Ethiopian Renaissance Dam and Ethiopia's Succession in Hydro-legal Prominence: A Script in Legal History of Diplomatic Confront (1957-2013) Vol. 9, No. 2 (December 2015), 369-407 http://dx.doi.org/10.4314/mlr.v9i2.5	
Abiy Chelkeba Worku	State Succession in International Transboundary Water Obligations: South Sudan and the Nile Water Agreements Vol. 10, No. 1 (September 2016), 100-125 http://dx.doi.org/10.4314/mlr.v10i1.4	
Muradu Abdo	Review of Decisions of State Courts over State Matters by the Federal Supreme Court Vol. 1, No. 1 (June 2007), 60- 74 http://dx.doi.org/10.4314/mlr.v1i1.55614	
መሓሪ ረዳኢ	የሰበር ሰበርና ተግዳሮቶቹ በኢትዮጵያ Vol. 9, No. 1 (September 2015), 175-200 http://dx.doi.org/10.4314/mlr.v9i1.6	Justice Sector
Elias N. Stebek	Judicial Reform Pursuits in Ethiopia, 2002-2015: Steady Concrete Achievements - *versus* - Promise Fatigue Vol. 9, No. 2 (December 2015), 215-257 http://dx.doi.org/10.4314/mlr.v9i2.1	

<table>
<tr><td rowspan="7">Elias N. Stebek</td><td>Legal Sector Reform Pursuits in Ethiopia: Gaps in Grassroots Empowerment
Vol. 9, No. 2 (December 2015), 258-300
http://dx.doi.org/10.4314/mlr.v9i2.2</td><td>Justice Sector</td></tr>
<tr><td>Role Conflict between Land Allocation and Municipal Functions in Addis Ababa
Vol. 7, No. 2 (December 2013), 241-282
http://dx.doi.org/10.4314/mlr.v7i2.3</td><td rowspan="2">Land Law</td></tr>
<tr><td>Access to Urban Land and its Role in Enhancing Business Environment: Multi-track versus Mono-route Land-use Markets
Vol. 9, No. 1 (September 2015), 1-36
http://dx.doi.org/10.4314/mlr.v9i1.1</td></tr>
<tr><td>Challenges in Access to Urban Land for Business Activities under Ethiopian Law: Between Oligarchy and Broad-based Private Sector
Vol. 9, No. 1 (September 2015), 37-82
http://dx.doi.org/10.4314/mlr.v9i1.2</td><td rowspan="3">Land Law,
Law in Development</td></tr>
<tr><td>Between 'Land Grabs' and Agricultural Investment: Land Rent Contracts with Foreign Investors and Ethiopia's Normative Setting in Focus
Vol. 5, No. 2 (December 2011), 175-214
http://dx.doi.org/10.4314/mlr.v5i2.1</td></tr>
<tr><td>Overview of Country Experience in Land Rights and Developmental Statehood: South Korea, Taiwan, China and Singapore
Vol. 7, No. 2 (December 2013), 207-240)
http://dx.doi.org/10.4314/mlr.v7i2.2</td></tr>
<tr style="display:none"></tr>
<tr><td>Belachew Mekuria Fikre</td><td>The Politics Underpinning the Non-realisation of the Right to Development
Vol. 5, No. 2 (December 2011), 246-263
http://dx.doi.org/10.4314/mlr.v5i2.3</td><td rowspan="2">Law in Development</td></tr>
<tr><td>Elias N. Stebek</td><td>The Constitutional Right to Enhanced Livelihood in Ethiopia: Unfulfilled Promises and the Need for New Approaches
Vol. 10, No. 1 (September 2016), 126-176
http://dx.doi.org/10.4314/mlr.v10i1.5</td></tr>
</table>

Mohammed Abdo	Legal Pluralism, Sharia Courts and Constitutional Issues in Ethiopia Vol. 5, No. 1 (Spring 2011), 72-104 http://dx.doi.org/10.4314/mlr.v5i1.68769	Legal Pluralism
Muradu Abdo	Subsidiary Classification of Goods under Ethiopian Property Law: A Commentary Vol. 2, No. 1 (January 2008), 52-90 http://dx.doi.org/10.4314/mlr.v2i1.55620	Property Law
Elias N. Stebek	Conceptual Foundations of Property Rights: Rethinking *De Facto* Rural Open Access to Common-Pool Resources in Ethiopia Vol. 5, No. 1 (Spring 2011), 1-40 http://dx.doi.org/10.4314/mlr.v5i1.68766	
Muradu Abdo	Legislative Protection of Property Rights in Ethiopia: An Overview Vol. 7, No. 2 (December 2013), 165-206 http://dx.doi.org/10.4314/mlr.v7i2.1	
Daniel W. Ambaye	The History of Expropriation in Ethiopian Law Vol. 7, No. 2 (December 2013), 283-308 http://dx.doi.org/10.4314/mlr.v7i2.4	
Muradu Abdo	Reforming Ethiopia's Expropriation Law Vol. 9, No. 2 (December 2015), 301-340 http://dx.doi.org/10.4314/mlr.v9i2.3	
Tewodros Meheret	The Concept and Characteristics of Public Enterprises in Ethiopia: An Overview Vol. 8, No. 2 (December 2014), 333-370 http://dx.doi.org/10.4314/mlr.v8i2.3	Public Enterprises
Awol K. Allo	Counter-intervention, Invitation, Both or Neither: An Appraisal of the 2006 Ethiopian Intervention in Somalia Vol. 3, No. 2 (September 2009), 201-239 http://dx.doi.org/10.4314/mlr.v3i2.54010	Public International Law, Counter-intervention
Abdi Jibril Ali	The Admissibility of Subregional Courts' Decisions before the African Commission or African Court Vol. 6, No. 2 (December 2012), 241-272 http://dx.doi.org/10.4314/mlr.v6i2.3	Public International Law

Amos O Enabulele, Eric Okojie	Myths and Realities in ‘Self-Executing Treaties’ Vol. 10, No. 1 (September 2016), 1-37 http://dx.doi.org/10.4314/mlr.v10i1.1	Public International Law
Mellese Damtie	Collation under Ethiopian Law of Successions: ‘Payment by Taking Less’ Vol. 2, No. 2 (July 2008), 229-254 http://dx.doi.org/10.4314/mlr.v2i2.55624	Successions
Taddese Lencho	Income Tax Assignment under the Ethiopian Constitution: Issues to Worry About Vol. 4, No. 1 (March 2010), 31-51 http://dx.doi.org/10.4314/mlr.v4i1.57148	Tax Law
	To Tax or Not To Tax: Is that Really the Question? – VAT, Bank Foreclosure Sales, and the Scope of Exemptions for Financial Services in Ethiopia Vol. 5, No. 2 (December 2011), 264-310 http://dx.doi.org/10.4314/mlr.v5i2.4	
አስቻለው አሻግሬ	የታክስ ከፋዮች ቅሬታ አፈታት ሥርዓት በኢትዮጵያ Vol. 8, No. 1 (September 2014), 190-236 http://dx.doi.org/10.4314/mlr.v8i1.6	
Simenek Kiros	The Trade and Environment Debate: The Normative and Institutional Incongruity Vol. 2, No. 2 (July 2008), 311-338 http://dx.doi.org/10.4314/mlr.v2i2.55630	Trade and Environment
Awol K. Allo	Mayhem in Darfur: The Accountability, Peace and Immunity Debate Vol. 3, No. 1 (March 2009), 70- 104 http://dx.doi.org/10.4314/mlr.v3i1.54007	War crimes, Human rights
Zbelo Haileslassie Embaye	The Quest for Standard Tests in Prioritizing Water Use Rights in Ethiopia: *Reasonable Use*, *Beneficial Use* or ‘Beyond’ Vol. 10, No. 1 (September 2016), 177-216 http://dx.doi.org/10.4314/mlr.v10i1.6	Water Law
Ayele Hegena Anabo	The Myth of ‘Tragedy of the Commons’ in Sustaining Water Resources Vol. 7, No. 2 (December 2013)309-350 http://dx.doi.org/10.4314/mlr.v7i2.5	Water Security

2. List of Publications and Links (Vol. 1 to Vol. 10)

MIZAN LAW REVIEW, Vol. 1 No. 1 (June 2007)

Articles (Peer Reviewed)		
Assefa Fiseha	Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (1- 32) http://dx.doi.org/10.4314/mlr.v1i1.55611	Constitutional Law
Elias N. Stebek	Eastern Nile at Crossroads: Preservation and Utilisation Concerns in Focus (33- 59) http://dx.doi.org/10.4314/mlr.v1i1.55613	International Water Law
Muradu Abdo	Review of Decisions of State Courts over State Matters by the Federal Supreme Court (60- 74) http://dx.doi.org/10.4314/mlr.v1i1.55614	Justice Sector
Elise Nalbandian	The Challenges Facing African Court of Human and Peoples' Rights (75-89) https://www.ajol.info/index.php/mlr/article/view/145452	Human rights
Elias N. Stebek	WTO Accession in the Ethiopian Context: A Bittersweet Paradox (90-118) http://dx.doi.org/10.4314/mlr.v1i1.55616	International Trade
Sharing Thoughts https://www.ajol.info/index.php/mlr/article/view/145455		
Girma W. Selassie	Some Nostalgic Thoughts on the Teaching of Law in Ethiopia (120-133)	Legal Education
Selamu Bekele	Living With My Strange Thoughts (134-144)	Miscellaneous
መንግሥቱ ኃ/ማርያም አርአያ	ስለዳኝነትና ዳኛ (በኢትዮጵያ ሁኔታ)፣ 145-148	Justice Sector
Notes https://www.ajol.info/index.php/mlr/article/view/145457		
Simeneh Kiros Assefa	Notes on Criminal Procedure: The Ideal Process in the Ethiopian Criminal Procedure (150-161)	Criminal Procedure
Maru Bazezew	Notes on Good Governance (162-168)	Justice Sector
Elise Nalbandian	Notes on Jurisprudence: Natural Law (169-178)	Jurisprudence

MIZAN LAW REVIEW, Vol. 2, No. 1 (January 2008)

	Articles (Peer Reviewed)	
Tsehai Wada	Abortion Law in Ethiopia: A Comparative Perspective (1-32) http://dx.doi.org/10.4314/mlr.v2i1.55618	Criminal Law
Harka Haroye	Competition Policies and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law (33-51) http://dx.doi.org/10.4314/mlr.v2i1.55619	Competition Law
Muradu Abdo	Subsidiary Classification of Goods under Ethiopian Property Law: A Commentary (52-90) http://dx.doi.org/10.4314/mlr.v2i1.55620	Property
Lantera Nadew	Void Agreements and Voidable Contracts: The Need to Elucidate Ambiguities of their Effects (91-109) http://dx.doi.org/10.4314/mlr.v2i1.55621	Contracts
ፊልጶስ ዓይናለም	De facto Divorce (Amharic)/ ሳይፋቱ ፍቺ፡፡ (110-136) https://www.ajol.info/index.php/mlr/article/view/145459	Family Law
	Sharing Thoughts https://www.ajol.info/index.php/mlr/article/view/145461	
Norman Singer	The Early Days of the Faculty of Law, AAU (137-145)	Miscellaneous
	Notes https://www.ajol.info/index.php/mlr/article/view/145462	
Elise Nalbandian	Notes on Jurisprudence: Early Legal Positivism (146-155)	Jurisprudence
Elias N. Stebek	Notes on Legal History: Jean Mallet's Lectures on Legal History (156-167)	Legal History
	Cases (168-200)	

MIZAN LAW REVIEW, Vol. 2, No. 2 (July 2008)

Articles (Peer Reviewed)		
Takele Soboka Bulto	Between Ambivalence and Necessity in the Nile Basin: Occlusions on the Path towards a Nile Basin Treaty (201-228) http://dx.doi.org/10.4314/mlr.v2i2.56149	International Water Law
Mellese Damtie	Collation under Ethiopian Law of Successions: 'Payment by Taking Less' (229-254) http://dx.doi.org/10.4314/mlr.v2i2.55624	Successions
Elias N. Stebek	Dwindling Ethiopian Forests: The 'Carrot' and 'Stick' Dilemma (255-286) http://dx.doi.org/10.4314/mlr.v2i2.55625	Environmental Law
Khushal Vibhute	The 2007 International Convention against Disappearance: Some Reflections (281-310) http://dx.doi.org/10.4314/mlr.v2i2.55627	Human Rights
Simenek Kiros	The Trade and Environment Debate: The Normative and Institutional Incongruity (311-338) http://dx.doi.org/10.4314/mlr.v2i2.55630	Trade and Environment
Sharing Thoughts https://www.ajol.info/index.php/mlr/article/view/145464		
Norman J. Singer	Three Eye-opening Events (339-345)	Miscellaneous
Notes https://www.ajol.info/index.php/mlr/article/view/145465		
Elise Nalbandian	Kelson's Pure Theory ofLaw (346-352)	Jurisprudence
Elias N. Stebek	Zweigert and Kötz on Western European Legal Traditions (353-372)	Legal History
Case comment and case summaries **(**373-399)		

MIZAN LAW REVIEW, Vol. 3, No. 1 (March 2009)

Articles (Peer Reviewed)		
Tecle Hagos	Adjudication and Aribitrability of Government Construction Contracts (1-32) http://dx.doi.org/10.4314/mlr.v3i1.54005	Arbitration, Construction contracts
Tsegaye Regassa	Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level (33- 69) http://dx.doi.org/10.4314/mlr.v3i1.54006	Constitutional Law
Awol K. Allo	Mayhem in Darfur: The Accountability, Peace and Immunity Debate (70- 104) http://dx.doi.org/10.4314/mlr.v3i1.54007	War crimes, Human rights
Fekadu Petros	Underlying Distinctions between ADR, *Shimglina* and Arbitration (105-133) http://dx.doi.org/10.4314/mlr.v3i1.54008	Arbitration, ADR
Sharing Thoughts https://www.ajol.info/index.php/mlr/article/view/145466		
Peter L. Strauss	To and From the Community (134- 137)	Miscellaneous
Notes https://www.ajol.info/index.php/mlr/article/view/145468		
Elise Nalbandian	Notes on Jurisprudence: Positivist Pure Theory of Law— Hart's Concept of Law (138-148)	Jurisprudence
Comments		
Elias N. Stebek	River Maiteb's Location in the Ethio-Eritrean Western Border: Critical Reflections (149-166) https://www.ajol.info/index.php/mlr/article/view/145469	Public International Law
Elias N. Stebek	ICJ Judgment (1994) on the Libya/ Chad Territorial Dispute: Brief Overview and Observations (167-188 https://www.ajol.info/index.php/mlr/article/view/145470	Public International Law

MIZAN LAW REVIEW, Vol. 3, No. 2 (September 2009)

Articles (Peer Reviewed)		
Awol K. Allo	Counter-intervention, Invitation, Both or Neither: An Appraisal of the 2006 Ethiopian Intervention in Somalia (201-239) http://dx.doi.org/10.4314/mlr.v3i2.54010	Public International Law
Mulugeta Getu	Ethiopian Floriculture and Its Impact on the Environment (240-270) http://dx.doi.org/10.4314/mlr.v3i2.54011	Environmental Law
Hailegabriel G. Feyissa	European Influence on Ethiopian Antitrust Regime (271-287) http://dx.doi.org/10.4314/mlr.v3i2.54012	Competition Law
Tsegaye Regassa	Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia (288-330) http://dx.doi.org/10.4314/mlr.v3i2.54014	Human Rights
Sharing Thoughts https://www.ajol.info/index.php/mlr/article/view/145471		
Roger Briottet	French, English and Amharic: The Law in Ethiopia (331-340)	Miscellaneous
Comments		
James Krueger	A Critique of Positivism as a Belief System (341-350) https://www.ajol.info/index.php/mlr/article/view/145472	Jurisprudence
Meiraf Girma	Violence against Women: Inadequate Remedies under the CEDAW (351-357) https://www.ajol.info/index.php/mlr/article/view/145473	Human Rights
Notes		
Maru Bazezew	Constitutionalism (358-369) https://www.ajol.info/index.php/mlr/article/view/145474	Constitutional Law
Elise Nalbandian	Notes on Ronald Dworkin’s Theory of Law (370-377) https://www.ajol.info/index.php/mlr/article/view/145475	Jurisprudence

MIZAN LAW REVIEW, Vol. 4, No. 1 (March 2010)

Articles (Peer Reviewed)		
Fekadu Petros	Emerging Separation of Ownership and Control in Ethiopian Share Companies: Legal and Policy Implications (1-30) http://dx.doi.org/10.4314/mlr.v4i1.57147	Commercial Law
Taddese Lencho	Income Tax Assignment under the Ethiopian Constitution: Issues to Worry About (31-51) http://dx.doi.org/10.4314/mlr.v4i1.57148	Tax Law
Tsegaye Regassa	Learning to Live with Conflicts: Federalism as a Tool of Conflict Management in Ethiopia – An Overview (52-101) http://dx.doi.org/10.4314/mlr.v4i1.57149	Federalism
Getahun Seifu	Revisiting Company Law with the Advent of Ethiopia Commodity Exchange (ECX): An Overview (102-141) http://dx.doi.org/10.4314/mlr.v4i1.57150	Commercial Law
Book Review https://www.ajol.info/index.php/mlr/article/view/145493		
Awol Kassim Allo	The Memory of Judgment: Making Law and History in the Trials of the Holocaust (142-155)	War Crimes
Notes https://www.ajol.info/index.php/mlr/article/view/145494		
Fasil Abebe	Notes on Administrative Law (156-163)	Administrative Law
Comment https://www.ajol.info/index.php/mlr/article/view/145495		
Frehiwot Wujira	Non-trade Concerns in Interpreting General Exception Clauses of WTO Agreements (164-175)	International Trade
ቤዛ ደሳለኝ	በፍርድ ውሳኔ ላይ አስተያየት (176-182)	Miscellaneous
Cases (183-200)		

MIZAN LAW REVIEW, Vol. 4, No. 2 (Autumn 2010)

Articles (Peer Reviewed)		
Gedion Timothewos	Freedom of Expression in Ethiopia: The Jurisprudential Dearth (201-231) http://dx.doi.org/10.4314/mlr.v4i2.63087	Human Rights
Dereje Zeleke Mekonnen	From Tenuous Legal Arguments to Securitization and Benefit Sharing: Hegemonic Obstinacy – The Stumbling Block against Resolution of the Nile Waters Question (232-257) http://dx.doi.org/10.4314/mlr.v4i2.63088	International Water Law
Worku Yaze Wodage	Operation and Effect of Presumptions in Civil Proceedings: An Inquiry into the interpretation of Art 2024 of the Ethiopian Civil Code (258-296) http://dx.doi.org/10.4314/mlr.v4i2.63089	Civil Procedure
Hailegabriel G. Feyissa	The Role of Ethiopian Courts in Commercial Arbitration (297-333) http://dx.doi.org/10.4314/mlr.v4i2.63090	Alternative Dispute Resolution
Case Comment https://www.ajol.info/index.php/mlr/article/view/145479		
Belachew Mekuria Fikre	Undue Equation of 'Savings' with 'Compensation for Services'(334-347)	Labour Law
Notes		
Elise Nalbandian	Introductory Concepts on Sociological Jurisprudence (348-354) https://www.ajol.info/index.php/mlr/article/view/145480	Jurisprudence
Fasil Abebe	Notes on Administrative Law: US Experience (355-361) https://www.ajol.info/index.php/mlr/article/view/145481	
Cases (362-374)		

MIZAN LAW REVIEW, Vol. 5, No. 1 (Spring 2011)

Articles (Peer Reviewed)		
Elias N. Stebek	Conceptual Foundations of Property Rights: Rethinking *De Facto* Rural Open Access to Common-Pool Resources in Ethiopia (1-40) http://dx.doi.org/10.4314/mlr.v5i1.68766	Property Law
Adem Kassie Abebe	Human Rights under the Ethiopian Constitution: A Descriptive Overview (41-71) http://dx.doi.org/10.4314/mlr.v5i1.68768	Human Rights
Mohammed Abdo	Legal Pluralism, Sharia Courts and Constitutional Issues in Ethiopia (72-104) http://dx.doi.org/10.4314/mlr.v5i1.68769	Legal Pluralism
Tecle Hagos Bahta	Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia (105-140) http://dx.doi.org/10.4314/mlr.v5i1.68771	Foreign Arbitral Awards
Notes		
Elise Nalbandian	Sociological Jurisprudence: Roscoe Pound's Discussion on Legal Interests and Jural Postulates (141-149) https://www.ajol.info/index.php/mlr/article/view/145483	Jurisprudence
Aron Degol	Notes on Arbitrability under Ethiopian law (150-157) https://www.ajol.info/index.php/mlr/article/view/145484	Arbitration
Cases (158-174)		

MIZAN LAW REVIEW, Vol. 6, No. 1 (June 2012)

MIZAN LAW REVIEW, Vol. 6, No. 2 (December 2012)

MIZAN LAW REVIEW, Vol. 7, No. 1 (September 2013)

MIZAN LAW REVIEW, Vol. 7, No. 2 (December 2013)

MIZAN LAW REVIEW, Vol. 8, No. 1 (September 2014)

MIZAN LAW REVIEW, Vol. 8, No. 2 (December 2014)

MIZAN LAW REVIEW, Vol. 9, No. 1 (September 2015)

Articles (Peer Reviewed)		
Elias N. Stebek	Access to Urban Land and its Role in Enhancing Business Environment: Multi-track *versus* Mono-route Land-use Markets (1-36) http://dx.doi.org/10.4314/mlr.v9i1.1	Land Law
Elias N. Stebek	Challenges in Access to Urban Land for Business Activities under Ethiopian Law: Between Oligarchy and Broad-based Private Sector (37-82) http://dx.doi.org/10.4314/mlr.v9i1.2	Land Law, Law in Development
Tessema Elias	Gaps and Challenges in the Enforcement Framework for Consumer Protection in Ethiopia (83-107) http://dx.doi.org/10.4314/mlr.v9i1.3	Consumer Protection
Kinfe Micheal Yilma & Halefom Hailu Abraha	The Internet and Regulatory Responses in Ethiopia: Telecoms, Cybercrimes, Privacy, E-commerce, and the New Media (108-153) http://dx.doi.org/10.4314/mlr.v9i1.4	Cyber Law
Kinfe Micheal Yilma & Halefom Hailu Abraha	The Internet and Ethiopia's IP Law, Internet Governance and Legal Education: An Overview (154-174) http://dx.doi.org/10.4314/mlr.v9i1.5	Cyber Law
መሓሪ ረዳኢ	የሰበር ሰበርና ተግዳሮቶቹ በኢትዮጵያ (175-200) http://dx.doi.org/10.4314/mlr.v9i1.6	Justice Sector
Comment		
Mobolaji P. Ezekiel and Desmond O. Oriakhogba	Towards a Viable Local Government Structure in Nigeria: Overview of US and German Local Government Systems (201-214) http://dx.doi.org/10.4314/mlr.v9i1.7	Local Government, Comparative Law

MIZAN LAW REVIEW, Vol. 9, No. 2 (December 2015)

	Articles (Peer Reviewed)	
Elias N. Stebek	Judicial Reform Pursuits in Ethiopia, 2002-2015: Steady Concrete Achievements - *versus* - Promise Fatigue (215-257) http://dx.doi.org/10.4314/mlr.v9i2.1	Justice Sector
Elias N. Stebek	Legal Sector Reform Pursuits in Ethiopia: Gaps in Grassroots Empowerment (258-300) http://dx.doi.org/10.4314/mlr.v9i2.2	Justice Sector
Muradu Abdo	Reforming Ethiopia's Expropriation Law (301-340) http://dx.doi.org/10.4314/mlr.v9i2.3	Property Law
Nigussie Afesha	The Federal-state Intergovernmental Relationship in Ethiopia: Institutional Framework and its Implication on State Autonomy (341-368) http://dx.doi.org/10.4314/mlr.v9i2.4	Federalism
Tadesse Kassa Woldetsadik	The Grand Ethiopian Renaissance Dam and Ethiopia's Succession in Hydro-legal Prominence: A Script in Legal History of Diplomatic Confront (1957-2013), 369-407 http://dx.doi.org/10.4314/mlr.v9i2.5	International Water Law
	Comment	
Daniel Behailu	Brief Comment on the Draft Land Administration, Use, Registration and Plan Proclamation, 2007 (EC) ,408-412 http://dx.doi.org/10.4314/mlr.v9i2.6	Land Administration

MIZAN LAW REVIEW, Vol. 10, No. 1 (September 2016)

MIZAN LAW REVIEW, Vol. 10, No. 2 (December 2016)

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Source: **Ethiopian Legal Education and Training Reform Document (June 2006)**

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