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Counter-intervention, Invitation, Both or Neither: An Appraisal of the 2006 Ethiopian Intervention in Somalia

Ethiopian Floriculture and Its Impact on the Environment

European Influence on Ethiopian Antitrust Regime

Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia

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The following submissions are acceptable for publication upon approval by the Editorial Committee. Publication of an article further involves evaluation by and feedback from two External Assessors.

Articles: Research articles that identify, examine, explore and analyze legal and related principles, concepts and statutory stipulations based on research findings from primary and secondary sources and that aim at interpretation, description, exploration or diagnosis towards the solution of problems in the realms of application and development of laws;

Comments: Case comments that highlight and analyze issues, laws and their interpretation and application in case decisions or fact situations under consideration; *Comments* on concepts and principles related with law or relevant to the legal profession.

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Articles shall not exceed 30 (or under exceptional circumstances 35) pages. *Comments* may range from five to ten pages. The maximum size for *Thematic Comments* shall be twenty pages.

ARTICLES

- Counter-intervention, Invitation, Both, or Neither: An Appraisal of the 2006 Ethiopian Intervention in Somalia

- Ethiopian Floriculture and Its Impact on the Environment: Regulation, Supervision and Compliance

- European Influence on Ethiopian Antitrust Regime: A Comparative and Functional Analysis of Some Problems

- Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia

COUNTER-INTERVENTION, INVITATION, BOTH, OR NEITHER ?

An Appraisal of the 2006 Ethiopian Military Intervention in Somalia

Awol Kassim Allo [*]

> SOMALIA: a land of clan-republics where the traveler had to secure protection from each group whose territory he has traversed.[1]
>
> (Ioan Lewis and James Mayall)

Introduction

The genesis of the 2006 military confrontation between Ethiopia and the Union of Islamic Courts traces its roots to colonial boundaries. Since independence, various Somali governments have seen the Ogaden region of Ethiopia, the north-eastern provinces of Kenya and the State of Djibouti as integral parts of what they often refer to as the 'Greater Somali Republic.'[2] In

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[*] LL. B (Addis Ababa University), LL. M (Notre Dame Law School, the University of Notre Dame, USA), PhD Student, (The School of Law, University of Glasgow, UK); Lecturer in Law, St. Mary's University College, Faculty of Law (Currently on study leave). I am extremely indebted for all those who in different ways helped enrich the ideas contained in this article. Special thanks go to my friends Suzanne DeBerry, Nicholas Sorochinsky, Katja Frimberger and Abadir Mohammed for providing a substantive and editorial critique on the manuscript. All the remaining errors *et al* remains those of mine. (For comments and suggestions, the author can be contacted at: a.allo.1@research.gla.ac.uk).

[1] Ioan Lewis and James Mayall, Somalia, in Mats Berdal and Spyros Economides(ed.), United Nations Interventionism (1991-2004), (Cambridge University press: Cambridge, 2007), p-10.

[2] See Testimony by David H. Shinn, *Somalia: U.S. Govrenemnt Policy and Challenges*, Hearing before the Subcommittee on African Affairs of the Committee on Foreign Relations, United States Senate , July 11, 2006, P-3. He told the Foreign Relations Committee: "It is also clear that some leaders in the UIC, certainly including Hassan Dahir Aweys, wish to reenergize the Greater Somalia concept by incorporating into Somalia those Somali-inhabited parts of Ethiopia, Kenya, and Djibouti. Wikipedia; Mohamed Olad Hassan, 'Islamic Leader Urges 'Greater Somalia', AP wire, reported in forbes.com, 18 November 200, in Wikipedia, Inside Somalia and the Union of Islamic Courts, available at: <https://secure.wikileaks.org/wiki/Inside_Somalia_and_the_Union_of_Islamic_Courts,> [accessed on 22 April 2009]; International Crisis Group, Somaliland: Time For African

particular, the claim to the Ogaden region of Ethiopia has lingered in the minds of some Somali political elites for decades and has been a source of serious and continuing anxiety to Ethiopia.[3] The two countries have fought a catastrophic war in 1977 as a result of Somali invasion of the eastern part of Ethiopia owing to Somalia's claim to territories that have been parts of the Ethiopian State.

Although Somalia has not had an effective government since the overthrow of the Barrie government in 1991, the hostility between the two States remained as suspicious as ever. However, the absence of government and the existence of various competing factions within Somalia itself, created a state of relative peace—one that can be best described as cold peace. This setting has descended into a complete quagmire when Islamist forces under the name of the Union of Islamic Courts, (hereinafter the UIC), stepped into Somalia's political spotlight.

In mid-2006, the UIC and Ethiopia started accusations and counter-accusations. The UIC blamed Ethiopia of interfering in Somalia's internal affairs while Ethiopia in turn accused the UIC of promoting a hidden agenda aimed at destabilizing the unity of the Ethiopian State. Ethiopia also contended that the leadership of the UIC was controlled by forces that are still actively pursuing the vision of a Greater Somalia—a vision that aspires to integrate Ethiopia's Somali-speaking Region of Ogaden into mainland Somalia and hence threatens Ethiopia's political independence and territorial integrity.[4] The threat of "terrorism" and "violent extremism" was also another important factor which informed the context of the conflict. Indeed, the military confrontation between Ethiopia and the UIC might have been averted had it not been for the entrenched history of hostility that exacerbated the longstanding mistrust, leading to the creation of what Ethiopia deemed a state of "clear and present danger" to its sovereignty.

Ethiopia argued that its actions in Somalia were justified by the invitation of the Transitional Federal Government (TFG) and its inherent

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Union Leadership, Executive Summary And Recommendations, Africa Report No. 110, 23 December 2006, p-1.

[3] See Response of the Ethiopian Government to the UN Monitoring Group on Somalia, annexed to Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1676(2006), Annex X, p-63.

[4] Dawit G, A Critical and Timely Resolution to Defend our Sovereignty, The Ethiopian Herald, Vol. LXIII, No.072, 3 December 2006, p-3; David Whitehouse, The US Proxy War in Africa**:** Why Did Ethiopia Invade Somalia?, available at <http://dissidentvoice.org/Jan07/Whitehouse07.htm>, (Last accessed 22 April, 2009), 7 January 2009; See also Testimony by David Shinn, *supra* note 2.

right to individual and collective self-defense. Due to the impossibility of providing an exhaustive account of these two continuously evolving but also shifting norms (invitation and self-defense) in the space available here and the consequent difficulty of doing justice to the different sides of the ever growing debate, self-defense is not discussed in this article. The article therefore concentrates on the examination of the legality of i*nvitation* and another closely related concept of intervention, *counter-intervention* (although the latter is not invoked as Ethiopia's official justification), with the view to situating Ethiopia's conduct in the norms of international law.

Drawing on contemporary norms of international law governing the use of force and military interventions, this article seeks to evaluate the legality of the 2006 Ethiopian military intervention in Somalia. Traversing through the principles of democratic legitimacy, international law principles of effective control and recognition, and other issues the article reflects on the legality of Ethiopia's intervention on behalf of Somalia's Transitional Federal Government (hereinafter the Transitional Government or the TFG). By calling attention to the instabilities of the normative foundations of invitations in international law, the article will ask whether the TFG is indeed a government proper commanding the moral and legal authority to extend invitation to foreign forces to intervene in the internal affairs of the State. Questioning the validity of Ethiopia's claim for invitation, the article further attempts to posit the unconventional state of affairs present in Somalia and explores whether there is a need for a different approach in the legal analysis of how invitation may be granted.

Working through emerging theories of international law, the article tries to extrapolate the form of governmental legitimacy that is required to invite foreign forces into the State when there are two or more competing factions. Accordingly, it asks whether the TFG's international recognition is, of itself, a sufficient parameter to entitle it to speak for the Somali State in light of international law and as such confers on it, rather than its Islamist rivals, a better right to invite foreign forces into the country.

Despite allegations by the UIC and other forces, Ethiopia consistently denied sending its troops to Somalia until it formally declared war on 24 December 2006.[5] Nonetheless, Ethiopia admitted to sending what it called "military trainers and advisers" to help strengthen the security and defensive capabilities of the fragile Transitional Federal Government even before its

[5] Report of the Secretary General to the Security Council on the Situation in Somalia, S/2007/115, para-5.

declaration of war.[6] In addition to the issues raised in the preceding paragraph, this article interrogates whether the provision of "military trainers and advisers" by Ethiopia upon the invitation of the TFG constitutes a violation of Article 2(7) (the non-intervention principle) and/or 2(4) (prohibition on the use or the threat of force) of the Charter. Finally, against the backdrop of the UN Charter and general international law, the article will aspire to shed light on possible exceptions to the non-intervention principle and to determine whether Ethiopia's conduct neatly fits into any of those exceptions.

1. Prelude: A Brief Account of the Setting

With the advent of the Islamic Courts claiming to be a unifying force and savior of the failed Somali State, the political landscape in Somalia changed significantly and abruptly. Although not an entirely new phenomenon in Somali politics, the new face of Islamic militancy exacerbated the threat to Ethiopia's sovereignty reinvigorating Ethiopia's sense of insecurity.[7] Indeed, as will be discussed shortly, this militancy and the threat of terrorism associated with it constituted one of the four major factors Ethiopia raised to justify its argument for self-defense.[8] The Ethiopian Premier associated the UIC with Eritrea and global terrorism. He said:

> . . . [y]ou have the messenger voice of the government of Eritrea who has been actively involved in the fighting in Mogadishu. Theirs is not a specifically Somali agenda. And finally, you have the jihadists led by Al-Itihad-al-Islamia, which I am sure you know, is registered by the United Nations as a terrorist organization. And so, for us, the Islamic Courts Union is not a homogeneous entity. Our beef is with Al-Itihad, the internationally recognized terrorist organization. It so happens that at the moment the new leadership of the Union of the Courts is dominated by this particular group. Indeed, the chairman of the new council that they have established is a certain colonel who also happens to

[6] See Emmanuel Fanta, *infra* note 14.

[7] *See* for example, Ioan and James, *supra* note 1 at 115. To demonstrate the unfathomable nexus between religion (Islam) and militancy in the political life of Somalia, Ioan and James made reference to a Somali fundamentalist Sheikh, who was "the most brilliant poet of his age" and proclaimed a holy war against Christian occupiers. The continuity of the religious vigor of Somali politics and the changing face of "terrorism" on the international arena played its own part in taking situations out of control. Ethiopia's experience with *Ali-Itihad* was also another reinforcing factor.

[8] See Meles Zenawi, Prime Minister of Ethiopia, Press Conference, at <http://www.ethioembassy.org.uk /Archive/PM%20Meles%20Zenawi%20Press%20Conference%2027th%20June%202006.html>, (Last accessed 19 February 2009).

> be the head of Al-Itihad. Now, the threat posed to Ethiopia by the dominance of the Islamic Courts by Al-Itihad is obvious.[9]

In the months leading up to the outbreak of a full-scale military confrontation, Ethiopia and the UIC had engaged in exchange of serious words that signaled the inevitability of an open military confrontation between the two.[10] While the UIC accused Ethiopia of sending its military into Somalia to support the Transitional Government, the Ethiopian government held the UIC responsible for joining hands with Eritrea to serve as a sanctuary for Ethiopian rebel groups bent on dismantling the constitutional order in Ethiopia.[11] The United Nations Security Council noted the existence of interventions in the internal affairs of Somalia by several countries and urged all parties to refrain from 'every hostile action' which could further exacerbate the already volatile security situation in Somalia.[12] Indeed, in Resolution 1725 (adopted 18 days before the culmination of the hostility into a full-scale war), the Council expressly endorsed a proposal by IGAD (Inter-Governmental Authority for Development*)* to exclude neighboring States of Somalia, which have a vested interest of their own in Somalia, from the 'Protection and Training Mission for Somalia'.[13]

Before Ethiopia officially joined the war in support of the TFG against the UIC, the spiritual leader of the Islamic Courts, Sheik Hassen Dahir Aweys, publicly stated that "Somalia is in a state of an all-out-war with the Ethiopian occupiers" and called on Somalis of all political spectrum to join the holy war (jihad) against what he described as "the Ethiopian

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[9] *Id*.

[10] See Statement by Shaikh Sharif Shaikh Ahmed in a Letter Addressed to the Monitoring Group on Somalia, Annex XIV, in the Report of the Monitoring Group on Somalia (2006); *supra* note 3 at p-68.

[11] See Letter from the Permanent Mission of the Federal Democratic Republic of Ethiopia to the United Nations, dated 15 June 2007, accusing the UIC of infiltrating "individuals and groups" and "some parties" which it said "bent on assisting the activities of these terrorist groups", Annex VII to the Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1724 (2006), S/2007/436, p-44-5; See also Shaikh Sharif Shaikh Ahmed, id.

[12] UNSC Res. 1725, 6 December, 2006, Preamble, P-2, States that " calls upon all parties inside Somalia and all other States to refrain from action that could provoke or perpetuate violence and violations of human rights, contribute to unnecessary tension and mistrust, endanger the ceasefire and political process, or further damage the humanitarian situation.".

[13] UN Security Council Resolution 1725/2006, S/RES/1725(2006), Para-3.

aggression".[14] Several days after Dahir Aweys called for a holy war (Jihad) against Ethiopia, the Ethiopian Prime Minister publicly announced that "The Ethiopian government has taken self-defensive measures and started counter-attacking the aggressive extremist forces of the Islamic Courts and foreign terrorist groups," [15] thereby indicating a state of war. At this point, it became clear that Ethiopia's intervention had moved beyond material support to the TFG and it, in fact, became a party to the ensuing hostility with the UIC.

2. The Legality of Ethiopia's Military Intervention in Somalia

The end of the Second World War ushered in a new world order, a world order founded on the promises of peace and security to the peoples of the United Nations in accordance with the high purposes and principles set forth in Article 1 and 2 of the Charter. Under the Charter, the peoples of the United Nations have undertaken to search for a common ground of cooperation on matters of peace and security.[16] Indeed, the quintessential notions of global peace and world (human) security, if not sanctity, have been accorded prominent significance and are the cornerstone of this distinctive international treaty: the UN Charter.

Central to this new international legal order is the prohibition on "the threat or use of force" proclaimed in Article 2(4) of the Charter. In the aftermath of the horrific tragedy caused by the two world wars, the victorious powers have shown a determination to "save succeeding generations from the scourge of war" and vowed to proscribe wars of conquest and expansion between States.[17] To that end, they set forth their determination and commitment in Article 2(4) of the Charter in the following terms:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

Article 2(4) of the UN Charter is considered as the nucleus of international prohibition on the use of force.[18] Professor O'Connell maintains that the

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[14] Emmanuel Fanta, Regional Coordinator for Great Lakes Conflict Early Alert Report, Analysis: Ethiopian intervention in Somalia in context, available at <http://www.bloggernews.net/14238>, (Last accessed 20 March 2008).

[15] Report of the Secretary-General on the Situation in Somalia to the Security Council, S/2007/115, 28 February 2007, para-5.

[16] UN Charter, Adopted on 26 June 1945, entered into force 24 October 1945, in accordance with Article 110, Preamble, art.1 & 2.

[17] *Id* at Preamble.

[18] Mary Ellen O'Connell, The Myth of Preemptive Self-Defense, The American Society of International Law Task Force (2002), p-3; Oscar Schachter, The Right of State to

prohibition set forth in Article 2(4) of the Charter recognizes only two "explicit exceptions".[19] The two notable exceptions are provisions relating to the use of force by the Security Council under the rubric of maintaining international peace and security[20] and the use of force in individual or collective self-defense reserved to States under Article 51 of the Charter.[21] Furthermore, the prohibition under Article 2(4) of the Charter applies not only to the use of force *per se*, but also to the *threat of force.*[22] The authority of the Security Council to use force under the rubric of maintaining international peace and security is elastic and often discretionary, and resort to use of force by individual States under Article 51 as well as customary international law is subject to rigorous and controversial requirements. Although self-defense is beyond the scope of this article, the legality of Ethiopia's actions predating the resort to the full-scale armed confrontation with the forces of the UIC will be analyzed by reference to the general prohibition on the use of force.

The events that culminated in a full-scale war between Ethiopia and the UIC on 24 December 2006 were preceded by other actions which involved the States neighboring Somalia, mainly, Eritrea and Ethiopia.[23] These two States accused each other of meddling in the internal affairs of the Somali State in pursuit of their own national agenda.[24] Ethiopia accused Eritrea of trying to use Somalia to achieve its mission of destabilizing Ethiopia,[25] and

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Use Armed Force, 82 Mich. L. Rev. 1620, 1624 (1984); Ian Brownlie, International Law and the Use of Force by States, (Clarendon Press: Oxford, 1963), p-112.(arguing that the customary rule on the prohibition of force is 'restated and reinforced' by Article 2, paragraph 4.

[19] Mary Ellen O'Connell, *supra* note 18 at 3.

[20] Mary Ellen O'Connell, *supra* note 18; UN Charter, *supra* note 16, art.39.

[21] Christine Gray, International Law and the Use of Force, (Foundations of Public International Law: Oxford University Press: Oxford, 2000), at 86, positing academic debate on the scope of the right to self-defense that "the right was fixed in customary international law in 1945 and is apparently not susceptible of restriction in the light of subsequent State practice"; Brownlie, *supra* note 18 at 269.

[22] See the United Nations Charter, *supra* note 16 at art. 2(4).

[23] See Report of the Monitoring Group on Somalia Pursuant to Security Council Res. 1587(2005), S/2005/625, para-8, 25; Report of the Monitoring Group on Somalia(2006), *supra* note 3, paras-6, 7, 10, 11, 18, 19.

[24] See *infra*, notes 25 and 26.

[25] For Ethiopia's accusation of Eritrea, see Global Policy Forum, Blame Game Over Somali Conflict, at <http://www.globalpolicy.org/security/issues/ethiopia/2007/0413blame.htm>, April 13, 2007, (Last accessed 5 May 2009); See also Interview with the Ethiopian Prime Minister Meles Zenawi, Ethiopian Herald, Vol. LXIII, No. 094, 28 December 2006;

Eritrea accused Ethiopia of meddling in Somali politics to advance its own domestic agenda.[26] Indeed, many commentators have labeled the 2006 Ethiopia-Somalia war as a 'proxy war' between Ethiopia and Eritrea.[27]

Professor Oscar Schachter posits the question of whether or not the prohibition enunciated in Article 2(4) of the Charter is limited to the use of armed force properly so called; or embraces other uses of coercive measures.[28] For Schachter, an even more important question is the central debate surrounding the content and substance of the phrase, "the threat or use of force against the territorial integrity or political independence" of States stipulated in Article 2(4).[29] For most experts on the use of force, including Schachter, the reference to 'force' instead of 'war' in this cardinal provision of the Charter underscores the fact that Article 2(4) prohibits not only the resort to armed force, but also the resort to other violent measures short of war.[30] In this regard, Schachter raises two central questions relevant to analyzing the legality of Ethiopia's pre-war conduct. He first asks whether force has been used within the meaning of Article 2(4) "when a [State] provides arms to outside forces engaged in hostilities or when it trains troops of an adversary party."[31] He also asks whether a State can be considered to have "indirectly employed force when it allows its territory to be used by

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Resolution of the House of Peoples Representatives, (8th Regular Meeting), Ethiopian Herald, Vol. LXIII, No.070, 1 December 2006, p- 1, authorizing the Ethiopian government to "take all legal and necessary steps".

[26] For Eritrea's accusation of Ethiopia, see the Report of the Monitoring Group on Somalia; *supra* note 3, Annex-VIII, Para-3.

[27] See the 2005 Report of the UN Monitoring Group, *supra* note 23 at para-45; Joe De Capua, Is Somalia a Proxy War between Ethiopia and Eritrea? 27 July 2007, available at< http://www.voanews.com/english/archive/2007-07/2007-07-27 voa27.cfm?CFID=180858569&CFTOKEN=25050208 &jsessionid =6630a78416705b0a7ed576c30677e6925769>, (Last accessed on 23 April 2009).

[28] Oscar Schachter, *supra* note 18 at 1624.

[29] *Id*; See also Mary Ellen O'Connell, *supra* note 18 at 4.

[30] Oscar Schachter, *supra* note 18 at 1625; Malcolm N. Shaw, International Law, (Cambridge University Press: 2005: 5th ed.), p-1018; Erin L. Guruli, The Terrorism Era: Should the International Community Redefine its Legal Standards on Use of Force in Self-Defense?, Willamette Journal of International Law and Dispute Resolution, 2004, p-103; Timothy Thriller, Principles of Public International Law, (Cavendish Publishing Limited: Slondon/Sydney: 1999), p-247; D. J. Harris, Cases and Materials on International Law, (Sweet and Maxwell: London: 2000: 5ed.), p-863. But see Sir Arthur Watts and Sir Robert Jennings, *infra* note 68 at 428.

[31] *Id*.

troops fighting in another country."[32] In response to these questions, Schachter advances his view of the prohibition in the following terms:

> These questions have tended to be treated under the rubric of "intervention," a concept which has often been dealt with independently of Article 2(4) and defined as dictatorial interference by a State in the affairs of another State. However, Article 2(4) remains the most explicit Charter rule against intervention through armed force, indirect and direct, and it is pertinent to consider such action as falling within the scope of the prohibition.[33]

Although Schachter recognizes the tendency of treating these situations within the purview of the doctrine of non-intervention rather than the prohibition under 2(4), he favors a broader construction of Article 2(4), bringing this conduct, i.e., training and provision of arms to an adversary and allowing one's own territory to be used for attack against another State, within the scope of the prohibition under Article 2(4).[34] On the other hand, Sirs Robert Jennings and Arthur Watts consider intervention to constitute a violation of Article 2(4), when that intervention involves the use of force.[35] Defending his claim for a broader construction of Article 2(4), Schachter notes: "it is pertinent to consider such actions [training of the adversary's military, provision of arms and allowing one's own territory to be used by the adversary] as falling within the scope of the prohibition set forth under Article 2(4)".[36]

This view is consistent with the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty which unequivocally excludes any possibility of a direct or an *indirect* intervention either in the internal or external affairs of the State.[37] The same view is reflected in the 1970 General Assembly

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[32] Oscar Schachter, *supra* note 18 at 1625.

[33] *Id*. See also Sir Robert Jennings and Sir Arthur Watts, *infra* note 68, at p-428-9, arguing that "Where intervention involves the use of armed force it is likely additionally, to violate Article 2(4) of the Charter of the United Nations, which prohibits threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the principles of the United Nations".

[34] *Id*.

[35] See Sir Robert Jennings and Sir Arthur Watts, *infra* note 68 at 428.

[36] *Id*.(Emphasis mine)

[37] GA Res. 2131(XX), The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, 21 December 1965, (GA Res.20th Sess., Supp. 14, p-11. (Note that arts., 1, 2, 3, and 5 of this Declaration have been incorporated *verbatim* into the 1970 Declaration on Friendly Relations in the section dealing with Non-intervention).

Declaration on the Principles of International Law (hereinafter the Declaration) which explicitly reaffirmed the "duty of any State to refrain . . . from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State".[38] Elaborating on the contents of Article 2(4) of the UN Charter, the Declaration reiterated "the duty of every State to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State".[39] This Declaration was adopted in accordance with the Charter of the United Nations and considered not only as an "elaboration or reiteration" of the general principles enunciated in the Charter of the United Nations, but also as a document of a more profound importance reflecting the *opinion juris* of States.[40] Reaffirming the crystallization of this Declaration into a norm of customary international law, the World Court has proclaimed the following:

> The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.[41]

In the *Military and Paramilitary Activities in and Against Nicaragua case* (hereinafter the *Nicaragua case)*, the International Court of Justice was confronted with the question of the legality of intervention by a foreign State in support of non-State forces in an internal conflict. In dealing with the issue of "the sending by a State of armed bands to the territory of another State,"[42] the Court held that such an act could be held to constitute an "armed attack" if "such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces".[43] However, the Court expressly declined to hold that "assistance to rebels in the form of the provision of

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[38] GA Res. 2625(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970), (hereinafter GA Res. 2625(XXV)), Preamble, para-9; See also

[39] *Id* at Principle 1(emphasis added).

[40] Military and Paramilitary Activities in and Against Nicaragua, (United States of America v. Nicaragua)(hereinafter Military and Paramilitary Activities in and Against Nicaragua), 1986 I.C.J. 14 (June 27), para-188.

[41] *Id* at para-188.

[42] *Id* at para-195.

[43] *Id*.

weapons or logistical or other support" constituted an "armed attack"[44] justifying resort to force. The Court, nevertheless, reaffirmed the position of the law proclaiming that "such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States".[45] Thus, although the provision of weapons, logistics and other assistance to a rebel force may not necessarily amount to an "armed attack" against the territorial integrity and political independence of the State" triggering the application of Article 51 of the Charter, it does amount to a violation of Article 2(4) and/or 2(7) of the Charter. According to the Court's ruling, a conduct by a nation in support of a rebel force in internal conflict, depending on its scale and effect, could amount to either a violation of 2(4) and/or 2(7), although the resort to self-defensive measures by any State requires to be preceded by a significant action amounting to an "armed attack".[46]

International law generally recognizes interventions under certain strictly regulated circumstances. Expressing his view of Article 2(4), Professor Schachter makes an explicit reference to impermissible "dictatorial interventions"[47], implying the permissibility of "non-dictatorial" or non-coercive interventions such as those undertaken through lawful invitation. For example, Watts and Jennings contend that British intervention in Jordan and American intervention in Lebanon in 1958, British interventions in Uganda, Kenya and Tanganyika in 1964, German Democratic Republic's (GDR) intervention in Somalia in 1977, upon the invitation of the respective leaders of those States, excludes the illegality of their interventions.[48] Invitation, therefore, legitimizes an otherwise illegitimate action by other States.

Most qualified publicists in international law do not dispute the legality of non-coercive interventions such as those conducted by invitation because of the absence of apparent incompatibility with the Charter and general international law.[49] A lawful intervention by invitation does not transgress

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[44] *Id*.

[45] *Id*.

[46] See id at para-195 *cum* UN Charter, *supra* note 16, art. 2(4) and 2(7), except in cases where international law required provision of assistance to peoples struggling for the enjoyment of the right to self-determination.

[47] Oscar Schachter, *supra* note 18 at 1624; See also Lassa P. Oppenheim, 1 International Law, (Sir Hersch Lauterpacht ed., 8th ed. 1955), 134.

[48] Robert Jennings and Arthur Watts, *infra* note 68.

[49] Military and Paramilitary Activities in and Against Nicaragua, *supra* note 40, Para-246, holding intervention by invitation "allowable at the request of the government of a State"; Thomas C. Heller & Abraham D. Sofaer, Sovereignty: The Practitioner's Prospective, in Problematic Sovereignty: Contested Rules and Political Possibilities

upon the protected domains of domestic jurisdiction, political independence and sovereignty. For example, distinguishing between two conceptions of sovereignty, Stephen D. Krasner claims that "voluntary actions by rulers, or invitations, do not violate international legal sovereignty".[50]

With the mushrooming of a plethora of overarching human rights regimes and the continued recognition by the international community of people's right to democratic governance, an era of exclusive Westphalian sovereignty has come to a close. Today, sovereignty is increasingly understood by States not only as a right/entitlement but also as a responsibility requiring a balance between internal legitimacy of regimes and their external competence to call on others, when necessary, to protect the essential interest of their State. Regarding the State of post Cold War conception of sovereignty, former Secretary General of the United Nations, Dr. Kofi Anan, said that: "State sovereignty, in its most basic sense, is being redefined .... States are now widely understood to be instruments at the service of their peoples, and not vice versa".[51] From this, one can safely say that in the exercise of sovereign power on behalf of the people of the State, governments can voluntarily allow others to intervene to the extent that such an intervention is in the interest of the people of the State.

On the other hand, this "redefined" conception of sovereignty also brings with it the right and responsibility of other States to intervene in another State in order to stop egregious abuse of human rights. Nowhere is this evident than in the Constitutive Act of the African Union where the responsibility of the Union to protect is coined not just in terms of the 'responsibility' to protect but rather in terms of the "right" of the Union to intervene. One of the founding principles of the Organization enunciated under Article 4(h) of the Constitutive Act proclaims "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity".[52]

(Stephen D. Krasner ed., 2001), 24, 25; Ian Brownlie, *supra* note 18 at 317; Malcolm N. Shaw, International Law, (Cambridge Press: 2004:5ed.) at 1042; See also L. Doswald Beck, The Legal Validity of Military Intervention by Invitation of the Government, 56 BYBIL, 189; David Wippman, *infra* note 56 at 446-47; Martin Dixon and Robert MacCorquodale, Cases and Materials on International Law, (4th ed.: Oxford University Press: 2003, p-557.

[50] Stephen D. Krasner, id, at pp-1, 11.

[51] Kofi A. Annan, *Two Concepts of Sovereignty*, THE ECONOMIST, Sept. 18, 1999, at 49, 49, *available at* <http:// www.un.org/News/ossg/sg/stories/kaecon.htm>, in W. Michael Reisman, Why Regime Change Is (Almost Always) a Bad Idea, 98 Am. J. Int'l L. 516, 517.

[52] The Constitutive Act of the African Union, 4(p).

Although not yet a well settled rule of general international law, there is no doubt that the norm is evolving and that under the authorization of the Security Council, States can intervene to protect civilians in the context of an armed conflict. For example, Reisman argues that contemporary international law recognizes the right/responsibility of States to intervene in cases of catastrophic humanitarian crises and/or gross and massive violations of human rights.[53] Others tie the right of intervention to the presence of an alarming state of human rights violations culminating into genocide, ethnic cleansing, war crime and crimes against humanity.[54] These rudimentary but evolving norms have been catalogued into the 2005 World Summit Outcome Document, a non-binding consensus document by the high-level plenary meeting of the General Assembly and referred to as the "Responsibility to Protect" (R2P).[55] The principles proclaimed in paragraphs 138-139 of the 2005 World Summit Outcome document (A/RES/60/1/2005) have been subsequently reaffirmed by the Security Council Resolution 1674 (S/RES/1674/2006) on the protection of civilians in armed conflict. The consensual adoption of these principles by the General Assembly, their reaffirmation by the Security Council, their binding status under the Constitutive Act of the African Union and the emblematic character of the

[53] Michael Reisman, *infra* note 122 at 795.

[54] Fielding, Taking the Next Step in the Development of New Human Rights: the Emerging Right of Humanitarian Assistance to Restore Democracy, 5 Duke J. Comp. & IL(1996) 329; Chadwick, Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict (1996); Richard Falk, The Complexities of Humanitarian Intervention in Africa, A New World Order Challenge, 17 Michigan Journal of International Law,(1996), 491; See also General Assembly Resolution 60/1, 2005, World Summit Outcome Document, A/60/L.1, 24 October 2005, at Para-139 where the member States of the General Assembly proclaimed to ". . . .take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity"; United Nations General Assembly, 2005 World Outcome Document, Follow up to the Outcome of the Millennium Summit, A/60/L.1, 15 September 2005, paras-138-139. This two paragraphs were re-articulated and given recognition by Security Council in resolution 1674(2006) at para4.

[55] See General Assembly Res. No.60/1(2005), World Summit Outcome Document, *supra* note at 54. See also Constitutive Act of the African Union, adopted in Lomé, Togo, 11 July 2000. The treaty provides member States of the Union the right to intervene in other States when gross violations of human rights occur. The UN General Assembly adopted Res. No. 63/308(A/RES/63/308), deciding to continue "consideration of the responsibility to protect".

norms (war crimes, genocide, crimes against humanity, ethnic cleansing) in question and their peremptory status, is a typical demonstration of the rapid crystallization of the doctrine of the R2P into a binding norm of international law.

Wippman enumerates four situations which constitute an exception to the doctrine of non-intervention[56]: intervention by invitation of a lawful internal authority[57]; counter-intervention designed to offset an illegal prior intervention by another State[58]; intervention in support of various substantive ends such as democracy, human rights[59], or self-determination[60]; and self-defense[61].

Ethiopia repeatedly argued that its intervention was justified by invitation of the internationally recognized government of Somalia and its inherent right to individual and collective self-defense under the Charter of the United Nations.[62] With the above rules and precedents as a background, the next sections will focus only on one of the official justifications of Ethiopia, namely, invitation, and another possible basis of justification, i.e., counter-intervention, will be examined with the view to test the validity of Ethiopia's potential claims under international law.[63]

3. Intervention by *Invitation* from Lawful Internal Authority

Lauterpacht considered external assistance to governmental authorities to suppress an internal revolt as 'perfectly legitimate' if the intervention is

[56] David Wippman, Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict, 27 Colum. Hum. Rts. L. Rev. 435, 446.
[57] *Id.*
[58] *Id*.
[59] *Id.*
[60] *Id*.
[61] UN Charter, *supra* note 16 at art. 51.
[62] See also Statement by Prime Minister Meles Zenawi with *Al Jazeera* saying that "We did not invade Somalia. We were invited by the duly constituted government of Somalia, internationally recognized government of Somalia to assist them in averting the threat of terrorism."
[63] Since Ethiopia did not ground its intervention on its moral or legal obligations to promote substantive ends such as the promotion of human rights, self-determination and democracy, or any humanitarian motives, those exceptions are not discussed here. Counter-Intervention, however, is discussed not because Ethiopia has anchored the legality of its intervention on its right to counter-intervention, but rather because, in the view of the author, it is a ground that seems to offer a response to Ethiopia's possible lawful response to the level of threat that clouded Ethiopia's political and territorial interest at the time.

requested by the government.[64] Although intervention by the invitation of rebel forces has been consistently treated as a violation of post-Charter rules of international law, intervention by the invitation of the legitimate State governments has never been questioned in principle. Indeed, some writers go to the extent of asserting that the ability to invite foreign forces is an expression of the sovereign authority of the inviting State.[65] However, as Brownlie notes, the controversy over the legality of intervention crops up when "the legal status of the government which is alleged to have given consent is a matter of doubt".[66] Summarizing the factors that create doubts about the legality of particular interventions by invitation, Beck notes:

> The reasons given for such doubts are variously stated to be the inability of a shaky regime to represent the State as its government, a conflict with the principle of self determination or a violation of the duty of non-intervention in the internal affairs of another State. . . . It is submitted that there is, at the least, a very serious doubt whether a State may validly aid another government to suppress a rebellion, particularly if the rebellion is widespread and seriously aimed at the overthrow of the incumbent regime.[67]

Jennings and Watts articulated what they consider to be the essential elements necessary for a lawful intervention by invitation.[68] They emphasized the ability of the inviting party to meet the triple tests of legitimacy, effectiveness and recognition.[69] An act of intervention by invitation, Jennings and Watts contend, will be lawful only if the party extending the invitation effectively controls the territory of the inviting State and is a legitimate representative of the people within the inviting State.[70] Viewed from this perspective, the debate as to whether the TFG could invite the Ethiopian forces turns on the

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[64] Lauterpacht, Recognition, in Malcolm N. Shaw, *supra* note 49 at p-1042.

[65] See Thomas C. Heller & Abraham D. Sofaer, *supra* note 49.

[66] Ian Brownlie, International Law and the Use of Force by States 317 (1963), in Christopher J. Le Mon, Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested, 35 N.Y.U. J. Int'l L. & Pol. 741, 743.

[67] L. Doswald Beck, *supra* note 49.

[68] Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law, (9th ed.), (Longman: 1992), at 150, 435-438. L. Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', 56BYIL, 1985, p-189 in Malcolm N. Shaw, *supra* note 49 at 1042.

[69] Robert Jennings and Arthur Watts, id at 435-438.

[70] Jennings and Watts, *supra* note *68* at 437,arguing that "when there exists a civil war and control of a State is divided between warring factions, any form of interference or assistance (except probably of a humanitarian character) to any party amounts to intervention contrary to international law."; Christopher J. Le Mon, *supra* note 66 at 744-746; David Wippman, Treaty-Based Intervention: Who Can Say No?, 62 U. Chi. L. Rev. 607, 624-625; But see David Wippman, *supra* note 56 at 439-40.

ability of the TFG's legal authority and constitutional legitimacy to call upon external forces to come into the State to do things which, under normal circumstances, are exclusively reserved to the "government of Somalia."

However, the question is far from being that simple. International law does not provide for the parameters that help determine a 'legitimate government' or a government with the 'legal authority' capable (legally and factually) of speaking on behalf of the State when there is no one party that is decisively in control and has visibly greater legitimacy than other warring factions. Although contemporary international law provides some indications, it does not offer a settled and clear-cut solution for the problems relating to determination of various conceptions of legitimacy, i.e., legitimacy of origin vis-à-vis legitimacy of exercise and internal legitimacy vis-à-vis external legitimacy.[71]

For example, the United States intervention in Grenada involved a debate about the legitimacy of alleged invitation of the United States' military by the Governor General of Grenada.[72] The debate following the Grenada episode turned not only on the existence of any such invitation, but also on the legal capacity of the Governor General to extend an invitation on behalf of the Island.[73] Justifying United States' intervention in Panama, the U.S. State Department invoked the right to assist the "lawful and democratically elected government in Panama".[74] However, the "lawful and democratically elected government" referred to above, had been prevented from taking office by General Noriega, *de facto* "chief executive officer", and the point of contention was therefore whether an elected head of State that was prevented from taking the oath of office could have the legal authority to invite external forces into the country.[75] Responding to this contention, Shaw held the view that the notion of a legitimate and democratic government that has not yet taken office inviting an external armed force "runs counter to the test of acceptance in international law of governmental authority, which is firmly based upon effective control rather than upon the nature of the regime, whether democratic, socialist or otherwise".[76]

Even in situations where the government is a legitimate representative of the people, most writers argue that "the traditional rule of permitting third-

[71] See generally Jean D'aspremont, *infra* note 114.
[72] Malcolm N. Shaw, *supra* note 49 at 1042.
[73] J. N. Moore, Law and the Grenada Mission, Charlottesville, in Malcolm N. Shaw, *supra* note 49 at p-1042.
[74] See Malcolm N. Shaw, *supra* note 49 at 1042.
[75] *Id* at p-1042.
[76] *Id* at p-1042.

party assistance to governments would not extend to aid where the outcome of the struggle has become uncertain or where the rebellion has become widespread and seriously aimed at overthrowing the government."[77]

In a nutshell, the above argument seems to support the view that even a legitimate government lacking effective control or on the verge of losing effective control to rebels, forfeits its legal authority to invite external forces into the country to maintain its grip on power. However, if the government's military power to maintain its authority is not put to question, international law allows such intervention of foreign forces by invitation in domestic affairs as an exception to the non-intervention doctrine embodied in Article 2(7) of the UN Charter.[78]

On a more general level, the UN Charter clearly prohibits interference in matters "which are essentially within the domestic jurisdiction of any State".[79] At the same time, the Charter envisages the right of the people within the State to exercise their right to self-determination through election and other legitimate methods recognized under international law.[80] Furthermore, Article 1 common to the two international human rights covenants of 1966 provides for the right to self-determination of all peoples and requires State parties to refrain from any conduct that interferes with the rights of "all peoples to determine their political status and to freely pursue their economic, social and cultural development".[81]

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[77] See Q. Wright, 'US Intervention in the Lebanon', 53 AJIL, 1959, p-112, 122; Antonio Tanca, Foreign Armed Intervention in Internal Conflict (1993), p-23; David Wippman, *supra* note 56 at 440;

[78] See Malcolm N. Shaw, *supra* note 49 at 1043; David Wippman, *supra* note 56, 446.

[79] UN Charter, *supra* note 16 at 2(7).

[80] Id at 1(2). Though some might argue that self-determination is meant for colonial States, the significance of the right still looms larger in the post colonial era and extends to such issues as the right of an organized political community to change their government according to their own wishes and by resorting to any method recognized by international law.

[81] See the International Covenant on Civil and Political Rights, *infra* note 144 at art.1. The International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, art. 1; The African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I. L. M. 58 (1982), entered into force Oct. 21, 1986, art. 20; The Charter of Economic Rights and Duties of States, Adopted by General Assembly, 1974, States "no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights".

Elaborating on the right to self-determination of all peoples enunciated in the UN Charter, the Declaration on Friendly Relations proclaimed the duty of every State "to refrain from any forcible actions which deprive peoples . . . of their right to self-determination and freedom and independence".[82] Indeed, the Declaration affirms the rights of peoples "to seek and receive support" in their struggle and resistance against forcible actions that encroaches upon the enjoyment of the right to self-determination.[83] Furthermore, the Declaration imposes a duty on States to refrain from any practice that hinders peoples' right to self-determination.[84] For example, it explicitly prohibits States from providing military, financial and other logistic supplies for parties in an internal conflict.[85] Indeed, self-determination, as a norm of *erga omnes*[86] character not only requires them to refrain from actions that jeopardize the rights of peoples to enjoy it but also imposes a positive obligation on States to support the realization of peoples' aspiration for self-determination.[87] In all other cases, however, international law leaves internal matters to internal forces consistently with international law while it certainly prohibits the use of any coercive force between sovereign States. In essence, this prohibition flows from the inevitable fear that these interventions by way of military and other logistic supplies could potentially "disrupt the internal play of forces, and thereby violate the political independence of the State and the right of its people to determine their own political future".[88] It is a principle that stems from a simple premise that peoples are the makers of their own destiny and places an absolute prohibition on the right of intervention particularly when

[82] GA Res. 2625(XXV), *supra* note 38.
[83] Id at Principle (e).
[84] *Id*.
[85] *Id* at Principle (e); David Wippman, Military Intervention, Regional Organizations, and Host-State Consent, 7 Duke J. Comp. & Int'l L. 202, 212.
[86] Barcelona Traction, Light and Power Co. Ltd, (Belgium v. Spain),1970, ICJ 3, 32(Feb.5); Reservations to the Genocide Convention, (Advisory Opinion of 28 May 1951), p- 8; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I. C. J Reports, (2004), p-199, para-155; East Timor Case, I. C. J Reports(1995), p-102, para-29, describing the *erga omnes* character of the right to self-determination as "irreproachable".
[87] GA Res. 2625(XXV), *supra* note 38, Principle (e); Georges Abi-Saab, *The State as a Primary Fact Compelling Acknowledgment by International Law*, in Marcelo G. Kohen (ed.), Secession: International Law perspectives, (Cambridge) (2006) at 470-3; Christian Tomuschat, Secession and Self-determination in Marcelo G. Kohen (ed.), at 23-5.
[88] *Id*; Oscar Schachter, *supra* note 18 at 1645.

the ability of the inviting party to maintain itself without foreign assistance is in question.[89]

The Transitional Government of Somalia was formed in 2004 by Somalia's clan leaders and war lords in Nairobi, Kenya, on the basis of a 4.5 matrix of power distribution among Somalia's clans.[90] Nevertheless, the UN Monitoring Group on Somalia conclusively found that the TFG would have been unable to maintain control over the Somali people and its territories if it were not for the support of the Ethiopian military forces.[91] At the time the TFG was constrained to the town of Baidoa near the Ethiopian border, the UIC had been exercising wide territorial control over much of Somali territory including the capital Mogadishu—effectively compromising and weakening the moral and legal standing of the TFG—posing as an indispensable *de facto* regime in Somalia.[92] Moreover, the UIC did not only exercise its authority by force but also seems to have enjoyed at least some degree of popular support in areas that were under its control. [93] In effect, two competing factions claiming to be the legitimate government of Somalia emerged. This compelled the international community to take note of the factual circumstances on the ground to decide with which of the factions it would have to deal. The question, then, will be: how can we legally determine the faction best placed to speak for the Somali State and invite foreign forces into the country? It is on this very question that the legitimacy of Ethiopia's claim of invitation turns.

Other things remaining constant, legitimacy and effective control have become the two indispensable requirements necessary for the determination

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[89] David Wippman, *supra* note 56, 446.

[90] International Crisis Group Report, SOMALIA: TO MOVE BEYOND THE FAILED STATE, African Report No.47, 23 December 2008. "The 4.5 formula was first adopted by the Transitional National Government in 2000. It allocates an equal number of seats in parliament to each of the four major clan-families – the Darood, Hawiye, Dir, and Digle-Mirifle – and half that number to remaining minority groups. The proposed formula for clan representation in parliament envisions 400 seats divided evenly between the four major clan groups, and minority groups collectively receiving half as many seats as a major clan (i.e., 84 seats for each major clan, 42 seats for minorities and 22 additional seats to be allocated at the discretion of the Technical Committee)."

[91] See Report of the Monitoring Group on Somalia, *supra* note 3, Summary, para-2.

[92] Ethiopia Invades Somalia; US Assists with Attacks in Somalia against Islamist Militants and Kills One Al-Qaeda Leader, December 24, 2006-January 2007: , at <http://www.historycommons.org/entity.jsp?entity=islamic_courts_union_1>, (Last Accessed 13 May 2009).

[93] The BBC News, Somalia's Islamic Courts, available at http://news.bbc.co.uk/1/hi/5051588.stm, (Last accessed 04 November 2009).

of the faction best situated to speak on behalf of the State. While the requirement of 'effective control' seems relatively factually verifiable, the question of legitimacy of governments involves unending debate. If legitimacy and effectiveness are the two yardsticks against which we can test the validity of Ethiopia's intervention by invitation, were these conditions present? The following sections will be devoted to the assessment of the presence of these conditions.

3.1-The Requirement of Effectiveness

The concept of effective control finds expression in several areas of international law ranging from the determination of statehood and governmental authority to questions of attribution of responsibility. 'Effective control' is an imperative test in international law not only for the determination of the establishment of the State as a safe and determinate international person but also for governments to act as the international faces of their respective States. In terms of governments, the effective control test relates to the ideals of independence and sovereignty and carries with it the right of the State itself. For Oppenheim, for example, effective government relates to the question of sovereignty. In his own words:

> There must be a sovereign government. Sovereignty is supreme authority, which on the international plane means — legal authority which is in law not dependent on any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all rounded within and without the borders of the country.[94]

In this sense, the effectiveness of the government in question highlights the political independence and sovereign authority of the State itself. However, when there are competing factions claiming to be representatives of the State, the question turns into a comparison between the competing factions and identifying one that displayed a better measure of control of the State so that it reflects the independence and sovereignty of that State.

However, in the absence of one entity capable of maintaining itself without external aid, invitation to intervene militarily cannot be lawfully granted.[95] Such intervention no doubt alters the internal structure of forces. Indeed, any military intervention that ultimately changes the interplay of forces domestically and determines the outcome of the struggle constitutes a violation of the non-intervention principle and hence an unlawful

[94] R. Jennings and A. Watts, *supra* note 68, p-122.
[95] Jennings, Watts and Oppenheim, *supra* note 68 & 69; See also *supra* notes 76, 77.

intervention.[96] Clearly, we know from the various reports to the Security Council by Somalia's Monitoring Group that neither the TFG nor the UIC could have achieved whatever level of control they achieved at the relevant time had it not been for the military and logistic support they received from external forces in violation of the binding Security Council arms embargo resolution.[97] In relevant part, the Monitoring Group noted:

> [T]he principal sources for the overall military build-up involving arms, military materiel and foreign military personnel can be variously attributed to ten (10) States, as follows: Djibouti, Egypt, Eritrea, Ethiopia, Iran, Libya, Saudi Arabia, Syria, Uganda and Yemen. Of the foregoing States, seven (7) are aligned with the ICU, as follows: Djibouti, Egypt, Eritrea, Iran, Libya, Saudi Arabia, and Syria; the remaining three (3) States, Ethiopia, Uganda and Yemen, are aligned with the TFG.[98]

The ability of the government to invite an external force depends on its ability to manifest the independence and sovereign authority of the State.[99] Even though international recognition is vital in constituting a government of State externally, the inviting party must have the political and territorial independence necessary to enter into international relations with other States. However, Somalia and the TFG did not seem to meet the prerequisite criteria of independence and sovereignty at the relevant time.

In the words of the Permanent Court of International Justice, independence of the government pertains to "the sole right of decision in all matters of economy, politics, financial or other"[100] and is the centerpiece requirement of statehood. The Court has described independence in an even stronger terms when it characterized independence as "the normal condition of States according to international law; it may also be described as sovereignty, by which it is meant that the State has over it no other authority than that of international law".[101] In the *Island of Palmas Case*, the Arbitrator, Judge Huber, enunciated the quintessential connection between independence

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[96] See Q. Wright, *supra* note 77; R. A. Falk, *supra* note 54.

[97] In its 2006 Report to the Security Council, the Monitoring Group has enlisted 10 States that in one or another way intervened in a matter that is entirely within the Somali affairs; *supr*a note 3 at p-44.

[98] Report of the Monitoring Group on Somalia; *supra* note 3, at 44.

[99] J. Crawford, Too Much too Soon, available at <http://www.heinonline.org/HOL/Page?handle=hein.journals European Journal of International Law>, p-2, (accessed on 3 May 2006); See also David Wippman, *supra* note 56 at 450.

[100] *Austro German Customs Union Case*, PCIJ, series A/B No 41, at 57-58 (1931)[however note that this decision was rendered in 1931 and does not take the Charter provisions into account].

[101] *Ibid*.

and statehood when he pronounced that: "independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of the State".[102] If non-intervention, as a matter of principle, is meant to protect the sovereign authority of the State and the democratic will of its citizens, not of the governments, and if the test of an effective government which enjoys "political independence or territorial integrity" on behalf of the State is one that embodies the characteristics set forth in the Permanent Court of International Justice's judgment in the *Austro-German Custom's Union* case or the one enunciated in the *Island of Palmas case*, the TFG is nowhere near such level of political independence.

For almost two decades, there has not been an effective and functional government that represents the Somali State internally and expresses its will externally. At the time Ethiopia sent its training and advising force, the TFG was certainly not such a force capable of maintaining itself without the Ethiopian government's active military and diplomatic assistance. According to the Monitoring Group, since both the TFG and the UIC "are overwhelmingly reliant on States for support", neither of them had the "means" to survive and act independently of the support they received from external forces[103]. As a result, the TFG lacks the effective territorial control test necessary and so fundamental in the assessment of the validity of invitation under traditional international law.[104]

However, post 1945 developments in international law, particularly the emergence of the UN Charter, the two 1966 Human Rights Covenants and regional human rights instruments have fundamentally changed older conceptions of 'governments' and unleashed new understandings of governments. Contemporary international law now requires not only

[102] *Island of Palmas Case*,(Netherlands *v*. USA), 2RIAA, 829, 838 (1928).[This decision was taken in 1928, long before numerous applicable rules have emerged. Rules of present day international law have deviated from this strict requirement of effectivity and also required legitimacy.

[103] Id at p-43.

[104] Tom J. Farer, Panama: Beyond the Charter Paradigm, 84 Am. J. Int'l L. 503, 510 (1990) contending that the "virtually uniform practice in international relations of treating any group of nationals in effective control of their State as constituting its legitimate government"); Igor I. Lukashuk, The United Nations and Illegitimate Regimes: When to Intervene to Protect Human Rights, in Law and Force in the New International Order 143, 152 arguing that classical international law recognizes effective control of the State's territory as "the only basis for recognizing a regime"; Louise Doswald-Beck, The Legal Validity of Military Intervention by Invitation of the Government, 1985 Brit. Y.B. Int'l L. 189, 190 in David Wippman, *supra* note 56 at 440.

compliance with the factual requirements but also of the legal requirements.[105] It is these fundamental changes recognized by eminent international law authorities, notably J. Crawford,[106] Marcelo G. Kohen,[107] Christian Tomuschat,[108] Andrew Clapham,[109] M. N Shaw and Théodore Christakis,[110] which strengthened the importance of the existence of a legitimate right and a due process in constituting a government that can speak for the State. Christakis, for example, wrote that the maxim *iniuria ius non oritur* defines the limits placed by the law on the principle of effectiveness.[111] As a result of these shared principles and the mushrooming of overarching international human rights regimes, legitimacy has become the centerpiece requirement of a governmental authority necessary to speak on behalf of the State. In what follows, I will examine the notion of legitimacy under international law and situate the TFG in that context.

3.2- The Requirement of Legitimacy

The debate over the notion of legitimacy springs from the nature of the idea of legitimacy itself and the multifaceted confluence of competing political interests involved in the determination of a faction/government as legitimate or otherwise. Although it is a highly regarded and most frequently referred principle of law and politics, the normative content and substance of legitimacy have remained as illusive a concept as ever.

Wippman views the notion that requires the legitimacy of government as a "legal fiction central to the conduct of international relations".[112] He argued that:

> The legal fiction that the government speaks for the State rests in turn on another legal fiction: that the State consists of a single, self-determining political community. As members of a single community, the citizens of the State form a government through an internal process that is unique to each State and entitled to the respect of other States. Because the government is formed by the political community of the State, it is entitled to represent the State.[113]

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[105] Théodore Christakis, The State as a *Primary Fact***:** Some Thoughts on the Principle of Effectiveness, in Marcelo G. Kohen, *supra* note 87 at 139.
[106] James Crawford, in Marcelo G. Kohen, *supra* note 87.
[107] Marcelo G. Kohen, *supra* note 87 at 3.
[108] Christain Tomuschat, in Mercelo G. Kohen *supr*a note 87.
[109] Andrew Clapham, in Mercelo G. Kohen, *supra* note 87.
[110] Théodore Christakis, *supra* note 105.
[111]. *Id*.
[112] David Wippman, s*upra* note 56 at 625.
[113] *Id*.

Although the consent of a government that meets the test of legitimacy stipulated in Wippman's characterization may validate intervention, a complex set of issues peculiar to the Somali politics, i.e., the absence of one decisive faction with stronger claim to effectiveness and legitimacy and Somalia's place in international legal and political order over the last two decades, renders this assessment unusually difficult. Wippman's analysis may not have envisaged a "failed-State" situation like Somalia and hence might not be held to be reflective of the real internal dynamics of the failed Somali State. Regardless, no matter how exceptional Somalia's situation may be, there is nothing that justifies a departure from internationally recognized rules in the analysis of the legality of intervention and invitation.

In the aftermath of the cold-war ideological confrontation between the East and West, democracy has become the "touchstone of legitimacy"[114], and become "a prominent yardstick with which to assess the legitimacy of governments".[115] Even before the burgeoning of the global human rights regimes, Roth notes, "almost all States—whether liberal democracies, one-party revolutionary States, military dictatorships, or traditionalist regimes—subscribed to the notion that 'the will of the people' constitutes the ultimate source of governmental legitimacy".[116] Speaking to the Ghanaian Parliament in his first trip to Sub-Saharan Africa as President of the United States, Barack Obama, set the tone for the quintessential notion of legitimacy when he said: "But history offers a clear verdict: Governments that respect the will of their own people, that govern by consent and not coercion, are more prosperous, they are more stable, and more successful than governments that do not".[117] But, the question is, how should we articulate legitimacy in a failed State context where constituting governments by a secret ballot is simply not an option? In whose eyes should a government be legitimate: its own people or other members of the international community? Should we emphasize on the legitimacy of origin or legitimacy of exercise? These are the issues that raised stern debate among writers and they will be discussed below in the light of Somalia's particular situation.

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[114] Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AM. J. INT'L L. 596, 599(1999) in Jean D'aspremont, Legitimacy of Governments in the Age of Democracy, 38 N.Y.U. J. Int'l L. & Pol. 877, 887.

[115] Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 494 (2001) in Jean D'aspremont, *supra* note 114.

[116] B. R. Roth, Governmental Illegitimacy in International Law (2000), in Jean D'aspremont, *supra* note 114 at 884.

[117] Remarks by the President of the United States of America, Barack Obama, Accra International Conference Center, Accra, Ghana, July 2009.

In his landmark article titled: *Legitimacy of Governments in the Age of Democracy,* D'aspremont calls for the deconstruction of what he calls a 'monolithic' conception of legitimacy which saw the whole idea of legitimacy as nothing more than legitimacy of origin.[118] Recognizing the emphasis of international scholarship on the legitimacy of origin, which holds the view that "a government is legitimate if it rests on the 'will of the people' expressed through a free and fair electoral process", D'aspremont calls for a holistic approach at legitimacy requiring not only legitimacy of origin but also legitimacy of exercise, which holds that "a government is legitimate if it exercises its power in a manner consistent with basic political freedoms and the rule of law".[119] In the context under consideration, since none of the two competing factions have emerged from a ballot box, these two aspects of legitimacy may not be as helpful.

On the other hand, Professor Thomas Frank's groundbreaking work, *The Right to Democratic Governance*, transformed the notion of legitimacy from a purely domestic agenda into an international agenda, unleashing a new theory of democratic entitlement in international law.[120] The democratic entitlement theory advanced the view that legitimacy of government should be determined not solely on the basis of internal criteria but also 'universal criterion of democracy'.[121] Reisman, another pioneer proponent of the democratic entitlement school, for example, asserted people's entitlement to an international right to "popular government".[122] The advent of the international human rights enterprise buttressed the view that the question of legitimacy of governments is not purely a matter left to the internal process of States, but rather a matter for international concern.[123] Anchoring their arguments in the emerging "right to democratic governance" deriving from "the right to political participation" stipulated in various international human rights instruments, the democratic entitlement school of thought contends that

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[118] Jean D'aspremont, *supra* note 114 at 880, 888.

[119] Id at 899.

[120] Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 48 (1992), 48.

[121] *Id.*

[122] Michael Riesman, Humanitarian Intervention and Fledgling Democracies, 18 Fordham Int'l L. J. 794, 795.

[123] See the UDHR, *infra* note 145 art. 20 (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will, shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

in addition to an internal requirement, the legitimacy of government should also be determined by international standards.[124] The sustained call for the determination of government's legitimacy through an external criterion brought into the light a new brand of legitimacy referred to as 'external legitimacy'. This brand of legitimacy essentially takes into account Frank's and Riesman's legitimacy of origin rather than D'aspremont's legitimacy of exercise. Debunking the approach of the democratic entitlement school, D'aspremont rejected what he saw as a narrow conception of legitimacy when he said:

> The authors of the democratic entitlement school interpret "democracy" as a narrow and process-oriented concept defined by the holding of periodic elections. The understanding of democracy as a procedural requirement is not only supported by the authors of the democratic entitlement school but has also been endorsed by many other authors. It can be traced back to Mill's, Bentham's, and, later, Schumpeter's instrumental and utilitarian understandings of democracy. . . I disagree with this procedural understanding of democracy. [125]

On the other hand, the question of whether the kind of legitimacy required is internal-how a government is perceived by its own people, or external -how that government is perceived in the eyes of governments of other States, is another hotly contested issue.[126] In the words of D'aspremont, notwithstanding the geopolitical and strategic considerations which so rampantly dominated international relations, "the external legitimacy of an authority has come to depend almost entirely upon its democratic character" since the last decade of the 20th century.[127] Although external legitimacy theoretically requires the legitimacy of origin, it is ultimately decided upon entirely by the foreign government's reading of the situation: their desire to enter into or continue existing relations with the new government. This renders the relevance of internal legitimacy as a measure of governmental legitimacy—one that has the legal capacity to speak for the State in the international system—essentially negligible.[128] According to this view:

> International law is only concerned with the way in which a government's legitimacy is perceived by other international authorities. In that sense, the application of international law is not directly contingent upon the perception of the people, although it cannot be excluded that the internal legitimacy of a given

[124] Gregory H. Fox, The Right to Political Participation in International Law, 17 YALE J. INT'L L. 543, 596; See also Thomas Franck, *supra* note 120 at 48.
[125] Jean D'aspremont, *supra* note 114 at 891.
[126] *Id* at 882.
[127] *Id* at 887.
[128] *Id*.

> authority affects the way other actors assess the external legitimacy of that authority.[129]

The TFG is not a product of a ballot. It was born out of years of negotiations between the various factional warlords of Somalia through the Nairobi processes.[130] Since legitimacy of origin emphasizes on "the will of the people . . . expressed in periodic and genuine elections . . . held by secret vote or by equivalent free voting procedures", the Nairobi and later the Djibouti processes[131] are incomparable to the requirements of legitimacy of origin. Thus, the TFG does not meet the test of legitimacy of origin.

Is it internally legitimate, i.e., is it perceived by the Somali people as their legitimate representative on the international plane even if it was not elected by them? Although internal legitimacy, as legitimacy of origin, requires the free and expressed will of the people through periodic election as a prerequisite, Somalia's unique situation might compel one to consider subsequent approval or support for that government by the people. Even when one considers the subsequent practices of the Somali public, although this could be contested as an unwarranted assertion, there is no evidence to suggest that the TFG masters more public support than its rivals and therefore more legitimate in front of the Somalis than the UIC.

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[129] See Stefan Talmon, Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law, in Jean D'aspremont, *supra* note 114 at 883.

[130] The Nairobi Process refers to the conference between Somalia's clan based warlords that negotiated the formation of the Transitional Federal Government of Somalia between October and November of 2004 in Nairobi, Kenya. This conference was concluded with the election of 275 members of the Somali parliament, the adoption of the Transitional Federal Charter and the election of the now replaced President Abdullahi Yusuf, for details on this, visit http://en.wikipedia.org/wiki/History_ of_the_Transitional_Federal_Government_of_the_Republic_of_Somalia;
(Last accessed 4 November 2009).

[131] The Djibouti process, although not a re-negotiation of the terms of the Transitional Federal Charter, was an all inclusive effort at reconciliation mediated by the UN with support of major international players. The election of Sheikh Sharif Sheikh Ahmed, former member of the UIC, as Somalia's President is an emblematic evidence of the inclusive character of this process. However, no matter how inclusive and who led the mediation process, the Djibouti process is incomparable with a free and fair election in which the wish of citizens is democratically manifested. Without reducing the importance of such steps at forming a condition necessary for such an election, the process itself, does not amount to election in the traditional sense. For more on this, visit http://www.apsta-africa.org/news/article290109.php, (Last accessed 04 November 2009).

Is it externally legitimate, i.e., perceived by governments of other States as legitimate? In contemporary international law, external legitimacy is anchored in and derives from legitimacy of origin. Individual governments usually declared their intention by bestowing recognition upon the faction they individually deem legitimate and hence a legitimate government of that State. However, the peculiarity of the situation in Somalia does not afford possibilities for elections. This unique situation dictated by almost two decades of Somalia's violent political past coupled with the discretionary character of the international law rules relating to recognition of governments, could lead one to the conclusion that the TFG has an external legitimacy. Indeed, the international community, both collectively and individually, recognized the TFG and its Transitional Charter as the only viable means towards the reconstruction of the Somali State. By May of 2006, the TFG was allowed to take Somalia's seat in all the major international organizations such as the United Nations, the African Union, IGAD, the Arab League and several other international organizations and accepted to membership of the Inter-Parliamentary Union.[132] According to International Crisis Group report, the unprecedented level of international recognition and support extended to the TFG implicitly suggests its relative ability to be seen as Somalia's international face.[133]

Given the geopolitical and strategic significance of Somalia and the extremist elements within the UIC, the community of nations has no option but to recognize the TFG. As recognition is granted, at least pursuant to the contention of the democratic entitlement school, in consequence of acknowledgment of the legitimacy of a government[134], the overwhelming recognition bestowed upon the TFG could be seen as an affirmation of the external legitimacy of the Transitional Federal Government of Somalia. Therefore, according to this view, as a legitimate government recognized by an overwhelming majority of the States of the world, the TFG could be seen to have the capacity to speak for the Somali State and hence lawfully extend invitation to the Ethiopian government. However, even if one accepts this narrow but practical conception of legitimacy, it only answers part of the larger question.

Indeed, Ethiopia links the validity of its invitation not so much to the notion of constitutional legitimacy and territorial effectiveness of the TFG,

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[132] *Id*.

[133] International crisis Group, Somaliland: Time for African Union Leadership, Africa Report N°110, 23 May 2006, p-3.

[134] Jean D'aspremont, *supra* note 114 at 901.

rather on the unprecedented global recognition bestowed on the TFG.[135] Indeed, the requirement of recognition of government is as important an issue in international law as the requirements of effective control and legitimacy.[136] However, if one views international recognition as constituting international legitimacy, one cannot avoid asking what counts in international law, international or internal legitimacy, in constituting governments for a country.

Somalia has been and is a member State of the United Nations and its Statehood has never been contested.[137] Although recognition of change of government is considered essential in determining future relationships with that State, such recognition would not affect the international legal personality of the State itself which is "perpetual and unaffected by the change of its agents".[138] Consequently, the absence of a meaningful government in Somalia does not affect Somalia's international personality. However, since the question at issue is the legitimacy of the government of Somalia, rather than the statehood of Somalia *as such*, the question then turns on whether international recognition constitutes conclusive evidence of a legitimate government as it constitutes conclusive evidence of statehood.[139] For TFG and its allies, legitimacy is national through the Kenyan and Djibouti Processes and international through recognition by the UN, AU and

[135] See the Response of the Ethiopian Government to the Monitoring Group on Somalia, *supra* note 11; Somalia has been a member State of the United Nations and its Statehood has not been challenged at any time after 1991. However, it was a State without any government, effective or otherwise, for almost 18 years. The Security Council has taken the opportunity to recognize the federal government and the Federal Charter in resolution 1725/2006 as the only route to peace and stability declaring "Reiterating its commitment to a comprehensive and lasting settlement of the situation in Somalia through the Transitional Federal Charter, and stressing the importance of broad-based and representative institutions and of an inclusive political process, as envisaged in the Transitional Federal Charter".

[136] Gerhard von Glahn, Law Among Nations, 62 (4th ed.,) (1981), Affirming that: "unless a group of people possessing territory and governmental institutions also possess independence- i.e., the ability to regulate its internal affairs without outside interference or control-that group cannot claim to be a State. This necessary ingredient, independence, must be as absolute as the modern legal order of the world permits it to be".

[137] Awol K. Allo, Fundamental Principles of Recognition in International Law and the Question of Palestine: A Critical Appraisal of the Factual Situations and the UN Resolutions, LL. B thesis, (Unpublished Paper, Addis Ababa University, Faculty of Law), p-29.

[138] D. P. O'Connell, International Law, V. I,(2nd ed),(Steven &Sons), (London: 1970), p-145 in Awol K. Allo, id.

[139] See I. Brownlie, *supra* note 18, p-100.

other major international organizations.[140] As a result, this view holds that the TFG is a legitimate government and, therefore, capable of extending lawful invitation to Ethiopia. Those opposed to the TFG, including the UIC, contend that external forces have no basis whatsoever to constitute a government for Somalia and the Somali people alone can constitute a government for the State of Somalia.[141]

Le Mon has made a survey of interventions justified on claims of invitations since the second half of the 20th century. Having analyzed existing debates in each case, he concludes that "a determination of the legality of an intervention by invitation centers on the external legitimacy of the inviting government regarding the exercise of the sovereign rights of the State".[142] Le Mon anchors his conclusion not necessarily on a settled rule of international law but rather on the dictate of pragmatism. To that end, he observed that:

> Though international legal relations exist between States, not governments, questions emerge when multiple competing factions claim to be the legitimate government of a recognized State. Whenever such a situation presents itself, other States must determine which faction is deemed to legally represent the State. Such decisions will be more predictable and sound if they are made in line with a legal doctrine regarding governmental recognition.[143]

On the contrary, others argue that the notion of government is essentially intertwined, both legally and conceptually, with the free and expressed not even implied, consent of the people of the State and as such, the argument goes, recognition by other States cannot constitute a government for the State or determine a faction best suited to represent the State. According to this view, therefore, recognition doesn't seem to weigh too heavily as to be the determining factor around which the legitimacy of a government turns.[144]

Furthermore, in the words of the Universal Declaration of Human Rights and the ICCPR, "the will of the people" alone constitutes the basis "of authority of the government" and it shall be expressed in periodic and

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[140] Jama Ali Ahmed, Somali Minister for Foreign Affairs, with Riz Khan, *Al Jazeera*, available at <http://www.youtube.com/watch?v=Ur7k9_nwbzQ>, (Last accessed 23 July 2009)

[141] Opposition Leader in Somalia speaking to Al Jazeera, available at <http://www.youtube.com/watch?v=Ur7k9_nwbzQ>,(Last accessed 23 July 2009).

[142] Christopher J. Le Mon, *supra* note 66 at 742.

[143] *Id* at 744-745.

[144] See The International Covenant on Civil and Political Rights, (Adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS, 171, (hereinafter ICCPR), art. 25; See James C. N. Paul and Christopher Clapham, Ethiopian Constitutional Development, (Faculty of Law: Haile Sellassie I University), 1967, pp-38-9

genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".[145] For the same reason, the unprecedented level of recognition bestowed upon the TFG, does not, of it self, confer a better right on it nor does it entitle it to invite a foreign force into the country. This means that, viewed from the point of view of international human rights instruments, the argument that international recognition and the Kenyan and Djibouti processes respectively confer international and national legitimacy on the TFG contradicts the principles of legitimate government. However, in exceptionally fragile security environment in which adherence to the standards of international human rights regimes is virtually impossible, i.e., holding election, external legitimacy, i.e., recognition, alongside the 'effective control' test, remains to be the only sensible determinant of the faction best placed to speak for the State. However, even if the TFG is said to be a legitimate representative of the Somali State (external legitimacy), its lack of effective control at the relevant time, strips it of its authority to invite foreign forces for the sole purpose of using them for an activity that is usually undertaken by the government of the State.

There are several cases of intervention of one State in the internal affairs of other States and justified under the rubric of invitation from lawful internal authorities. Although some of these are lawful interventions through invitations,[146] some have failed to meet the requirements of the law and hence declared illegal by the international community. For example, the United States has defended its intervention in Dominican Republic in 1965, Grenada in 1983 and Panama in 1989, among other things, on the basis of invitation by

[145] See Universal Declaration of Human Rights, G.A. Res. 217A, at 75, U.N. GAOR, 3d. Sess.,183 plen. Mtg., U.N. Doc A/810 (Dec. 10, 1948). See also, G.A. Res. 49/190, U.N. Doc. A/RES/49/190 (Dec. 23, 1994); G.A. Res. 48/131, U.N. Doc. A/RES/48/131 (Dec. 20, 1993); G.A. Res. 47/138, U.N. Doc. A/ RES/47/138 (Dec. 18, 1992); G.A. Res. 52/129, U.N. Doc. A/RES/52/129 (Dec. 12, 1997); G.A. Res. 56/159, U.N. Doc. A/RES/56/159 (Dec. 19, 2001). G.A. Res. 46/137, U.N. Doc. A/RES/46/137 (Dec. 17, 1991); G.A. Res. 43/157, U.N. Doc. A/RES/43/157 (Dec. 8, 1988); G.A. Res. 45/150, U.N. Doc. A/RES/45/150 (Dec. 18, 1990).

[146] The intervention of United Kingdom at the request of the legitimate leader of the State of Jordan in 1958, Muscat and Oman in 1957, Uganda, Kenya and Tanganyika in 1964, and Zambia in 1965. France has intervened militarily in Chad at least on three occasions over the course of five years, in Zaire in 1978 at the request of the leaders of the State and no unlawful intervention has been found. India intervened in 1987 in Sri Lanka to help restore order the country with at the invitation of the Sri Lankan government.

"lawful authorities" of these States.[147] The Soviet Union invaded Hungary in 1956, Czechoslovakia in 1968 and Afghanistan in 1979 and argued that its military intervention was justified by the invitation of the respective governments of the three States.[148] Despite the contention of the USA and the Soviet Union to have been invited by what they considered to be legitimate authorities of these States, the debate has centered, not so much on the validity of the invitations, but rather, on the existence of any such invitations.[149]

With the notion of State sovereignty come government's responsibility towards its own people and the community of nations. In order to protect an essential interest of the State and its people, States are at liberty to extend invitation to other States. However, that invitation must be lawful, legitimate and consistent with the wishes and aspirations of the peoples concerned. Viewed in that light, the interventions by the USSR and the USA have not met the minimum threshold and said to have constituted a violation of the Charter and the doctrine of non-intervention.[150] Indeed, let alone a government as fragile as the TFG, in the words of David Wippman, even a "purely internal challenge to the government's authority, if it is of sufficient magnitude, theoretically strips the government of its right to receive outside

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[147] David Wippman, *supra* note 70 at 621. See M. N. Shaw, *supra* note 49 at 1033 where he argues that the protection of its nationals abroad was also another reason used for the intervention; Center for Constitutional Rights, White Papers, 100 Days to Restore the Constitution, Amend the War Powers Resolution, available at, <http://www.astrid-online.it/--Riforma-/Documenti/CCR_100-days_WarPowers.pdf>, (Last accessed 22 July 2009), p-9.

[148] UN SCOR, 746th mtg 4, UN Doc S/PV.746 (1956) (Hungary); UN SCOR, 23d yr, 1441st mtg 1, UN Doc S/PV.1441 (1968) (Czechoslovakia); UN SCOR, 35th yr, 2185th mtg 2, UN Doc S/PV.2185 (1980) (Afghanistan) in David Wippman, Treaty-Based Intervention: Who Can Say No? 62 U. Chi. L. Rev. 607, 620.

[149] Id. See also GA Res. 1004, 1005 and 1006(ES-II)(1956); Report of the UN Special Committee on the Problem of Hungary (1957, UN Doc. A/3592 in Robert Jennings and Arthur Watts, foot note 14, p-436. On Afghanistan, see GA Res. ES-6/2, 14 January 1980. These claimed invitations were considered as either "manufactured or coerced" and as such widely criticized. "Invitation of the United States by the Lebanese government, the invitation of the USSR by the dubious government of Afghanistan, Libya and French Intervention in Chad are among examples of intervention justified on the basis of one or another form of invitation". See Dixon and Robert MacCorquodale, *supra* note 49 at 558, referring to those claims as a case of 'fabricated invitations'.

[150] David Wippman, s*upra* note 56 at 450, arguing that "most States were openly critical of US military interventions . . . though there was some level of recognition that the United States' intervention in each case was, arguably designed, at least in part, to establish a democratic government."

assistance, on the ground that internal forces alone should decide the outcome of the conflict".[151]

Similarly, the TFG lacks the prerequisite elements of a legitimate and independent government in control of the territory of Somalia. As a result, it lacked the right to invite an outside force. Had it not been for Ethiopia, the TFG could not have maintained itself and survived the ever growing administrative control and offensive capabilities of the UIC.[152] In other words, if the TFG was not capable of maintaining itself without Ethiopia's support, an external force, the intervention makes Ethiopia the ultimate decider on a matter that should have been decided upon only by the internal support competing factions mobilize.[153]

4. Counter-Intervention: Offsetting A Prior Illegal Intervention

Percy Winfield once said that "the non-intervention rules appears to be a patent consequence of independence with a host of disorderly exceptions fastened on to it".[154] Although one can identify a host of arguable exceptions to the duty of non-intervention, counter interventions intended to offset a prior illegal intervention is one of the most recognized of the exceptions. Having ruled out the permissibility of intervention in the strongest terms, Jennings and Watts noted that "if there is outside interference in favor of one party to the struggle, other States may assist the other party".[155] Analogizing this notion with collective self-defense, the International Court of Justice has affirmed the right of a third State to intervene in the affairs of another if another State has already interfered in the internal affairs of that State.[156] Therefore, there is a broad consensus that an act of counter-intervention that is proportional to the circumstances occasioning the intervention and intended to protect the independence of the State from an illegal intervention is allowable in international law.[157]

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[152] See Jeffrey Gettleman, In the Third Day of Fighting in Somalia, Worries of a Sharp Escalation By Ethiopian Forces, December 23, 2006, available at <http://www.nytimes.com/2006/12/23/world/africa/23somalia.html>, (accessed on 20 March 2009).

[153] David Wippman, *supra* note 56 at 450.

[154] Vaughan Lowe, International Law, Clarendon Law Series, Oxford University Series, 2007, at p-109

[155] Jennings and Watts, *supra* note 68 at 438.

[156] Timothy Thriller, *supra* note 30, p-253.

[157] Malcolm N. Shaw, *supra* note 49 at p-1041. Oscar Schachter, *supra* note 18 at 1642; See J. N. Moore, Law and the Indo-China War, in Malcolm N. Shaw, p-1041. The

Concurring with the holding of the ICJ in the Nicaragua case, Schachter is of the opinion that such form of counter-intervention is tantamount to a "collective-self-defense" since it aims at defending the State against foreign intervention.[158] However, Schachter's approach to counter-intervention carries in mind an operating meaning, i.e., that there is a lawful internal authority in conflict with other internal forces and either the government or the other forces have received unlawful external assistance that justified counter-intervention by other States to defend the independence of the State. Schachter argued that "counter intervention may be justified as a defense of the independence of the State against foreign intervention".[159] So for him, whether the assistance is provided to the government or other internal forces, as long as that assistance is illegal, counter-intervention is justified.[160] On the basis of these international norms of customary character, Ethiopia could obtain the legal right to intervene in Somalia with the view to balance a prior illegal intervention by other States.

Wippman approaches the issue from a different perspective and observed that:

> A purely internal challenge to the government's authority, if it is of sufficient magnitude, theoretically strips the government of its right to receive outside

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USSR and Cuba defended their interventions in Angola during the country's civil war "by reference to the prior South African intervention". The United States justified its intervention in South Vietnam with reference to the intervention of North Vietnamese forces in the Southerners conflict.

[158] *Id.*

[159] David Shinn, Former US Ambassador to Ethiopia, The Ethiopia-Somali Conflict, December 28, 2006, available at <http://nazret.com/blog/index.php?title=the_ethiopia_somalia_conflict&more=1&c=1&tb=1&pb=1>, accessed, 21 February, 2008.

[160] Note the discussion in part II on the question of who can invite external forces into the State and when the government or the rebels can legally receive assistance from foreign forces. Jennings and Watts, however, held that "when there exist a civil war and control of a State is divided between warring factions, any form of interference or assistance (except probably of a humanitarian character) to any party amounts to intervention contrary to international law. In such a case the authority of any party to the conflict to be the government entitled to speak (and to seek assistance) on behalf of the State will be doubtful; and assistance to any party will prejudice the right of the State to decide for itself its form of government and political system". Timothy Thriller added "States may now only intervene to assist a foreign government experiencing low level civil strife and only in such situations where the consent of the foreign government is freely given. Subject to the rules relating to self-determination, States may never give assistance to rebels, since to do so would contravene the prohibition on interference in the domestic affairs of another State".

> assistance, on the ground that internal forces alone should decide the outcome of the conflict. But if the challenge to the government's authority rests in part on external aid to the rebels, then application of the rule of non-intervention may not result in an outcome based on the support each party is able to muster internally. Instead, outside forces may determine the winner.[161]

On the basis of the above rules and authoritative opinions, if the TFG is effectively challenged by the UIC and their challenging ability has rested on the assistance external forces such as Eritrea accorded them, Ethiopia could have a legal basis to counter-intervention to prevent outside forces from deciding the outcome of the conflict in Somalia and hence prevent encroachment upon the national aspiration of the Somali people and the independence of their State. Among other things, the military and other logistics provided to the UIC by six reported Middle Eastern countries and Eritrea played a significant role in enhancing the military and political capital of the UIC.[162] When, as in the case under discussion, an illegal aid from external force tilts the playing field against one of the internal belligerents (government or another internal force), the notion that only "internal forces alone should decide the outcome of the conflict"[163] will no longer operate. As Ethiopia's military aid to the TFG has been widely reported, the UN Monitoring Group on Somalia has documented the military and other material support given to the UIC by Egypt, Syria, Yemen, Djibouti, Saudi Arabia, Iran and Eritrea.[164] Indeed, it is clear from the reports of the Monitoring Group that in numerical terms, a greater number of States has been alleged to have provided some form of support to the UIC than the number of States that supported the TFG.

If the intervention of these external forces has already skewed the political and military landscape against one of the belligerent forces, in this case the TFG, a further invocation of the doctrine of non-intervention will not serve the initial purpose for which the non-intervention principle was

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[161] David Wippman, *supra* note 56 at 450.

[162] See Report of the Monitoring Group on Somalia (2006), *supra* note 3, p-44. noting that "the principal sources for the overall military build-up involving arms, military materiel and foreign military personnel can be variously attributed to ten (10) States, as follows: Djibouti, Egypt, Eritrea, Ethiopia, Iran, Libya, Saudi Arabia, Syria, Uganda and Yemen. Of the foregoing States, seven (7) are aligned with the UIC, as follows: Djibouti, Egypt, Eritrea, Iran, Libya, Saudi Arabia, and Syria; the remaining three (3) States, Ethiopia, Uganda and Yemen, are aligned with the TFG".

[163] David Wippman, *supra* note 56 at 450.

[164] See Report of the Monitoring Group on Somalia (2006), *supra* note 3 at p-44; See also generally Reports of the 2005, 2006 and 2007 issued by the Monitoring Group on Somalia, *supra* note 3 and 23.

designed —protecting the independence of the Somali State and leaving the fate and destiny of the Somali people to themselves. This is precisely because intervention has already occurred and the sovereignty and independence of that State has already been compromised. If the intervention of the above mentioned countries have already provided a significant military boost to the forces of the UIC, then the intervention of Ethiopia on behalf of the TFG cannot be said to have violated the purposes behind the non-intervention principle. It rather defends the principle by counter-balancing illegal prior interventions amounting to a violation of the political independence and territorial integrity of the State referred to in the Charter of the United Nations. The purpose of the doctrine, among other things, is to enable the people of the State decide their own national fate on the basis of the support internal forces galvanize internally without the intervention of external forces.[165] Counter-intervention in this context has the purpose of restoring the independence of the State altered by the prior intervention, thus, the people of that State could decide for themselves without the foreign intervention. In the context of Somalia, a lawful counter-intervention has the effect of enabling the Somali people to become the makers of their own destiny by creating a government of their own choice.

However, the whole argument about counter-intervention rests on the question of whether there is an illegal intervention that should be counter-balanced. The only nonpartisan evidence the author could find on the issue is the Report by the Monitoring Group on Somalia annually submitted to the Security Council. As early as 2003, this Group has reported on the rising shipment of arms to Somalia by the neighboring States in contravention of the binding Security Council arms embargo resolution.[166] Although the Group noted in its 2005 Report that the magnitude of the shipment has taken an alarming turn after the establishment of the TFG, the Report does not address the issue of who first engaged in the provision of such a support.[167]

Consistent with the decision of the ICJ in the *Nicaragua Case*, although support through funding and the sending of arms certainly constitutes an act of intervention contrary to Article 2(7) of the Charter, it is not sufficient to justify counter-intervention disproportionate to the circumstances which in the first place necessitated the intervention. For example, the sending of "trainers and military advisors" cannot be seen to be proportionate to the shipment of arms and financial support. However, when States begun "training and arming" a faction within one State, this could be seen as an

[165] See David Wippman, *supra* note 56 at 450.
[166] See Report of the Monitoring Group on Somalia (2005); *supra* note 23 at p-17.
[167] *Id.*

intervention and the threat of the use of force. The existence of such an intervention and threat of the use of force justifies a proportionate counter-intervention by a third State with the view to redressing the harm done to the Victim State injured by the act of a prior intervention. Therefore, the relevant question in determining the legality of counter-intervention turns on the question of who took the first initiative in sending troops and military trainers to Somalia to support either side. If Ethiopia was not the first to do this, then its counter-intervention measure is legally justified. Put simply, in order for Ethiopia's intervention to be sustainable at law as counter-intervention, Ethiopia's action to counterbalance a prior illegal intervention must have followed, not preceded the intervention by other States.

Finally, international law requires counter-intervention, like all other forms of counter-measures, to be proportionate to the measures that originally necessitated them.[168] Assuming that Ethiopia's provision of "military advisers and trainers" to the TFG followed, not preceded, intervention by other States on behalf of the UIC, and also assuming that Ethiopia has not sent a fighting force to Somalia before the declaration of the war, Ethiopia's conduct of sending military trainers and advisers seems to be proportionate to a similar action by Eritrea and the other nations. Thus, Ethiopia's counter-intervention preceding the declaration of a conventional military engagement on 24 December 2006, subject to the above conditions, could be considered as lawful under international law.

5. Conclusions

The question on the legality of Ethiopia's military intervention in Somalia presents into light the complex predicaments resulting from the realities of a 'failed State' and the current threat of "violent extremism". Ethiopia claims that the invitation by the legitimate and recognized Somali government and Ethiopia's lawful right to collective and individual self-defense justified its military intervention. Examining the validity of these claims involve the consideration and appreciation of highly contested facts and unverifiable allegations.

Contemporary international law permits intervention in matters that are within the exclusive jurisdiction of other States with the consent, *volenti non fit injuria*, of that State. Although invitation to intervene in the internal affairs of States by the legitimate governments of that State is seen as an expression of the sovereign authority of that State, the nature of the inviting government,

[168] See Thomas M. Franck, On Proportionality of Counter-Measures in International Law, 102 AJIL, 715, 720-1.

the precarious and limited nature of its authority, its lack of both internal and/or external legitimacy, are among the factors that render the legality of interventions uncertain. Though any form of interference in the internal or external affairs of any State is contrary to the stipulation of the Charter and customary norms of international law, the existence of consent precludes the wrongfulness of the act. However, the debate on the question of invitation turns, not so much on the existence of such invitations, but rather, on the legal validity of the invitations.

In order for a government to extend an invitation to another State on matters of internal affairs, international law requires that government to be a legitimate representative of the State, in effective control of the people and territory of the State and capable of speaking on behalf of that State (recognition). Even if there is no one party that is unequivocally better placed to speak and decide on behalf of that State, a party in a relatively better position can represent the State in question. In the context of Somalia, none of the two factions satisfy the triple requirements of legitimacy, effectiveness and recognition. None of these parties claimed legitimacy over the other as none of them was product of a freely and fairly contested election. Whereas the UIC was in a better position as far as control of the larger proportion of the Somali territory is concerned, the TFG commanded substantial level of recognition among the international community. From the point of view of international law, one needs to be invited by an entity that meets not only the test of international recognition but also the tests of legitimacy (whether internal or external) and of effectiveness. Although the TFG had sufficient level of international recognition, it lacked the legal authority to speak for the Somali State. Even if it was a government that met the test of both legitimacy and recognition, the lack of effective control of the Somali territory strips it of the right to request assistance and denies third States the right to intervention. However, this does not exclude the right of such a government to request assistance to quell a low level strife within the State. The TFG does not meet this requirement and its invitation could not be lawful. When one of the parties is not in a clearly better position to act on behalf of the State, intervention by invitation is illegal since external forces will have the opportunity to decide the outcome of a purely internal struggle.

Although the invitation argument lacks the essential requirements of the law, Ethiopia seems to have a valid right to counter-intervention in response to prior illegal interventions by Eritrea and other States with the view to defend the political independence of Somalia. The principle of counter-intervention assumes the existence of a prior illegal intervention in violation of the political independence and territorial integrity of States protected under the UN Charter. If an illegal intervention in the internal affairs of the State

had already occurred in violation of international law, others States will earn the right to intervene to counter-balance that illegal intervention. So the latter intervention is interference in the affairs of the State for the sole purpose of defending and restoring the independence and sovereignty of the State offended by a prior illegal intervention. On the same vein, the intervention of several States in the internal affairs of Somalia accords Ethiopia the right to intervene to offset an illegal intervention that is already underway.

Counter-intervention subject to conditions might justify Ethiopia's action. Yet, it is also noteworthy to take account of the silence of the Security Council, the General Assembly or the African Union in the face of a mounting conflict between the two States that was grave enough as to trigger the jurisdiction of these institutions. Ethiopia's action was not officially condemned by these organs. This could be attributed to the realization by the international community of the unfathomable truth relating to the breading of militancy in Somalia and the consequent threat posed against Ethiopia, and such questions are beyond the scope of this article and therefore have not been discussed.

Aside from the issue of self-defense which is not addressed in this article, Ethiopia's conduct predating the full-scale military confrontation with the UIC can be seen from two angles, i.e., invitation and counter-intervention. Since the TFG lacks the legal authority to invite, Ethiopia's claim for invitation does not seem to be consistent with norms of international law governing intervention. The description of Somalia quoted at the beginning of this article as a "*land of clan republics*" does not offer the right to intervention by micro-invitations by the various clans for the purpose of international law. However, assuming that the intervention in Somalia of Eritrea and other states preceded Ethiopia's sending of 'military trainers and advisors', Ethiopia has the legal right to counter-intervention to defend the political independence and territorial integrity of the Somali State and of its people. This might sound 'altruistic' unless we realize the deeper motive of such counter-intervention that seems to trace its roots to various problems that can emerge in failed states and transcend boundaries. ■

ETHIOPIAN FLORICULTURE AND ITS IMPACT ON THE ENVIRONMENT:
Regulation, Supervision and Compliance

Mulugeta Getu*

Introduction

Floriculture can be defined as "a discipline of horticulture concerned with the cultivation of flowering and ornamental plants for gardens and for floristry, comprising the floral industry."[1] It can also be defined as "The segment of horticulture concerned with commercial production, marketing, and sale of bedding plants, cut flowers, potted flowering plants, foliage plants, flower arrangements, and noncommercial home gardening."[2]

Flowers are luxurious products with high social value and rarely used for food. The demand for these luxurious products has increased in the international market in recent years. The international market for flowers reached $40 billion at the end of 2008.[3] The Netherlands is the leading exporter accounting for some 54 percent of world trade.[4]

Floriculture is one of the booming sectors in Ethiopia. The first private floriculture companies, Meskel flower and Ethio–flora, started activities around 1997 on a few hectares of land[5]. Today, the Ethiopian Investment Agency has given permit to 251 investors in the floriculture sector until 2008. Out of these, 61 are operational, 21 are at implementation stage, 134 are at pre-implementation stage and 36 permits have been cancelled.[6] This number does not include companies solely run by Ethiopians, as they do not apply to

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[1] *See* www.answer.com/library/ *Dictionary+for+Gardeners*-cid-30567/ last retrieved on June 2, 2009

[2] *See* www.answer.com/library/*Sci%2DTech Encyclopedia–cid-30567/* last retrieved on June 2, 2009

[3] Mitiambo, P.M., *Floriculture Value Chain; the Case of Kenya*, ESAMI, 2008, at. 3

[4] *Id*, at. 3

[5] Nigussie Kassa, *Floriculture Industry in Ethiopia: Trends, Prospects and Challenges*, Jimma University College of Agriculture and Veterinary Medicine, August, 2006, at 7

[6] Ethiopian Investment agency, *HortiFlora Data Base raw data*, June 10, 2009

the Ethiopian Investment Agency but rather to regional investment bureaux for a permit. According to the report of the Oromia Investment Bureau, Oromia accounts for 94% of the investment in the floriculture sector and the number of companies registered in the region reached 134 (62 local, 54 foreign and 18 joint-ventures) in 2006.[7] Recent data show that the region has allotted more than 3,491.04 hectares of land to the sector.[8]

Ethiopia has earned US$ 186 million from horticulture exports out of which 80% was generated by flower exports in 2008.[9] The floriculture farms engage, according to the 2008 statement of the Ministry of Trade and Industry, around 30,000 employees[10] (60,000 according to others[11]). The Ministry of Trade and Industry disclosed that in the 2008/09 Fiscal Year, the country planned to earn $ 306 million from the flower sector.[12] Such plans seem to continue unless their sustainability and future expansion are affected by the global financial crisis. The level of production has made the nation the sixth greatest rose exporter in the world and the second in Africa. A UN Special envoy said that "We were surprised to learn that Ethiopia is the second-largest producer of roses in Africa, with Kenya leading, and sixth in the world after Holland, Colombia, Ecuador, Kenya and Isreal. Seventy percent of the flower export goes to the Netherlands, the biggest auction center for flowers and the rest to Russia, the U.S, and Japan etc..."[13]

The rapid growth of floriculture in Ethiopia is due to different factors like suitable climatic and natural resources, high level of support by the government, favorable investment laws and incentives, proximity to the global market, efficiency of the transport system and availability of abundant and cheap labor.[14] The floriculture industry has also organized itself into an

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[7] Oromia Investment Commission/Bureau, *Investment Profile,* Master Printing Press, April, at 4

[8] Oromia Investment Bureau, *Flower data base,* accessed on June 12, 2009

[9] *See* http://www.floracultureinternational.com/index.php?option=com_content&task=view&id= 885&Itemid=7&ed=47 Last visited on May 20, 2009.

[10] *'Addis Zemen'*, a daily Amharic newspaper of the Ethiopian government published by Ethiopian Press Agency, Issued on Saturday August 9, 2008

[11] Reuters Africa, *Ethiopia says recession hits Dutch flower sale*, Mon Mar 2, 2009, http://af.reuters.com/article/investingNews/idAFJOE5210BX20090302/ last visited on June 3, 2009.

[12] *See 'Addis Zemen'* Supra note 10

[13] UN Special, *Ethiopian Millennium – Coming up Roses; After Coffee - Ethiopia's Other Export,* September 2007, pages 40 and 41.

[14] *See* Nigussie *Supra note* 5, at 31. See also See also Federal Negarit Gazeta, *Investment Proclamation No. 280/2002* Federal Negarit Gazeta, *Investment (Amendment)*

association called the, Ethiopian Horticulture Producers and Exporters Association (here after EHPEA), which is helping the sector.

Due to the growth of the industry, environmental concerns are indeed growing. This article looks at some of these environmental concerns relevant for Ethiopia. The article confines itself to some of the very prominent environmental concerns. Environmentalists are raising many concerns in relation to the expansion of floriculture in Ethiopia such as the use of pesticides and chemical fertilizers, disposal of waste materials, and the protection of water bodies. According to environmentalists, the industry uses too much pesticides and chemical fertilizers which damage the environment. They believe that too much pesticide is getting into water bodies damaging the biodiversity and excessive chemicals are killing useful organisms in the soil. Environmentalists are also concerned, that waste materials will damage the environment – will get into the soil, into water bodies or be used by people and cause serious damage.

The article assesses the industry's environmental impact and the threat it is creating to the natural environment. The first section examines these allegations after the introduction. In the second, third and fourth sections, the regulatory instruments – national policies and laws, code of practice developed by the sector and the market/labeling system are assessed. Specifically, this will include environmental impact assessment in the industry, the presence or lack of laws and standards in the use of chemical fertilizers and pesticides and the practice of monitoring of the same, if any, the feasibility of tasks done by the floriculture farmers and agencies to minimize the adverse environmental impact of the sector's water use and disposal of waste. Moreover, the extent to which the industry observes the compliance standards required in binding instruments and regulatory schemes will be assessed.

Literature has been reviewed to assess the impact of the industry on the environment and to explore some lessons from other nations. In addition, legislation, policies, strategies and reports have been consulted where necessary. Empirical data obtained through interviews with floriculture farmers, agency officials and experts on the subject have also been used to indicate the degree of the threat and the extent of compliance.

Proclamation No. 375/2003, and Federal Negarit Gazeta, *Council of Ministers Regulations on Investment incentives and Investment Areas Reserved for Domestic Investors* (*Council of Ministers Regulations No. 84/2003)*

1. Environmental Impact of the Floriculture Activities

With the expansion of the floriculture industry, there is a growing concern as to its adverse effect on the national environment. Ato Tsegaye Abebe, Head of EHPEA, is aware of this concern and stated that, "When any new sector is introduced into a country there are inevitably concerns about the impact of the sector on the local environment…."[15] This section highlights the kinds of environmental risks - use of fertilizers, pesticides, and safe disposal of wastes - involved, the extent of the threat and the activities undertaken by other nations to combat the risk.

1.1- Fertilizers

Some environmentalists are of the opinion that the environment is unique and irreplaceable, and therefore no "price" can or should be assigned to it. This argument is typically used against policies that trade off environmental objectives against economic interests. The argument may be criticized because "if taken literally it would make daily living impossible"[16] and prohibit any development activities. The viable course of action thus seems to be minimizing the adverse impact of floriculture on the environment.

Much criticism has been forwarded against chemical fertilizers. Yet, in the absence of realistic alternatives to chemical fertilizers and pesticides in agriculture, the insistence to their use continues.[17] The only alternative to chemical/artificial fertilizers, is the use of organic[18] cultivation.[19] Nitrogen in

[15] *See* Flora Culture International, supra note 9.

[16] David G. Abler, 659 *NAFTA*, [North Atlantic Free Trade Association], *Agriculture and the Environment*, 28 Tulsa L.J. 659, Summer, 1993, International Agriculture Symposium.

[17] *Id*.

[18] There is no a general consensus in the society as to what 'organic production' means. But According to the US Organic Foods Production Act of 1990, in April 1995 the National Organic Standards Board (NOSB) reached a consensus and defined organic agriculture as (a)n ecological production management system that promotes and enhances biodiversity, biological cycles, and soil biological activity. It is based on minimal use of off-farm inputs and on management practices that restore, maintain, and enhance ecological harmony. See also Claire S. Carroll, 117 *What does "organic" mean now? Chicken and wild fish are undermining the Organic Foods Production Act of 1990, evolution of the legal definition of "organic"-business interests must be stopped from re-defining "organic" contrary to the purpose of the Organic Food Production Act of 1990*, 14 San Joaquin Agric. L. Rev. 117,2004.

[19] Artur Granstedt and Lars Kjellenberg, *Long-Term Field Experiment in Sweden: Effects of Organic and Inorganic Fertilizers on Soil Fertility and Crop Quality*, (In

fertilizer can produce nitrates, which can be washed away from fields by rain or irrigation, eventually finding their way to water bodies and soil. Water pollution, soil and water quality degradation, human and cattle health effects, air pollution, risk on aquatic life, as well as water logging and salinization are only a few of the undesired impacts discussed below.

a) Effects on Health

Many diseases such as *Methemoglobinemia*, Japanese encephalitis (JE), cancer etc. have been noted due to use of chemical fertilizers. Research demonstrates that "on rare occasions, nitrates have caused infants to become ill or die of *Methemoglobinemia* (more commonly known as blue-baby syndrome)."[20] *Methemoglobinemia* occurs when the excess nitrates that remain in the soil move into the ground water and when this water is used for drinking by human beings as a result of which the nitrite interferes with the oxygen carrying capacity of the blood.[21] Nitrates are also suspected to cause cancer, especially stomach cancer, and non-Hodgkin's lymphoma, although the proof is inconclusive and the intensity of these risks is unknown.[22] Excess use of urea also causes a human disease called *Japanese encephalitis (JE)*, which mainly affects children between the ages of four to fourteen years.[23] Cattle are also exposed to many diseases when they graze on fields with high content of chemical fertilizers.[24]

b) Effects on Soil

A growing crop does not take up all the nutrient ions in the fertilizer applied to the soil. Generally, healthy soil contains enough nitrogen fixing bacteria, which fixes sufficient atmospheric nitrogen to supply the needs of the growing plants.[25] But continued use of chemical fertilizers may destroy these nitrogen-fixing bacteria and many other micro- and macro- organism of the soil.[26] In addition, acids in chemical fertilizers, such as sulfuric acid and hydrochloric acid, which tends to increase the acidity of the soil, reduces the soil's beneficial organism population and interferes with plant growth.

Proceedings of an International Conference in Boston, Tufts University, Agricultural Production and Nutrition, Massachusetts March 19-21, 1997.) at 5

[20] *See* David G. *Supra note* 16.

[21] Rumita Chowdhury, *Effects of Chemical Fertilizers on the Surrounding Environment and the Alternative to the Chemical Fertilizers*, ENVIS Newsletter, Indian Environmental Society, Vol VII, No III, 2004, at 7

[22] *See* David G. *Supra note* 16.

[23] *See* Rumita Chowdhury *Supra note* 21.

[24] *Id*.

[25] *Id*.

[26] *Id*.

c) Effects on Aquatic Life

There are many fertilizers, which leak through the soil to the ground water or ditches and streams, thus causing water pollution. In a process known as *eutrophication*, fertilizer washed from fields into surface waters stimulates algae growth, which blocks sunlight needed by aquatic vegetation putting their survival at stake.[27] This loss in vegetation disrupts the food chain, leading to the death of economically important aquatic life. Moreover, this causes depletion of oxygen found in the water thus degrading the quality and usability of the water.[28]

d) Effects on Atmosphere

Some fertilizers, like Urea, spread in the fields with the help of sprayers and the ammonia therein react with the water present in the air causing the formation of ammonia oxide, and hence air pollution.[29]

e) Water Logging and Salinization

Abler wrote that "Naturally, some water seeps into the ground from irrigation ditches and canals. In what is called water logging, this seepage can cause the subsoil water table to rise to the root zone of crops, killing them. The problem can be compounded by salinization, which occurs when water logging brings harmful salts to the surface."[30] Some plants, e.g. tomatoes, have very low tolerance for salt making growth nearly impossible in saline soil. Salinization occurs because salt is left behind as irrigation water evaporates,[31] or from leaking of salt and minerals from the soil due to water use for agriculture.[32]

During their growth cycle, the West Australian Government has recommended the following to minimize the adverse effect of fertilizers on the environment:[33]

- Regular monitoring of the soil nutrient concentrations (nitrogen, phosphorous and potassium) in the bed and adding fertilisers only when necessary;

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[27] *See* David G. Abler, *Supra note* 16.
[28] Steven Ferrey, *Environmental Law – Explanation and Examples,* Aspen Publishers, NY, US, 2004, at. 3
[29] *See* Rumita Chowdhury *Supra note* 21.
[30] *See* David G. *Supra note* 16.
[31] *Id*
[32] *See* Ferrey, *supra note* 28, at 8
[33] Department of Water, Government of West Australia, *Water Quality Protection Note - Floriculture activities near sensitive water resources,* 17 July 2006. at 5 www.water.wa.gov.au/ Last visited on May 26, 2009.

- Testing the soil prior to planting and managing the soil pH, essential humus (containing carbon to sustain useful soil microorganisms), salinity and variable nutrient; and
- Tracing element requirements of plants.

Moreover, it suggested that *fertigation* (the controlled application of soluble fertiliser in irrigation water), and computer based programs, such as *Fertijet* and *Fertigal*, or plant leaf tests be used to determine the appropriate amount of fertiliser required.[34] If there is the argument that this is not practical, application of small amounts of fertiliser suitable for growth stage of the plants should be done[35] in spite of all the drawbacks highlighted above.

1.2- Pesticides

Pesticides (which include herbicides, insecticides, fungicides and more) can contaminate organisms, soil, water, turf, and other vegetation. It is estimated that less than 0.1 percent of the applied pesticide reaches the target pest, leaving 99.9 percent as a pollutant in the environment, including the soil, air, and water, or on nearby vegetation.[36] The adverse effect of pesticide use includes degrading water and soil quality, effect on non-targeted lives like soil organisms, aquatic life, human beings, insects, cattle etc, air pollution, and increase of pesticide resistance by targeted pests.

a) Water

Pesticides can move from the site of application via drift, volatilization, leaking, and runoff. Pesticides, including herbicides, can and do leak to contaminate ground water. Once ground water is polluted with toxic chemicals, it may take many years, a huge expense and a complex process for the contamination to be cleaned up. As a result, the contamination (by pesticides) of ground and surface water, which supplies the greatest part of drinking water, is a serious problem worldwide.[37] When pesticides contaminate water, they can be harmful to the fish and other marine or freshwater animals that live there.

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[34] *Id.*
[35] *Id.*
[36] Pimentel, D. *Amounts of pesticides reaching target pests: environmental impacts and ethics*. Journal of Agriculture and Environmental Ethics 8, 1995:17-29.
[37] David Pimentel, *Overview of the Use of Genetically Modified organisms and Pesticides in agriculture*, Indiana Journal of Global Legal Studies, Fall, 2001 (9 Ind. J. Global Legal Stud. 51): Symposium: Sustainable Development, Agriculture, and the Challenge of Genetically Modified Organisms)

b) Soil Organisms

Soil is a dynamic living system with a variety of micro- and macro- floral and faunal species including *bacteria, actinomycetes, fungi, nematodes, arthropods, crustaceans and earthworms*.[38] These flora and fauna play a primary role in the degradation of plant and animal residues and other organic matter in the environment as well as in nitrogen fixation, nitrification and the release of nutrients from soil minerals.[39] Anything that affects their activities in turn affects the function of soils in crop production, and in the global carbon and nitrogen cycles.[40]

c) Pesticide Resistance

The extensive use of pesticides has resulted in the development of pesticide resistance in many insect pests, plant pathogens, weeds, and rats.[41] Worldwide, more than 500 insect and mite species, more than 150 plant pathogen species, and more than 275 species of weeds have become resistant to herbicides. The estimated cost of pesticide resistance in pests in the United States, for example, is estimated to reach $1.4 billion annually[42].

d) Non – Target Organisms

The effect of pesticide on non-target organisms is also immense. It has been reported that about ten million non-target organisms including thousands of domestic animals are poisoned each year throughout the world.[43] Moreover, it destroys the population of natural enemies, whose destruction and lack of biological control in agriculture, result in food loss due to pests which can

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[38] *Impact of Long Term Pesticide Usage on Soil Properties Using Radiotracer Techniques*, Report of a Final Research Coordination Meeting organized by the Joint FAO/IAEA Division of Nuclear Techniques in Food and Agriculture and held in Hangzhou, Zhejiang, Peoples' Republic of China, 24-28 May 1999, at p. 1

[39] Doetsch, R.N., Cook, T.M., Eds, *Introduction to Bacteria and Their Ecobiology*. Univ. Park Press, Baltimore, Maryland, USA (1974). *See* also Frankenberger, W.T., Jr. and M.A. Tabatabai. 1991. *Factors affecting L-asparaginase activity in soils*. Biol. Fert. Soils 11:1- 5).

[40] Jess Silver and Becky Riley, *Environmental Impact of Pesticides Commonly Used on Urban Landscapes*, September 2001, Northwest Coalition for Alternative to Pesticides/NCAP, E ugene, Oregon.) Pages 8-18). *See* also Impact of Long Term Pesticide Usage, *Supra note* 38.

[41] David Pimentel & Hugh Lehman, *Assessment of Environmental and Economic Costs of Pesticide Use, in the Pesticide Question: Environment, Economics, and Ethics* 47, 1993, at 55. *See* also Vandana Kaushik, *Problem Posed by Fertilizers and Pesticides*, IRENet, ENVIS Newsletter, Indian Environmental Society, Vol VII, No III, 2004

[42] *See*, David Pimentel, *supra note* 41, at 60.

[43] *Id*.

increase by as much as fifty-eight percent. [44] Pesticide use also has an adverse effect on the pollination process as honey and wild bees are vital for pollination of about one-third of fruits, vegetables, and other crops worldwide.[45] Wild birds and mammals are also hurt by the application of pesticides. [46] The ethical issue that arises at this juncture is the extent to which it is justifiable to destroy thousands of species for the purpose of killing the "harmful" few.

e) Air Pollution

Many pesticides can volatilize (that is, they can evaporate from the soil and foliage, move away from the area of application, and contaminate the environment).[47] As much as 80-90 percent of applied pesticides can be volatilized within a few days of application.[48] Research conducted in the US shows the availability of pesticide residues in air.[49]

Accounting for all of these effects, a conservative estimate of the total damage to the environment and public health caused by pesticides is about $9 billion each year.[50] Research is not available to show how much of this impact is contributed by the floriculture sector, but it is obvious that the sector usually uses more fertilizer than conventional farming.

1.3. Waste Disposal

Floriculture activities produce different types of waste ranging from liquid to solid, hazardous to non-hazardous, and in effect require safe waste disposal

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[44] *Id*

[45] David Pimentel et al., *Economic and Environmental Benefits of Biodiversity*, 47 BioScience 747, 753 (1997).

[46] David Pimentel et al., *Environmental and Economic Impacts of Reducing U.S. Agricultural Pesticide Use*, in 1 CRC Handbook of Pest Management in Agriculture 679 (David Pimentel et al. eds., 2d ed. 1991).

[47] Glotfelty and Schomburg. *Volatilization of pesticides from soil in Reactions and Movements of organic chemicals in soil*. Eds. BL Sawhney and K. Brown. Madison, WI: Soil Science Society of America Special Pub,1989..; and Que, S. et al.. *Factors effecting the volatility of DDT, dieldrin, and dimethylamine salt of (2,4-dichlorophenoxy) acetic acid (2,4-D) from leaf and glass surfaces*. Bull. Environ. Contam. Toxicol. 13(3): 1975, at 284-290.

[48] Majewski, M. and P. Capel. *Pesticides in the atmosphere: distribution, trends, and governing factors. Volume one, Pesticides in the Hydrologic System*. Ann Arbor Press Inc. pg. 1995. 118.

[49] USGS. Pesticides in the atmosphere: current understanding of distribution and major influences. Fact Sheet FS-152-1995. http://water.wr.usgs.gov/pnsp/atmos/ Last visited on May 27, 2009

[50] See David Pimentel, Supra note 37

and differentiated treatment. Empty chemical containers (fertilizers, pesticides) and their washing waters and obsolete chemicals are the major spheres of concern in addition to which other agricultural waste such as cut off crop parts, unused soil, and waste water are generated in the sector.

In the UK, waste has been understood as any substance which constitutes a scrap material or an effluent or other unwanted surplus substance arising from the application of a process; or, any substance or article which requires to be disposed of as being broken, worn out, contaminated or otherwise spoiled (not explosive).[51] Hazardous wastes are those which contain hazardous substance(s) in a quantity liable to cause death, injury or impairment to living beings, pollution of waters, or an unacceptable impact on the environment if not properly treated, handled or disposed of.[52] It is believed that toxic/hazardous wastes have an adverse effect on the environment and human health. These include increased exposure to cancer, and children born near toxic waste sites can be physically deformed or have developmental disabilities.[53]

There are different types of waste disposal mechanisms including landfill, incineration, anaerobic digestion and recycling. Unfortunately, they are unevenly implemented partially because of the cost involved. The most common disposal methods, in the UK, for example, are landfill (the disposal of waste material or refuse by burying it in natural or excavated holes or depression[54]) and to a lesser extent incineration. A less common but more sustainable method of waste disposal is anaerobic digestion (a process whereby waste decomposes in an enclosed chamber, unlike in a landfill site). Recycling of waste is also a means whereby organic waste breaks down over a few weeks into mulch which can be used as soil fertiliser. In the UK, it is a criminal offense for a person to deposit controlled waste at an unlicensed site or to knowingly cause or knowingly permit it to be deposited at such a site.[55] It is also a criminal offense to treat, keep, or dispose of controlled waste other than in compliance with a license, or to treat, keep, or dispose of controlled

[51] *See* http://www.envocare.co.uk/hazardous_waste.htm/ last visited on May 27, 2009, *See* also EPA 90, s.75.
[52] Id.
[53] *See* http://www.answers.com/ topic/toxic-waste/ last visited on May 26, 2009.
[54] *See* Microsoft® Encarta® 2008. © 1993-2007 Microsoft Corporation. All rights reserved.
[55] UK Environmental Protection Act 1990, Chapter 43, §33(1) (a), (6).

waste "in a manner likely to cause pollution of the environment or harm to human health" whether or not a person has a license.[56]

Under the US legal regime, the Resource Conservation and Recovery Act of 1976 (RCRA) has defined 'solid wastes' as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities."[57] Wastes can also be classified as hazardous and non hazardous wastes by considering their effect on human health and environment.

In the US, land disposal[58] sites are determined according to the nature of the waste and its threat to the environment and human health.[59] Accordingly, three classes of land disposal sites are in use in the United States. Class I, "Waste Management Units for Hazardous Waste," is used primarily for hazardous waste treatment[60] residues. Class II, "Waste Management Units for Designated Waste", are designated solely for certain solid hazardous wastes, such as asbestos. Class III, "Landfills for Non hazardous Wastes," accepts common household waste and construction debris.

It is not hard to know that empty chemical containers contain residual amounts of chemicals and require safe disposal. In an effort to ensure that this residue is handled, recycled or disposed of properly, procedures have been

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[56] *Id*. at, Chapter 43, §33(1) (c), (6).)

[57] 42 U.S.C. 6903(27) (2000). *See* also Jeffrey M. Gaba, *Rethinking recycling*, 38 Envtl. L. 1053 (2008)

[58] US law defines disposal as a discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters. See 42 USCA § 6903(3), and also Richard B. Gallagher, J.D., John Kimpflen, J.D., and Tim A. Thomas, J.D., § 1158. *Hazardous waste treatment, storage, and disposal facilitie*s, 61C Am. Jur. 2d Pollution Control § 1158, 2009.

[59] *See* Robert *Supra note* 57, at **§** 24

[60] "The term 'treatment', when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste non hazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it non hazardous." 42 USCA § 6903(34) See also Richard B. Gallagher, J.D., John Kimpflen, J.D., and Tim A. Thomas, J.D., § 1158. *Hazardous waste treatment, storage, and disposal facilities*, 61C Am. Jur. 2d Pollution Control § 1158, 2009).

prescribed by different institutions[61] in harmony with the national legal frameworks. According to the Princeton and Penn State universities, chemical containers that have been emptied must be triple-rinsed with water or other suitable solvent and dried before disposal.[62]

The West Australian government believes that liquid waste and leachate from floriculture activities may contain high levels of nutrients, pesticides and other chemicals derived from different sources.[63] Its guideline further state that, "Flower preservative solutions normally contain carbohydrate, usually in the form of sucrose, plus a bactericide, fungicide, and a wetting agent. These latter chemicals prevent organisms developing in the vase water and blocking the cut stems, and improve water uptake. Some long used floral preservatives may also contain heavy metals; however there are now alternative low toxicity preservatives available."[64] As a result, the guideline puts reuse or recycling of liquid wastes residuals as a primary option. Or else, it should be collected and stored in 'an impermeable container' or 'solar evaporation pond', and be transported offsite for safe disposal at a local government approved waste facility, remote from any sensitive environment.[65]

The guideline recommends recycling to be used as a primary method of disposing solid wastes (includes packaging, washed chemical drums, bags, and inert waste material, such as clean soil or rock), or disposing of them "outside any sensitive environment at a local government approved waste disposal facility".[66]

Water is the first and foremost substance under threat as a result of floriculture activities discussed above. To minimize, if not avoid, the adverse effect of floriculture activities on water, especially due to the use of chemical fertilizers, pesticide and unwarranted waste disposal, the west Australian government's guideline, *inter alia*, recommends a separation distance of at least 100 metres between non-contained floriculture, i.e. the farms that involve irrigation and/ or regular additional inputs of chemicals (including fertilizers) directly to soil connected to the environment and drinking water source bores (i.e. the place where drinking water well or drilled hole or tunnel

[61] *Disposal of Empty Chemical Containers*, Penn State Environmental health and Safety (EHS), Available at www.ehs.psu.ed, Princeton University Environmental Health and Safety (EHS) Guidelines, available at http://web.princeton.edu/sites/ehs/chemwaste /mtcontainers.htm, last visited on May 25, 2009.
[62] *Id*.
[63] *See* Department of Water, Government of West Australia *Supra note* 33.
[64] *Id*, at 6
[65] *Id*. at 6
[66] *Id*., at 6

is found) or the full supply level of surface water storage reservoirs and their feeder streams. It is to be noted that fully contained plant growing on the contrary does not have on-site discharge.

Adequate separation distances should be maintained between floriculture and natural waterways to minimise the risk of degradation of water quality; a minimum vertical separation distance of two metres to the maximum groundwater table (end of wet season for free draining soils), should be maintained to avoid water logging and allow for soil contaminant filtration and aerobic microbial action. Besides, the sites of flower farms should be gently sloping ground where gradients are between one in 10 and one in 200.[67]

2. Regulatory Framework and Compliance: National Policies and Laws

The problems stated above will be very severe if the controlling framework, within the sector or from government, is loose. Policy plays a vital role in the formulation and implementation of any regulatory framework. Based on the national policy, laws have been enacted. The Environmental Policy of Ethiopia and Ethiopian Water Resource Management/ Sector Policy are a few which are substantiated by laws.

2.1- Environmental Policy

The Environmental Policy of Ethiopia (EPE)[68] included various policy directions which address the need to protect and develop the environment and conserve national resources for sustainable use. As a key guideline principle, the policy takes the position that when a compromise between short-term economic growth and long-term environmental protection is necessary, it is better to err on the side of caution as far as possible because rehabilitating a degraded environment is very expensive.[69]

EPE underlines the necessity of undertaking full environmental, social and economic impact assessment of all development programmes.[70] Other than the EPE, the Ethiopian Water Sector Policy and the Ethiopian Water Sector Strategy[71] make it very clear that environmental conservation will be

[67] *Id*, at 3-5.
[68] FDRE, *Environmental Policy of Ethiopia (EPE)*, 1997.
[69] *Id*, Section 2.3(f) page 5.
[70] *Id*, Section 3.1(s) page 8 and Section 4.9 (a-c) page 18.
[71] FDRE Ministry of Water Resources, *Ethiopian Water Resource Management/ Sector Policy*, 2001, Section 2.2.2 (A) page 9, and FRDE Ministry of Water Resources,

an integral part of all water related projects. To this end, Environmental Impact Assessment (EIA) is mandatory in all water resource projects. Moreover, standards and classification systems will be established in relation with the various water uses by laying down quality standards and quantity including limits and ranges of desirable and permissible levels, waste discharges, source development, catchments, management, etc.[72] But there seems to be a gap regarding when and by whom these standards are to be formulated.

EPE underlines recycling waste water when it is found to be safe for health and environment or when the recycling cost is not high.[73] With regard to fertilizer use, EPE promotes the use of organic matters.[74] EPE also regulates waste management by stipulating that waste disposal guidelines and strategies, and regulations to enforce them will be formulated, and an effective monitoring system will be established.[75]

However, the extent to which these guidelines have been formulated during the last 12 years since the EPE came into existence is a point of controversy. Standards to control discharge of pollutants from the agricultural sector have not yet been formulated. Yet, there is inadequate awareness about the environmental harm caused by the usage of pesticides and chemicals in the agricultural sector. Recycling of wastes, control of imports and control of unused hazardous chemicals have to be considered as well.[76] Providing "adequate regulation of agricultural (crop and livestock) chemicals and micro-organisms" should also be undertaken in addition to the precaution required in minimizing and preventing, if possible, the discharge of hazardous substances and application of the 'polluters pays' principle.[77]

2.2. Legislation

Although there are gaps in the sphere of implementation, laws have been enacted, however insufficient they may be, to regulate the floriculture sector. Upon the issuance of permit, investors give an undertaking that they will be

Ethiopian Water Resource Management/ Sector Strategy, 2001, Section 4.1.10(1), page11.

[72] *Id*. Water Policy Section 2.2.2 (c) page 10 and Water Strategy Section 4.1.10(1) page11.

[73] *See* EPE *Supra note* 68, Section 3.4 (j) page 11 and Section 3.4 (a) page 11.

[74] *Id*. Section 3.1(c) and (d) page 7.

[75] *Id*. Section 3.8 (g-i) page 16 and 17

[76] *Id*. Section 3.8 (m-o) page 17).

[77] *Id*. Section 3.8 (a-d) page 16

bound by and work according to national laws.[78] As a result, irrespective of nationality and place of investment, the entire floriculture activity is governed by these laws.

Polluting[79] the environment is prohibited as stipulated in various laws.[80] For example, the Water Resource Management Proclamation prohibits disposing of waste into any water bodies unless one gets a permit from the appropriate authority.[81] Public Health Proclamation only allows disposal of waste in a *specially designated* place and in a manner which does not affect public health, and allows disposal of solid, liquid or any other waste in a manner which does not contaminate the environment or affect public health.[82] However, the attention given to the environmental impact of the floriculture wastes is very poor and is evident in the weak link between the farms and EPA.[83]

With regard to hazardous waste and chemicals, Article 4 of the Environmental Pollution Control Proclamation stipulates that generation, transportation and use of a chemical categorized as hazardous or of restricted use requires a permit from the EPA or the relevant regional environmental agency (hereafter REA). [84] Moreover, as per Article 6 of the same, the EPA, in consultation with competent agencies, is required to formulate standards, among other things, for the discharge of effluents into water bodies and sewage systems, for the types and amounts of substances that can be applied to the soil or be disposed of on or in it, and waste management standards specifying the levels allowed and the methods to be used in the generation, handling, storage, treatment, transport and disposal of the various types of

[78] *Ato Taddese Gashaw*, Agricultural Projects Facilitation and Aftercare Expert in the Federal Investment Authority, an interview conducted on June 03, 2009.

[79] Pollution is defined as "any condition which is hazardous or potentially hazardous to human health, safety, or welfare or to living things created by altering any physical, radioactive, thermal, chemical, biological or other property of any part of the environment in contravention of any condition, limitation or restriction made under this Proclamation or under any other relevant law". Art.2(12)of *Environmental Pollution Control Proclamation No. 300/2002*

[80] Importation of new equipment that is used to control pollution shall, upon verification by the Authority, be exempted from payment of custom duty and other additional incentives are foreseen in the future.

[81] Art 10(2) and 11 (1) (d) of *Water Resource Management Proclamation No 197/2000,*

[82] Art 12 of *Public Health Proclamation No 200/ 2000*

[83] *Ethiopia: Cut flower Bonanza: At What Cost?* Jimma Times, Published 02/18/2008 - 3:18 p.m. GMT, By Tamiru L. Obole | JT Senior Reporter, available at http://www.jimmatimes.com/article. cfm?articleID=17680/ last visited on May20, 2009.

[84] Art of Article 4

waste. But the Environmental Council (EC)[85] of EPA has to some extent, succeeded in coming up with standards but only with regard to the discharge to water and emission to air of twelve different kinds of industries.[86]

The other regulatory device underlined under the policies we have seen so far and emphasized in most environmental legislation is the necessity of Environmental Impact Assessment (EIA)[87] before engaging in development activities. With such an end in view, the Environmental Impact Assessment Proclamation authorizes EPA to issue directives that will help to select projects not likely to have negative impacts and that would not require environmental impact assessment, and projects likely to have negative impacts and requiring environmental impact assessment.[88] In April 2009 the Environmental Council has approved 'a directive issued to determine the categories of projects subject to the Environmental Impact Assessment'. The directive is yet to be published so that it can be ready for implementation. Yet, it is indeed a good development that '*horticulture and floriculture development for export'* are among the 22 (twenty two) types of projects which require Environmental Impact Assessment. Moreover, Articles 11 and 12 of the Proclamation require EPA to follow up and monitor the implementation of the project already done according to the EIA and to see whether circumstances have occurred which might require a new EIA to be done.[89]

Moreover, the Environmental Impact Assessment Proclamation requires a licensing agency, prior to issuing an investment permit or a trade or an operating license for a project, to ensure that the EPA or REA has approved it. Without authorization from EPA or REA, no person can commence

[85] To understand the powers of the EC see Arts.7-10 of the, *Environmental Protection Organs Establishment Proclamation No. 295/2002*

[86] "The Environmental Council has approved the Industrial Pollution Prevention and Control Regulation, directive and standards in April 2009. Under the standards, the types and amounts of discharge to water and emission to air from twelve kinds of industries are determined. However, these standards and directives are not yet published and ready for implementation.

[87] EIA is defined as "the methodology of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed project or public instrument" Art 2 (3) of *Environmental Impact Assessment Proclamation No. 299/2002*

[88] Art 5 of, *Environmental Impact Assessment Proclamation No. 299/2002*,

[89] *See* also Art 6(5)-(7) of *Environmental Protection Organs Establishment Proclamation No. 295/2002*

implementation of any project that requires environmental impact assessment according the 2002 EIA Proclamation.[90]

2.3- Modalities of implementation

The relationship between the Ethiopian Investment Agency and EPA does not seem to have the due harmony and concerted cooperation towards ensuring the environment compliance standards set forth in the policies and various laws. A few years ago, the investment office used to request EPA to provide approval of the EIA report of the project before issuing a permit. But with the aim of accelerating the issuance of the investment permits and to ensure a '*one window shopping*' service, the Ethiopian Investment Agency started issuing the permit before EIA was done. The Investment Agency then notified EPA after issuance of investment permits so that EPA can deal with the investor.[91] Issuance of an investment license before EIA has clearly reduced the incentive of investors to go through the process of impact assessment. Hence, neither the EPA nor the investment agency could find it easy to demand and effectively implement EIA report from investors.

The two offices seem to have failed to conduct coordinated efforts to solve the gap. According to Ato Solomon Kebede, Head of EIA Service, the solution provided by the government is transferring EIA review to each sectoral agency, like the Ministry of Trade and Industry, the Ministry of Health, the Investment Agency etc. This is an indication of how the matter became fragmented and the power of reviewing EIA reports and monitoring the same given by the proclamation to EPA has been given to agencies involved in the implementation of the project. Consequently, EIA reports of the floriculture sector are expected to be reviewed and supervised by the Ministry of Agriculture and Rural Development according to Ato Solomon.

For obvious reasons, these agencies cannot be regulatory bodies of a project over which they have an interest, and when the project is funded by the national government. Even worse, agencies do not have sufficient expertise to review EIA. However, donors in many instances have refused to accept EIA review accomplished by agencies, and when this occurs EPA has been called to review the EIA.

Ato Solomon added that as a result of the current negotiations between EPA and the Development Bank of Ethiopia, the Bank made EIA statements

[90] *See* EIA Proclamation *Supra note* 86, at Article 3

[91] *Ato Solomon Kebede*, Head EIA Service, EPA, interview conducted on June 12, 2009 in his office and *see Ato Taddese Gashaw*, *Supra note* 78.

and EPA's review a precondition for the grant of loan to the floriculture sector. As a result, around 10 floriculture farms have done EIA reports; not with the aim to fulfill the legal requirements but only to get a bank loan from the Development Bank of Ethiopia. Yet, companies also have the option of obtaining loan from other banks and EIA statements will not be required by any of these other local banks. It is surprising to hear that Sher, the largest floriculture company in Ethiopia with 500 hectares of farm around Zeway, has not done EIA yet. Environmental Impact Assessment should have been proactive task, but now it is being demanded after the company has gone far in production and after it has become too late to stop production for the mere lack of EIA. On the other hand, Ato Fekede Terefe and Ato Ahmed Hussien,[92] experts in Oromia Investment Bureau and Oromia Land and Environmental Protection Bureau respectively, confirmed that EIA review is not being done by their respective offices.

EHPEA and EPA have agreed, to incorporate EIA within the EHPEA's Code of Practice which will be discussed later. In the opinion of this writer and Dr Glenn,[93] because of its limited staff, EPA may have considered the *Code of Practice* as a substitute regulatory framework. It is noted, indeed, that EIA should have been more proactive because EHPEA's members have already started operation making EIA study nearly unrealistic, except when a member wants to extend its farm or get a new site.

Another pertinent issue relates to the manner of allocation of land to floriculture and the kinds of land given. In Oromia region, which comprises around 94% of the current production area,[94] government holdings – covered with forest or unoccupied, communal holdings such as grazing lands, and some times private holdings are given for floriculture production upon payment of compensation. In such instances, the availability of water (underground or surface), favorability of the altitude, soil, temperature etc will be considered. However, the impact of the production on the local environment is not considered yet. This might be because the government's intention at this early stage is to attract investors in the sector. This proves

[92] *Ato Fekede Terefe*, Investment projects Follow-up Performer, Oromia Investment Bureau, an Interview conducted on June 3, 2009, and *Ato Ahmed Hussein*, EIA expert in Oromia Land and Environmental Protection Bureau, an interview conducted on June 10, 2009.

[93] *Dr Glenn Humphries*, EHPEA Training Coordinator. Interview conducted on May 23, 2009 at 9:30 in her office, Gelila Building 2nd Floor.

[94] *Ethiopian Herald*, Saturday August 9. 2008, government newspaper published by Ethiopian Press Agency in English.

that the need to protect sensitive water areas [95] from possible and irreversible damage is not yet felt in Ethiopia. Dr Glenn is of the opinion that concentrating floriculture farms in a certain locality might negatively affect the environment – pollution, draining the water resource etc- and requires the attention of the land allocating agency.

The Environmental Office of Oromia was established in 2002. It has been restructured and renamed the Oromia Land and Environmental Protection Bureau in 2009. This Bureau is now conducting land management plan and has accomplished 47% of it.[96] Accordingly, allocation of land for all activities is done by this bureau which was previously carried out by the Investment Bureau. The land management plan will designate the type of land and its potential use, including floriculture. Ato Ahmed adds that this study is expected to take into account levels of environmental impact before allocating land to the floriculture sector. Ato Ahmed also indicated that concentration of farms in a certain locality, evident now around Holleta, Koka, Zeway and Debre Zeit, might affect the amount of available ground water and complaints have been made by neighboring floriculture farms.

According to Ato Solomon, the floriculture sector is booming in Ethiopia but is not properly regulated by the government. Ato Solomon characterizes the situation as 'Deregulation of the floriculture Sector', and some of the reasons for this according to him are the following;[97]

a) Lack of sufficient laws to regulate the sector,
b) The existing laws are not well implemented,
c) The floriculture sector has political support and lobbies the government in many respects,
d) EIA has not been requested by any office, like land allocation offices, credit associations, custom offices etc,
e) Lack of political commitment within government agencies to enforce laws, and
f) Government's desire to attract FDI (Foreign Direct Investment) is manifested in deregulation of the sector.

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[95] *See* the discussion under Section 1.3 above about sensitive water courses and its protection in Australia. This resources according to West Australian government *includes public drinking water source areas, conservation valued wetlands and waterways, and aquifers or waters with significant economic, social and/or cultural values.(* Department of Water, Government of West Australia, *supra note 33*

[96] *Ato Ahmed Hussein, supra note* 90.

[97] *Ato Solomon Kebede, supra note* 89.

One may say that we have enough water and land to grow as much flower as we want today. However, no one can be sure about the future and the precautions recommended by the EPA need to be considered and decisions ought to be made based on adequate research findings about the sustainability of the resources that are being allocated for the sector.

3. Self-Regulation: Code of Practice adopted by flower farms

Ethiopian Horticulture Producers and Exporters Association (EHPEA) developed its own Code of Practice[98] (hereinafter the Code) in 2007 with the aim of providing "…a mechanism that enables the Ethiopian floriculture sector to achieve the highest performance standards by continuous improvement and sustainable development thereby improving the competitive position in the market."[99] In the process of developing the Code, review of Ethiopian laws, the concerns and labels of the international market, stakeholders' concern and the interests of farmers have been taken into account.[100]

The Code sets the minimum requirements a flower farm has to fulfill to get the certification for the Bronze Level, which is compulsory for all EHPEA members.[101] A flower farm will receive EHPEA Code Accreditation after its compliance is proved through independent verification from an internationally accredited verification body selected by tender.[102] The higher standards and compliance criteria of the Silver Level and the Gold Level are not yet finalized although the Code states that they "are in preparation" and will entitle to MPS GAP/ EUREP GAP Certification and MPS SQ/ FFP Certification which are international market labels.[101]

Compliance at this Bronze level, among other things, ensures that the farm does or refrains from the following:[103]

a) Measure, document and evaluate every month its performance on water consumption, pesticide use, fertilizer use, waste management and energy consumption;

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[98] EHPEA, *"EHPEA Code of Practice for Sustainable Flower Production - Bronze Level"*, which is a 'Living Document'. Its first version was issued and launched on June 2007, and the second version (version 1.2), which is the basis of the discussion in this article, was issued on October 2008.

[99] *Id*, at. 2

[100] *Id*, at. 1

[101] *Id*, at 5

[102] *Id*, at 6

[103] *See*, (P.22 note)

b) Assess the risk related to the environment and occupational health and safety and put in place suitable mitigating actions in accordance with the Environmental Impact Assessment procedures;

c) Not to purchase, store or use banned and un-registered (excluding temporary permission to use products) pesticide products as per WHO list of internationally banned pesticide products;

d) Implement safe pesticide use and storage;

e) Ensure that personnel related to pest control activities are trained.

The Code further, lists compliance criteria for this level in Annex 1.[104] This annex has three chapters – Production Management, Environmental Management and Personnel, Labour and Human Resource Management – which are further divided into Sub-topics together with Requirement and Compliance Criteria and Reference Documents under each topic.

Under the first chapter of the Annex (titled Production Management), much has been said about the management of the farm, record, monitoring of inputs and the like. Section 1.2 deals with 'Farm Site Risk Assessment' and requires farmers to make risk assessment periodically and take corrective measures and minimize risk, if any, especially when taking new land or expanding on a new site. The use of inputs is also regulated under the chapter. The use of Methyl Bromide for soil and substrate fumigation (to sterilize soil and substrate) is prohibited except until the existing stock is used up or under exceptional circumstances when permitted by the EHPEA Board. The Code, however, does not say anything about the circumstances that entitle a farmer to the permission.

Methyl Bromide is an ozone-depleting substance regulated under the Montreal Protocol that is used as a fumigant on crops, for pest control in structures and stored commodities and for quarantine treatments[105] and smaller amounts are also used in the preparation of other organic compounds.[106] The bromine from methyl bromide is 60 times more destructive to ozone on an atom-per-atom basis than the chlorine from

[104] Annex II listed 'Useful References' including Ethiopian legislations related with the floriculture sector.

[105] United Nations Environment Programme (UNEP), *Floriculture and the Environment - Growing Flowers without Methyl Bromide*, www.uneptie.org/ozonaction/ Last visited on May 20, 2009.

[106] *Methyl bromide.* (2009). Encyclopædia Britannica. Ultimate Reference Suite. Chicago: Encyclopædia Britannica.

CFCs.[107] UNEP's Methyl Bromide Technical Options Committee has identified alternatives for the vast majority of current uses and many of these are already successfully used around the world.[108]

Recognizing its threat to the ozone layer, the international community is taking serious measure against methyl bromide and the parties to the Montreal Protocol have agreed to a global phase-out schedule for methyl bromide in 1997.[109] This schedule requires that industrialized countries phase out methyl bromide by 2005. Developing countries must freeze methyl bromide consumption by 2002, with a 20% reduction in 2005 and a phase out by 2015. Whether or not the Code's scheme coincides with the international scheme thus requires further inquiry including the questions on how long and how often the Board gave permission for its use.

Chapter one of the Annex further sets standards for 'Monitoring and Evaluation of the Use of Inputs', that is, water consumption, pesticide use, fertilizer use, waste disposal and energy consumption. Instead of setting the amount to be used, this section only requires farmers to have a written procedure on these matters and a clear and traceable record of it. Obviously, floriculture is intensive farming and a relatively high amount of pesticides and fertilizers might be used in the greenhouse than in the conventional farming. Dr Glenn[110] admits this fact. However, she argues that the amount and the manner of using pesticides and fertilizers are highly regulated by the discipline, the market for the product and the price of the chemicals. She further explains that the amount of fertilizer used is determined by the soil analysis result. The appropriate amount of fertilizer will be dissolved in water which is used only to wet the soil and the root of the plant. As a result, the amount of fertilizer that gets in to the soil and that will not be used by the plant is minimal.

With regard to pesticides, Dr Glenn argued that the amount of pesticide used is limited to the need of the targeted pests. Crop hygiene and cultural

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[107] CFS (trichlorofluoromethane) was used extensively as aerosol-spray propellant, refrigerant, solvent, and foam-blowing agent after WWII. But due to its negative effect on the ozone layer, a ban was imposed on the use of CFCs in aerosol-spray dispensers in the late 1970s by the United States, Canada, and the Scandinavian countries. In 1990, 93 nations agreed to end production of ozone-depleting chemicals by the end of the century, and in 1992 most of those same countries agreed to end their production of CFCs by 1996. **("***chlorofluorocarbon* (CFC)**."** Encyclopædia Britannica. Ultimate Reference Suite. Chicago: Encyclopedia Britannica, 2009.)

[108] *See* UNEP *Supra note* 104.

[109] *See* UNEP *Supra note* 104.

[110] *Dr Glenn Humphries, Supra note* 92.

practices will be implemented to minimize the appearance of pests from the very beginning. If the crop scouting shows the existence of pests, the nature of the pest and the nature of the weather will be studied before spraying to determine whether or not treatment is needed and whether it is the right time. The product selection will be determined by factors like effectiveness, resistance management, cost, availability, environmental impact and operators' safety. Besides, the application of pesticide should be at the right time, with the correct amount and on the right target. Consequently, there will be only a little amount which will run off the plant to get into the soil unlike out door spraying by airplane, which happens in conventional farming.

The second chapter of the Annex lists requirements for safe 'Environmental Management' which calls for farmers to demonstrate possession of appropriate storage facilities for fertilizers and pesticides. A dry and secure place for storing fertilizes is necessary so that fertilizers can be free from risk of fire, contaminated water courses and employees. Moreover, the proper recording of fertilizers (purchased and used) is stated as a requirement.

More stringent standards are set for the pesticides than for fertilizers for obvious reasons. This includes storing pesticides in 'suitable constructed stores.' The Code of Practice has indicated the material to be used for its construction, the facilities to be provided, safety equipments to be installed, its location on the farm and contact with employees, the need for labeling and keeping it in the original container, and safe disposal of 'obsolete' pesticides. In addition, national and international regulations have to be observed in the transportation of pesticides and the use of agrochemical products. The use of measuring equipment and mixing equipment and the application of safety measures are also regulated. During spraying of toxic products, unprotected persons are not allowed to be in the greenhouse and re-entry is prohibited for some hours after spray. The spraying is also regulated and must be done by a well trained and equipped sprayer; the date must be recorded as well as the site. The type of pesticide that is used, the amount and volume of spray and the reason for its application must be stated. The equipment and clothes should as well be washed after spray.

Waste disposal management methods are treated in the second chapter of the Annex. Different types of treatment of wastes are possible as waste handling is defined according to type of waste (plastics, paper, wood, chemicals). A site must be available for the disposal and standard procedures for the treatment and disposal must be used, especially if the waste is toxic. A more detailed procedure has been indicated in the Code for handling and disposal of chemical product packaging. To this effect, it says "Rinse (at least three times), remove and store empty packaging such that human exposure to

the products, its re-use, and environmental pollution are avoided." Accordingly, water used should then flow back to the spraying equipment. Moreover flower farms are required to "pierce or compress the stock in a labeled area prior to incineration in a *Silsoe incinerator"* followed by "burial or collection by an officially approved collection and disposal scheme in accordance with local legislation".

However, detailed procedures for the disposal of obsolete chemicals, which are also a threat to the environment, have not been provided. Ato Solomon said that wastes generated by the floriculture sector should have been disposed of on a disposal site determined by EPA. Incineration sites for obsolete chemicals, which are too costly to be handled by a single farm, should have been established for disposal of chemical wastes. In determining this site, impact assessment will be studied and a closed incineration site will be established. Ato Solomon adds that in addition to the weakness of the system of control of imports of chemicals, their disposal is also one of the challenges of the sector. Returning the obsolete chemicals to their place of production is also an alternative. But, for the time being the sector is functioning independently with an imperfect regulation by government agencies.

Dr Glenn Humphries, EHPEA Training Coordinator, explained what will happen to the water and empty container after washing.[111] The water will be accumulated in a spray tank, which will be sprayed in the greenhouse or treated to make it safe. The spray tank will be washed and the water will be accumulated in a special hole in which there is charcoal at the bottom to trap the chemicals, and the rest will be decomposed by microbes in the soil. The washed containers will be pierced so as to make them unusable for any other purpose or by the local community. They will then be accumulated in a designated area and will be burned at about 1000 °C. She added that the smoke and the ash resulting from the burning do not have adverse effect on the environment. Recycling of the empty containers, however, has not been done yet.

The third chapter of the Annex is about personnel, labour and human resources management. It requires, among other things, that personnel working on each activity, especially those handling chemicals should get the required training on their safe handling.

The Code made it very clear that all EHPEA members will be obliged to meet the Code's standards and non-members are also encouraged to

[111] *Id*.

comply.[112] A farmer will get EHPEA Code Accreditation certificate after compliance is proven through independent verification from an internationally accredited verification body selected by tender.[113] This has been started as a pilot project on ten floriculture farms. Dr Glenn explained that the ten farms have been selected on a voluntary basis and EHPEA has, as a pilot project, made a decision to empower these farms, which had some demonstrative experience in the sector. These first ten flower farms[114] received the certificate of code of practice for sustainable flower production after a one-year auditing process by a Dutch company, Control Union Certification, on February 26, 2009 and the cost was covered by the Ethio-Netherlands Horticulture Partnership and EHPEA.

It is very clear that the Code's standards can be a regulating framework for the sector in minimizing adverse environmental impact. However, only 10 out of more than 86 floriculture farms have so far met the terms of the Code. According to Dr Glenn, the second and the third auditing will be conducted very soon ensuring greater compliance from the farm. Moreover, EHPEA has a plan for all its members to get the certificate by the end of 2009. This seems ambitious in view of the world economic recession which affects the sector. Not all floriculture farms operating in Ethiopia have joined EHPEA,[115] thereby putting non-members outside the regulatory framework of the Code. It is to be noted that only 10 of the farms are regulated by the Code leaving more than 85% of the farms unregulated.

4. Market Label

Many Dutch owned floriculture farms are operating in Ethiopia and more than 65% of Ethiopia's floriculture product goes to the Dutch market. In addition, there is a very close relation between the two nations in the floriculture sector and this has led to the Ethio - Netherlands Horticulture Partnership Agreement. Dr Glenn[116] also believes that Ethiopian floriculture

[112] *See*, The Code, *supra note* 96, at. 5

[113] *See*, The Code, *Supra note* 96, at 6

[114] These are ET Highland Flora, Maranque Plants, Florensis, Ethio-Agri CEFT, Red Fox Ethiopia, Ethiopia Cuttings, Lafto Roses, Olij (Avon) Roses Ethiopia, Dunga Floriculture and Minaye Flowers that operates with in 75 Kms radius of Addis Ababa in Holeta, Sebeta, Koka and Debre Zeit towns.

[115] Though the exact figure is not known around 80% - 90% of the floriculture farms are members of EHPEA. Dr Glenn believes that non-members are mostly farms that are under construction phase and which did not start production.

[116] Dr Glenn Humphries, *Supra note* 91.

is highly regulated by the MPS[117] market system and the EHPEA Code of Practice was inspired by it. As briefly discussed below, the market label system helps the floriculture sector develop environment friendly operation. Focus is made to the MPS label/market system which has its origin and development in Holland but has grown to operate in the international floriculture market.

4.1- Origin and Operation of the MPS Label/Maret

The MPS mainly is owner/administrator and developer of certification schemes for the horticultural sector. It appeared in 1993 as a regional project in the Westland, Holland. Various groups made up of growers, educators and researchers developed a certification programme aimed at reducing the environmental impact of the floriculture sector and improving the sector's image. By the end of 1994, around one thousand growers were already registering their environmental data with it and certification began in January 1, 1995 with MPS-ABC/D qualification.[118] In February 1995, MPS was turned into a national association of all the Dutch flower auction houses. It now has grown into an organisation which is active in more than 50 countries.[119]

MPS issues certificates for floriculture growers including MPS-ABC– environmental certification; MPS-Socially Qualified – for social aspects, such as safety, health and working conditions; MPS-GAP – certification for compliance with demands from the retail sector; MPS-Quality – quality care certificate; MPS-QualiTree – proper quality and maximum reliability; ETI – Ethical Trading Initiative; ISO 9001:2000 – certificate in the field of quality care; and MPS-Florimark production – the TOP certificate for TOP companies with TOP products.[120]

4.2- Kinds of MPS Certificates/Labels

4.2.1- MPS-ABC: Registration and qualification

MPS-A, B and C are environmental registration certificates. The qualifications MPS-A, B and C are awarded to MPS participants who record their usage of crop protection agents, fertilisers, energy and waste over four-week periods. At the end of the period, participants send the recorded data to

[117] MPS - '*Milieu Project Sierteelt'* in Dutch literally means 'Floriculture Environment Project'. Official site of MPS : www.mymps.com/

[118] *See* http://www.mymps.nl/?id=321/ last visited on May 15, 2009.

[119] *Id*.

[120] *Id*.

MPS, to be processed using calculation rules. A maximum number of achievable points have been set for each theme. Participants are awarded qualifications four times a year namely MPS-A, B or C based on the total number of points achieved. The qualification MPS-A stands for the most environmental-friendly cultivation, while the qualification participant (D) is awarded when a participant has registered for three successive periods or has registered for 13 periods and scored less than 10 points on the four themes.[121] Hence, according to Dr Glenn, EHPEA Training Coordinator,[122] the MPS A/B/C market will regulate the amount and kind of input – water, pesticides, fertilizers and energy, and waste management – and give A or B or C grade based on the current system. Especially, weighting, solubility in water, threat to fish and other aquatic life, toxicity, volatility of fertilizers and pesticides will be considered.

MPS-ABC registration is becoming a precondition for accreditation under other certificates. It also helps farms meet market demand, increase sales, receive an MPS report, be entitled to use the logo emblem, be included in the MPS database accessible to all purchasers, profile themselves as responsible and sustainable business undertakings, and comply with all legislation.[123]

4.2.2- MPS Socially Qualified: Healthy and Safe Working Practices

MPS Socially Qualified (SQ) is a certificate that allows growers to demonstrate that their products are cultivated under good working conditions. MPS-SQ includes requirements on health, safety and terms of employment, and respect for universal human rights, the codes of conduct of local representative organizations, and International Labour Organization (ILO) agreements. This certificate is becoming a pre-condition for entry into the market system in some nations now, and will likely be used by many in the future.[124]

4.2.3- MPS-GAP: Meeting the requirements of retail

MPS-GAP is a label with which you can anticipate the retail market demands. The MPS-GAP certification scheme is based on criteria formulated by the European retail organisation EUREP for safe, sustainably-cultivated, high-quality and traceable products. These criteria are expressed in Good

[121] *See* http://www.my-mps.com/asp/page.asp?sitid=665/ last visited on May 15, 2009.
[122] *Dr Glenn Humphries, Supra note* 91.
[123] *See* my mps, *Supra note* 120.
[124] *Id*

Agricultural Practice (GAP). MPS-GAP is benchmarked with the EUREPGAP[125] flowers and plants scheme.[126]

4.3- Benefit of MPS Award and Environmental Standards

The basic purposes of participating in the MPS certification are diverse depending on the type of certification. But generally, they help a floriculture farm to meet environmental standards, its purchasers' interest, stay competitive in the market, meet government regulations and enhance production efficiency on the farm. Due to the growth of consumer power, they are putting minimum conditions for entry into the market. A growing number of purchasers are making MPS ABC registration a requirement for their suppliers. The British retail channel involves GAP and social requirements (MPS-SQ) for suppliers as of 2006. Other countries are expected to follow suit. It means it is becoming difficult to get opportunity in the market without GAP (e.g. MPS-GAP) approval. Flowers and plants are increasingly being sold through the retail channel, which subjects suppliers to strict requirements.

These are developments offering enormous opportunities for the floriculture sector. It could tap new markets, retain or expand existing markets or be a pioneer. A floriculture farm must also enhance its company image and reduce the level of risk for its client through the guaranteed traceability of products. To this end, MPS-GAP trademark may be an option which a farm can use for promotional and packaging purposes. In addition, MPS-Quality enables growers to guarantee the reliability of the product information and services that are provided.

Consumers are also becoming ever more critical on cultivation methods and the origins of the products that they purchase. In addition to the environment, international supermarket chains are increasingly focusing on social aspects. As a result, the demand for products grown under good, healthy and safe working conditions is increasing. MPS-SQ certificate positively addresses this concern of consumers, and enhances the market and confidence in the product.

Moreover**,** MPS-Florimark award entitles a product to a golden label enabling farms to be selected TOP companies with TOP products. Thus, participating in the MPS system is beneficial to flower farms. Almost all

[125] EUREP GAP stands for 'European Retailer Producer working group programme to develop a system for the certification of Good Agricultural Practice' and EUREP is the registered trademark for this group,

[126] *See* http://www.my-mps.com/asp/page.asp?sitid=661/ last visited on May 15, 2009.

certification puts environmental protection standards as a minimum requirement and helps the floriculture sector to pay attention to environmental impacts.

Floriculture companies functioning in Ethiopia have been involved in the MPS certification system though the data are not conclusive. For instance,[127] Langano Lily Flowers Plc has received ETI – Ethical Trading Initiative and MPS Socially qualified certification in 2009 (data up to 20-05-2009). In addition, Olij Roses Ethiopia in 2009, and Maranque Plants PLC, A.Q. Roses PLC and Golden Rose Agrofarm Ltd in 2008 have secured the MPS Socially Qualified certification (Upto 19-05-2009). When we see the MPS ABC/D certification profile, six companies have MPS-A, one MPS-C, one MPS-D and two more have MPS-D (Up to 09-06-2009). These are, DJ.J. Kothari & Co. (Eth) Ltd. (A 78), E.T. Highland Flora plc. (A 78), Roses PLC , (A 87), Alliance Flowers Plc (A 85), Oromia wonders Plc (A 77), Dugda Floriculture Deu Plc (A 81), Holetta Roses PLC (B 59), Olij Roses Ethiopia (C 55), Sher, the largest floriculture farm holder in Ethiopia, and Ethiodream PLC have only MPS D, participation certificate.

The extent to which the MPS system enhances environmental compliance standards depends on whether the flower farms have MPS certificates. But the above data is disgruntling as only few are under MPS certified companies list. Hopefully, more companies will get under the list because the marketability of a flower farm's product can eventually be at stake unless customers are ensured that it operates under socially and environmentally responsible standards.

Conclusion

The floriculture sector is booming in Ethiopia making the country the second largest rose exporter in Africa and the sixth in the world. Floriculture is also growing in the world market. Meanwhile, however, environmental concerns are growing because, floriculture requires intensive use of chemical fertilizers and pesticides and needs huge amounts of water than conventional farming in addition to thoroughly monitored waste management system. If it is not well managed, whatever the farms put on the ground, sooner or later, will end up in the water or soil. The substances, like nitrate, which are found in fertilizers and pesticides, are hazardous for the environment.

The impact of pesticides on the environment includes degrading water and soil quality, adverse effect on non-targeted lives (such as soil organisms,

[127] Fully certified companies list is available on MPS official site http://www.mymps.nl/?id=379/ last visited on June 10, 2009, summary by the writer.

aquatic life, human beings, insects, cattle etc), air pollution, and increased pesticide resistance by targeted pests. In its strict sense, a fertilizer, unlike pesticides, is not inherently toxic. Yet, fertilizer runoff from farms has dire consequences. Water pollution, soil and water quality degradation, human and cattle health hazards, air pollution, risk on aquatic life, as well as water logging and salinization are some of the adverse effects of fertilizers. Disposal of waste produced by the sector includes empty chemical containers (fertilizers, pesticides), washing waters and other agriculture waste like cut off crop parts, unused soil, unused chemicals and waste water. These are indeed threats to the environment unless proactive prevention measures are put in place.

In spite of some gaps in the regulatory framework and although there are problems of effective regulation of the floriculture sector, Ethiopia has developed policies and legislation to protect and preserve the environment. Moreover, the international market system plays a significant role in forcing farms to comply with environmental standards. The Code of Practice formulated by EHPEA is also another self-regulatory framework, and its members are expected to observe environmental compliance standards in the course of their activities. But only few flower farms (of this expanding sector) have committed themselves to this Code of Practice, thereby making the environmental threat an imminent concern. The respective government agencies are thus expected to promptly empower themselves and minimize the threat through appropriate institutional and regulatory frameworks that can benefit from the environment friendly market pressure and the code of conduct that is at the initial stage and process of being put into practice.

Unless the activities of the sector are well managed, supervised and subjected to an effective regulatory system, the floriculture sector might, to a substantial degree, become a threat to the national environment. The government is thus expected to empower its regulatory offices (EPA, Ethiopian Investment Agency, Ministry of Water Resources, Ministry of Agriculture and Rural Development, Ministry of Capacity Building, and its respective regional bureaus, and the newly established Ethiopian Horticulture Development Agency[128]) and give due attention to the adverse environmental impact which is already observable rather than offering priority to short-term income generation at the expense of the environment. ■

[128] *See*, Council of Ministers Regulation No 152/2008 that established the agency together with its objectives, powers and duties.

Acronyms

CFCs	Chlorofluorocarbons
EC	Environmental Council [Ethiopian
EHPEA	Ethiopian Horticulture Producers and Exporters Association
EIA	Environmental Impact Assessment
EPA	Environmental Protection Authority/Agency
EPE	Environmental Policy of Ethiopia
EUREP GAP	EUREP GAP stands for 'European Retailer Producers Good Agricultural Practice'
FDRE	Federal Democratic Republic of Ethiopia
MPS	*Milieu Project Sierteelt*' in Dutch literally means 'Floriculture Environment Project'
MPS GAP	*Milieu Project Sierteelt'* Good Agricultural Practice'
MPS SQ	*Milieu Project Sierteelt'* Socially Qualified
REA	Regional Environmental Agency
UNEP	United Nations Environment Programme

EUROPEAN INFLUENCE ON ETHIOPIAN ANTITRUST REGIME:

A Comparative and Functional Analysis of Some Problems

Hailegabriel G. Feyissa*

Introduction

Despite a noticeable European influence on the Ethiopian competition legal regime, some aspects of Ethiopia's 2003 Trade Practice Proclamation are still inadequate to appropriately deal with certain competition problems. The limitations of the rules need to be put right since achievement of the very goals of competition law requires a well designed set of competition rules and effective implementation schemes.

This article attempts to make a brief comparative and functional analysis of some of the major inadequacies of the Trade Practices Proclamation. A brief appreciation of the background to the 2003 Ethiopian Trade Practice Proclamation and a subsequent perusal at the European marks of the same will serve as stepping stones to comparative and functional analysis of some problems related to the Ethiopian antitrust regime. Finally, I argue in favour of a functionally sound approach to solve some problematic aspects of the existing Ethiopian competition legislation.

1. Background: Free Market and Competition Regulation in Ethiopia

Regulation of competition is a fairly recent phenomenon in Ethiopia. Before 1991, the economic policy in Ethiopia was not based on the ideals of free market aside from the introduction of a mixed economic policy around 1990. The military (socialist) regime – that seized power after the 1974 revolution – took measures that reduced the role of the private sector and the free market that had started to flourish during the imperial regime of Haile Selassie.[1] Consequently, key motives for the regulation of competition, e.g. (a failure in) a free market, were absent from the outset.

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[1] Before 1974, Emperor Haile Selassie's (1930-1974) Ethiopia opted for market oriented mixed economy which saw a considerable involvement in the economy by the private sector; see, e.g., Kibre M., *Policy-induced Barriers to Competition in Ethiopia*, Jaipur, CUTS International, 2007, at 4 (hereinafter Kibre).

Works to bring the market back into play have been done since the last decade of the previous millennium, after the downfall of the socialist regime. As part of the move towards liberalised and free market economy, different restructuring works has been put in place.[2] The different schemes of liberalisation have enhanced the role of the private sector in the Ethiopian economy. Would this, however, guarantee smooth competition in the actual market? The answer would be in the negative. Neither privatization of nationalised industries nor opening up of previously closed markets would necessarily guarantee smooth competition in the actual market as there are structural barriers inherited from the previous system which created monopolies in various sectors. Moreover, the absence of competition culture may tempt some businessmen, dominant or non-dominant, to engage in restrictive business practices. Such problems could only be dealt with appropriately if competition is regulated.

Ethiopia enacted its first ever competition law only in 2003 – more than a decade after it started a move away from socialism. One could see the 2003 Trade Practice Proclamation as part of the worldwide surge in competition legislation happening after the demise of socialism in Eastern Europe. The growing consensus that antitrust law is not a luxury, but a necessity, to developing free market states – that are not of course invulnerable to anticompetitive practices – has been one of the main driving forces behind the growing interest among states like Ethiopia in antitrust regulation. The universal rise in competition endorsement has also been motivated by factors external to the concerned states. Ethiopia does not seem to be an exception to this.[3] As would be seen in the forthcoming sections, Ethiopia's antitrust regulation has benefited from the already well developed competition statutory and case laws of the traditional free market economies – most importantly that of Europe.

[2] These, for example, include privatisation of previously nationalised enterprises and enactment of new legislation allowing the participation of the private sector in areas that in the past were closed to them; Kibre rightly notes that these restructuring processes could be understood as being part and parcel of a broad competition policy; Kibre, p.4 *et seq*.

[3] In part, Ethiopia's competition law seems to be the result of Ethiopia's engagement in regional common markets (see below for more on this). The conditioning of funds [from international funding agencies (IMF and World Bank)] on a range of liberalisation issues which include the adoption of different competition policies, including law, is the other likely reason for the adoption of the competition law.

2. Antitrust Rules in the Trade Practice Proclamation: Its European Marks

Ethiopian antitrust regulatory rules are embodied in the Trade Practice Proclamation (TPP) enacted in 2003. In Part Two of the Proclamation, particularly Articles 6-11, spell out two of the three conventional competition rules. While Art.6 deals with anti-competitive practices (*cartels*), Art.11 prohibits *abuse of dominance*. The first of the two provisions reads "No person may directly or indirectly enter into any written or oral agreement that restricts limits, impedes or in any other way harms free competition, in the process of production, supply, distribution or marketing of goods and services."[4]

Apart from this general rule, the same article provides some exemplary anti-competitive practices which include: (a) agreements of jointly fixing prices; (b) agreements for collusive tendering as to determine market price; (c) agreements as to market or consumer segmentation; (d) agreements as to allocation by quota of production and sales; (e) concerted refusal to deal, sell and render services.

Article 11, on the other hand, contains the Ethiopian rule on abuse of dominance. Accordingly, "no person may carry on trade which gives opportunity to control a relevant market for goods or services; or limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on market development."[5] Like Article 6(1), the general rule in Article 11(1) is followed by some illustrative abuses [by a dominant undertaking]. *Inter alia*, these include (a) the direct or indirect unfair imposition of excessively high or low selling price or service fee or withholding supply or any pre-emptive behaviour to impede entry into market; (b) the selling of similar goods or services to consumers on unequal terms or payments; (c) the application to dealers in transaction of unequal terms in respect of similar goods thereby placing some at competitive disadvantage; (d) to impose a condition of combined sales on a buyer when the goods or services so combined are not required by the buyer; (f) refusing sales of goods or services to customers without good cause; and (g) selling at a price that does not cover production cost to eliminate fair competition.[6]

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[4] Art.6 (1), TPP.

[5] Ibid, Art.11 (1).

[6] The appropriateness of the inclusion of some of these specific abusive practices is questioned by some; see, e.g., a report by USAID, *Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic*, USAID, 2007 at 60[hereinafter USAID

The European marks on the Ethiopian rules on anti-competitive practices or restrictive business practices (RBP) are very visible. A cursory look at Art.6, TPP and its European equivalent – Art.81, the 1957 Rome Treaty establishing the European Community (EC Treaty) – reveals that the latter has been the primary material source to the former. The text of Art.81 (1) of the EC Treaty reads:

> The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
> a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> b) limit or control production, markets, technical development, or investment;
> c) share markets or sources of supply;
> d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

This provision is the basis for numerous domestic antitrust rules on RBP, both within and outside Europe. Apparently, the Ethiopian antitrust rules on RBP are equally inspired by this European material source. Despite the absence of complete verbal similarity between the corresponding provisions of the TPP and the EC Treaty, Art.6 (1) of the former is noticeably influenced by the Art.81(1) of the latter. Firstly, same as the latter, the former declares that any form of agreement that prevents, restricts, or impedes competition is prohibited. Secondly and most importantly, Art.6 (2), TPP takes on the illustrative anti-competitive practices enumerated under Art.81 (1), EC Treaty. For instance, one may look at the striking similarity between (1) the order and (2) type of illustrative RBPs listed under Art.6 (2), TPP and Art.81 (1), EC Treaty.[7]

Report]; Harqa H., *Competition Policies and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law*, 2 Mizan Law Review 33 (2008), at 48[hereinafter Harqa].

[7] Both under Art.6 (2), TPP and Art.81 (1), EC Treaty, *joint price fixing* is the first in the list of illustrative RBPs. Moreover, note that Art.6 (2), TPP adopts [directly or indirectly] almost every single illustrative RBPs mentioned in Art.81 (1), EC Treaty.

Incidentally, it is worth noting that Ethiopia has apparently enacted its rules on RBP in accordance with Art.55[8] of the Common Market for Eastern and Southern Africa (COMESA) Treaty, which itself is comparable, if not identical, with its European counterpart, i.e., Art.81 of the EC Treaty. Membership in the Common Market entails, *inter alia*, the enactment of domestic antitrust legislation or the application of the regional Treaty rules to domestic competition matters.[9] In other words, Ethiopian rules on anti-competitive practices are, in part, the result of Ethiopia's commitment to the regional free trade arrangement, COMESA.

The prohibitions embodied in Art.11 of TPP are also comparable with those under Art.82 of the EC Treaty. Art.82 of the EC Treaty, embodying the European law on abuse of dominance stipulates:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
>
> a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> b) limiting production, markets or technical development to the prejudice of consumers;
> c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

As it is the case with the Ethiopian rules on cartels, the rules on abuse of dominance bear European origin. The very preference of the term *abuse of*

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[8] The text of this article, *inter alia*, reads: "… the Member States agree to prohibit any agreement between undertakings or concerted practice which has its object or effect the prevention, restriction or distortion of competition within the Common Market…" Note the verbal similarity between the texts of this article and its European counterpart.

[9] Ethiopia and other member states have been assisted by COMESA in developing their respective domestic competition legislations. Apparently, states who fail to adopt one or another piece of law are obliged to apply the regional competition rule enshrined under Art.55, COMESA Treaty; see Stewart T., Clarke J. & Joekes S., *Competition Law in Action: Experience from Developing Countries*, International Development Research Centre, Ottawa, 2007, at 45[hereinafter, Stewart, Clarke & Joekes].

dominance, instead of *anti-monopolisation*, itself confirms the European root of the rule as the term was first coined and used in Europe.[10] Furthermore, the marked similarity [in form and content] between Art.11, TPP and Art.82, EC Treaty tells the rest.

Institutions of antitrust enforcement might as well manifest instances of European influence on the Ethiopian antitrust regime. An administrative body – Trade Practice Investigation Commission – has been set up to enforce the regulation. Answerable to the Ministry of Trade and Industry, the Commission is empowered to (1) investigate complaints submitted to it by any aggrieved party, (2) to take administrative measures or/and give penalty decisions.[11] Thus, Ethiopian competition law is set to be enforced within the context of administrative law. At this point as well, the Ethiopian system is generally comparable with the European – where, unlike in the US, antitrust cases are initially and mainly enforced administratively.

As could be evident from the discussion so far, the Ethiopian antitrust regulation is modelled after that of advanced western free market economies, i.e., mainly that of Europe. Apart from the formal and substantive similarity between Ethiopian and European antitrust rules, Ethiopia's preference of administrative, than judicial, enforcement antitrust is seemingly inspired by European experience.

Incidentally, one may question whether there would be any sound reason for a developing country like Ethiopia to opt for antitrust law that "mirrors" that of developed free market economies of Europe? Put differently, would Ethiopia's adoption of an antitrust regime based primarily on developed free market economies be level-headed in face of the triumphant argument that "there is no unique universally applicable competition law and policy"?[12]

First, core principles of competition law hold good for all states and could be part of any antitrust law.[13] The traditional motive underlying antitrust regulation – the fear of inefficiency resulting from monopoly power – is hardly absent in Ethiopia. Least developed states like Ethiopia cannot afford

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[10] Europeans use the term *abuse of dominance* to identify what in USA and similar jurisdictions is generally known as "anti -monopolisation" rules.

[11] Art.12 *et seq*.,TPP

[12] This argument is underlined on the fact that there are huge socio-economic, political and cultural differences between developed and developing nations.

[13] See, e.g., Adhikari R. & Knight-John M., *What Type of Competition Policy and Law Should a Developing Country Have?*, South Asia Economic Journal, 5(2004), at 2 (hereinafter Adhikari & Knight-John); Dimgba N., *Introduction to Competition Law: a sine qua non to a Liberalised Economy*, 2006 , at 30(available at: www.globalcompetitionforum.com) [hereinafter Dimgba]

inefficiency. Second, the science/art of antitrust regulation in traditional free market states – where the regulation has been tested by practice for decades – readily supplements the understanding, in the receiving state, of meanings of the core principles.[14] Moreover, the ever changing character of antitrust concerns in traditional free market states would give insights into improved competition policy objectives in emerging free market economies. Therefore, Ethiopia or other emerging free market countries, may pick up elements out of the major pre-existing antitrust regulatory systems, which best suits their context. [15]

3. What to Expect from the Enforcement of the Antitrust Rules

Regulating markets through state intervention has been necessitated for markets do not always work "perfect". Put in other words, market failure provides the very typical rationale for government regulation of the market.[16] Governments of various free market economies intervene mainly through competition policies/regulations.[17] What do we mean by "market failure"? Why does it matter? What do we specifically want to achieve by intervening in a failed market?

At least within the context of antitrust regulation, market is said to have failed when competition is eliminated from a certain market. The elimination of competition from a certain free market matters because it takes away, according to a highly persuasive economic theory, the greatest benefits which otherwise would be there in the presence of competition.[18] What is disadvantageous to the society is not necessarily the absence, in a certain market, of competition. It is rather the eventual economic loss – what is usually known as deadweight loss – that provides the economic *raison d'être* behind antitrust regulation. The major concerns of antitrust regulation are summarized by Viscusi et al:

> "...because of the control over the price exerted by a monopoly [market power that may be created through the elimination of competition] there are economic efficiency losses to society. Product quality and diversity may also be affected.

[14] Dimgba, at 30.

[15] For instance, Joan-Ramon Borrell recommends either American or European antitrust regime or a blend of the two depending on the strength of law enforcement institutions in a specific country. For details see generally Borrel J., *Choosing among American, European, or no Antitrust at all*, 2005(available at www.ssrn.com), [hereinafter Borrel]

[16] Bowels R., *Law and the Economy*, Martine Robertson & Comp., Oxford, 1985, at 165.

[17] Harqa, at 35.

[18] Johns A. & Sufrin B., *EC Competition Law: Text, Cases and Materials*, 3rd Edition, OUP, London, 2008, at 1. [hereinafter Johns & Sufrin]

> Society could potentially be better off if limitations were imposed on the operation of a monopoly or a similar kind of concentrated industry."[19]

Law and economics scholars agree that one, if not the sole, aim of regulating competition is to maintain the competitiveness of a certain free market for it maximises efficiency and, in return, promotes public [consumer] welfare. Though antitrust regulations in different jurisdictions have not always been enacted with the sole aim of efficiency, efficiency [along with consumer welfare] still remains the primary goal we specifically want to achieve by intervening in a failed market.

TPP has two expressly stated objectives: (1) to bring a fair competitive process through the prevention and elimination of anti-competitive practices, and (2) to safeguard the interests of consumers through the prevention of any restraints on the efficient supply and distribution of goods and services. Accordingly, maintaining the competitive process (or the presumably efficient supply and distribution mechanism) in the actual market through the elimination of RBPs for the benefit of the society at large and the consumer in particular is the economic rationale behind antitrust regulation in Ethiopia. These economically sound objectives – the most widely recognised objectives of competition law elsewhere – are not supplemented[20] by other stated objectives although some specific provisions, as would be seen below, make us doubt the exclusiveness of the two expressly stated economic objectives. In the immediately following section, the adequacy of some specific regulatory rules of the TPP in achieving these economic objectives is appraised.

4. A Comparative and Functional Inquiry into Some Aspects of the Ethiopian Law

A. the Limited Scope of Application: Robbing the Regulation its Main Targets?

In most antitrust regimes, the scope of application of the law is broad enough to include as many economic activities as possible. But, some carefully designed limitations on the scope of application are recognised. In Europe, for

[19] Viscusi W., Vernon J. & Harrington J, *Economics of Regulation and Antitrust*, 2nd Edition, MIT Press, Cambridge, 1998, at 5.

[20] Other specific objectives of competition law are recognised in different countries. The 1998 Competition Act of South Africa, for instance, has, *inter alia*, the objective of encouraging small and medium sized enterprises so as "to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons"; Stewart, Clarke & Joekes, at 21 et seq.; also, some country-specific factors determine objectives of competition law and policy (see, e.g., Adhikari & Knight-John, at 3-5).

instance, certain specific sectors are made outside the scope of application of certain competition rules.[21] *Inter alia*, this is justified in terms of services of general economic interest which, if competition rules are applied, may not be provided adequately.[22] Other public interest considerations have also been used to either limit or broaden the scope of application of competition law.[23]

In Ethiopia, as well, antitrust regulation seems to exclude certain firms and economic sectors from its scope of application. As a rule, the proclamation applies to all persons involved in any commercial activity. Exceptionally, the inapplicability of the law may, on a case by case basis, be considered if (1) commercial activities that are, according to investment proclamation, exclusively reserved for the Government; (2) enterprises having significant impact on development and designed by the Government to fasten growth and facilitate development; and (3) basic goods and services that are subject to price regulation.[24]

The first thing one may note is perhaps the discretion the regulator – the Trade Practice Commission – enjoys in deciding the [in]applicability of the rules to certain categories of undertakings. Obviously, this risks legal certainty. This is of particular economic implication as the Commission decides [in]applicability of the law to firms only after an alleged violation of the law:

> "The broad discretion of the Commission to exempt enterprises from the law, and to do so *ex post facto*, does not provide the assurances and predictability that would encourage innovation, expansion, or entrance [to a market] by entrepreneurs whose success depends upon free competition."[25]

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[21] For details on various limits of European competition law, see e.g., Johns & Sufrin, at 615 *et seq*.

[22] Art.86 (2), the 1957 Treaty of Rome (the Treaty establishing the European Community). This provision is an instance of legislative approval to the theory that free market principles are not ideal in all situations. For instance, the efficient and uninterrupted provision of some basic public services requires the deliberate granting of exclusive or special rights to certain undertakings involved in the provision of the basic public services. This is obviously against the principle of competitive market. Yet, policy makers in various jurisdictions have long understood the importance of exceptionally doing away with free market principles.

[23] For instance, industrial, trade, and other public interest considerations including affirmative actions aiming at rectifying social inequalities have, in some jurisdictions, been given emphasis at the expense of the traditional concerns of competition law, i.e., market efficiency; see, generally, Stewart, Clarke & Joekes, at 21 *et esq.* and Adhikari & Knight-John, at 2-5.

[24] Art.5, TPP.

[25] USAID Report, at 59-60.

Apart from this, there seems to be another greater danger. In the absence of any set of interpretative guidelines to be considered [in deciding applicability or otherwise], the ideal targets of the law may easily be absolved from liability if the Commission discretionarily decides not to apply the law against them. Given the fact that the main actors in the Ethiopian economy (even in sectors that are not exclusively reserved to the state) are big state monopolies who possibly benefit from exemption under Article 5, one cannot help questioning the efficiency or welfare "gains"[26] the inapplicability of the law may bring. This would also, at least in the future, be one of the issues that test the impartiality of the administrative organ overseeing the enforcement of the antitrust regulation.[27]

B. Don't We Need Regulatory Rules on Mergers and Vertical Agreements?

Cartels, intent to monopolise (abuse of dominance), and mergers are the traditional concerns of antitrust regulation. A fairly detailed antitrust legislation includes rules not only on cartels and abuse of dominance but also on mergers – which are of *ex ante* character. Scholars suggest *ex ante* or preventive as opposed to curative measure is a better way to fight anticompetitive practices in smaller economies like Ethiopia.[28] Some studies as well show that ex-ante authorizations such as cartel registrations and competition restraint authorizations are better suited where law enforcement institutions are moderately strong.[29]

However, emerging free market states including Ethiopia still leave mergers unregulated. Though ex-ante authorisation rules are recognised within the context of anticompetitive practices,[30] explicit merger control regulations are absent in TPP. The absence of merger rules in TPP may perhaps be attributable to the usual developing countries' qualm for it. Many developing countries believe that the creation of domestic monopolies enhances economies of scale and this in return would help international

[26] Assuming that the law's main objective is efficiency and consumer welfare, one may argue any decision of inapplicability is only meant to serve efficiency or welfare purposes – and nothing else.

[27] For now we may safely reckon with what the Commissioner of the Trade Practices Commission has, in a fairly recent scholarly article, stated. According to the Commissioner, a strong case that challenges the impartiality of the Commission is yet to come; see Harqa, at 49.

[28] Adhikari & Knight-John, at 14 *et seq*.

[29] See generally Borrel.

[30] See, e.g., Arts.7-9 of TPP which allow various ex-ante rules.

competitiveness.'[31] Though this might not be miles away from economic truth, especially where export competitiveness is among key developmental objectives, there are competing empirical evidences showing the relevance of merger control regulations for developing countries.[32] Hence, the absence of rules on merger makes the Ethiopian antitrust regime incomplete[33] and this situation may inappropriately benefit dominant firms at the expense of consumer welfare and efficiency –which are the declared objectives of the law.

The prohibition of vertical restraints is also unclear from the reading of the statute's provisions dealing with collusive behaviours.[34] The fact that Article 6(2) enumerates only conventional horizontal[35] restraints may arguably be taken as a legislative approval of vertical agreements which seldom pose serious competitive problems. However, the unqualified permission of vertical (distribution) agreements may impact on efficiency and, particularly consumer welfare:

> "...if practices such as resale price maintenance, excusive and selective distribution are widespread, retailers engaged in significant price discounts will be eliminated from the market, consumers may be deprived of innovative retailing and price discounting so that prices may increase, price competition between suppliers may be softened, [and importantly the situation] may foreclose the market to competitors."[36]

C. Economic Analysis of Comparative Significance of RBPs

Adjudicatory bodies often apply rules formalistically. This formalistic approach has not been at ease in so far as antitrust enforcement is concerned. There have been attacks on the formalistic judicial approach (in preference for an economic approach) to the analysis of the effects of anticompetitive

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[31] Stewart, Clarke & Joekes at 24; Adhikari & Knight-John, at 6-7

[32] Stewart, Clarke & Joekes, at 24.

[33] One may, however, argue that merger cases may in some instances be governed by the rules on abuse of dominance. This was the case in Europe before a separate merger regulation has been put in place. But, the rules on abuse of dominance do, as will be seen below, have their own drawbacks that may still leave some merger problems unsolved; thus, further rules on merger control would still be needed.

[34] Harqa, at 47.

[35] Horizontal restraints could simply be equated with collusions between competitors, e.g., two or more suppliers of a product. Whereas, vertical restraints are those collusive behaviours involving non-competitors, e.g., producers and suppliers.

[36] Johns & Sufrin, at 695. It is also unclear whether cartels which falls short of either written or oral agreements are caught under Article 6; see, e.g., Harqa, at 47.

practices.[37] Economic approach to the analysis of anticompetitive practices is particularly important not to categorically prohibit alleged anticompetitive practices whose [competitive] advantage, upon economic analysis, would be greater than the disadvantages.

TPP seems to implicitly recognise the importance of economic analysis of anticompetitive practices within the context of ex-ante authorisation rules under Art.7. According to Art.7 of TPP, the Ministry of Trade and Industry, which may authorise agreements between competitors subject to commitments by the later, has to first undertake the necessary studies to ensure that "advantages of the agreement to the Nation is greater than the disadvantages"[38] The phrase *ensuring that advantages of the agreement to the Nation is greater than the disadvantages* seems broad enough to even invite [economic or non-economic] analysis of factors other than the comparative competitive advantages of alleged anticompetitive practices.[39] This provision seems to introduce an undeclared goal – national economic welfare – of the Ethiopian antitrust regime. Even so, the expressly declared objectives of the law would have dictated only economic analysis aimed particularly at identifying the comparative gains (to, for example, consumers) of supposedly anticompetitive agreements. Understandably, however, arguments based on strategic trade theory call for the relaxation of competition rules to accommodate "the problems of industries that are having serious difficulty competing internationally" even at the expense of consumer welfare.[40]

The rules on Art.7 *et seq*., however, relate only to ex-ante authorisation. Absent ex-ante authorisation, defences based on comparative competitive advantages of a restrictive agreement seem to be unacceptable by the Commission. Put in other words, there is no clear distinction, under TPP, between *object* and *effect* cases[41] comparable with that recognised in the

[37] For a detailed discussion on this point in the European context, see Johns & Sufrin, at 209 *et seq*.

[38] Art.7, TPP.

[39] It is, for example, argued one of the factors considered under Art.7 is 'national treatment' which may be used to discriminate against foreign companies in favour of domestic ones; see USAID Report, at 60.

[40] See, for example, First H., *Structural Antitrust Rules and International Competition: the Case of Distressed Industries*, New York University Law Rev. 62 (1987), at 1054; see also Adhikari & Knight-John, at 11-14, for a fair appreciation of how trade and other areas of public policy impact on the enforcement of competition law.

[41] Some collusive agreements are now known to have as their *object* the restriction of competition; for example, price fixing, market segmentation, and limitation of output or sales. These obvert cases of RBPs are usually enumerated in legislations as is the case with TPP. Some agreements, on the other hand, do not apparently have the restriction

European competition jurisprudence. Hence, there would presumably be no analysis of economic effects of apparently non-restrictive business practices of undertakings. Consequently, we may risk allowing anticompetitive agreements whose effects are not visible at first sight. Conversely, apparently anticompetitive agreements which upon critical economic analysis might not be prejudicial to either efficiency and/or consumer welfare may inappropriately be punished.[42]

D. Abuse of Dominance under Article 11 Looks Economically Strange!

Defining market and assessing the effects of cartels and/or monopoly power in the defined market is now an established part of any antitrust analysis. TPP's rules on abuse of dominance do not seem to be in harmony with this anecdote. They do not explicitly require prior definitions of relevant market and, most interestingly, dominance within it. Despite the express title of Art.11 being *abuse of dominance*, the provision is addressed to *all* persons carrying on trade irrespective of their dominance in a certain market. Thus, the prohibition may ironically be applied to firms with insignificant market power in a certain market.[43] The literal application of this rule does not make any economic sense as regulatory rules on abuse of dominance are basically meant to deal with the conduct of dominant [in a defined market] undertakings. As the author has noted elsewhere,[44] the Trade Practice Investigation Commission - the federal agency that interprets the law - apparently applies the law to all traders irrespective of their status in a defined market.[45] The current

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of competition as their object. As such the identification of latent restrictive effects of such agreements requires further economic analysis – as this is the best known way to look into their economic [competitive] *effects* on a certain market – before any prohibition.

[42] It seems, however, the Commission considers the actual effects of the anticompetitive practices during the assessment of fine. In fixing the amount of fine, the Commission takes into account, among other things, the seriousness of the offense, the damage caused and the share of the market affected (Art.27, TPP).

[43] *See* the provisions of Art.11 (1) cited above.

[44] Hailegabriel G., *Avoid Misuse of Abuse of Dominance Law*, Fortune (14 Dec. 2008).

[45] Even when the Trade Practice Commission interprets the provisions in a manner compatible with the very purpose of rules on abuse of dominance, it has been the interest of the [prosecutor of] Ministry of Trade and Industry that the Commission literally interprets the rules notwithstanding the potentially flawed outcomes of such interpretation. In a certain legal opinion addressed to the Minister, the prosecutor (on Tahsas 23rd 2000 E.C.) expressed its disagreement with the (Tahsas 11th 2000 E.C) decision of the Commission in *the Ministry of Trade and Industry v. Ato Abdulsemed Takele and others* and similar other cases –"*Teff cases*" wherein the Commission

application of the law would be futile as "prohibiting single-firm conduct without regard to the firm's dominance opens wide the possibility that either competitively neutral or, even, pro-competitive conduct will be prohibited."[46]

However, a contextual interpretation of Art.11 may dictate the application of the rules on abuse of dominance to only certain undertakings that are dominant in a relevant market.[47] For one thing, the very stated objectives of the law are efficiency and consumer protection; and the law should not be applied to impede these objectives by, for instance, penalising pro consumer-welfare conducts. For another, the relevant article is headed abuse of dominance, and as such it should be applied to anticompetitive conducts by dominant [in a defined market] undertakings, as it is the case in other jurisdictions, including Europe - the primary material source of Ethiopia's law on competition in general and rules on abuse of dominance in particular.

E. The Trade Practices Investigation Commission

One of the benchmarks for the effective enforcement of competition law is the establishment of investigative and adjudicatory bodies.[48] The investigative body (what, in many jurisdictions, is also known as the *competition authority*) participates in triggering investigations, making recommendations in some policy decisions by the government, and intervening beforehand when undertakings seek ex-ante authorisation of potentially anticompetitive agreements. The adjudicatory body (may be an ordinary court), on the other hand, arbiters on cases involving alleged violations of competition rules.

The separation of the two bodies is commendable. The dangers of fusing the two functions into one agency are, according to Adhikari & Knight-John, multifaceted:

> "If [investigative and adjudicatory powers are not separated], the competition agency may become the investigator, prosecutor, judge...rolled into one. Moreover, if both powers are given to one agency, there could be a tendency in the competition commission to be biased in favour of the investigation report and the judgement could invariably go against the business enterprises, which have been seen as conducting anti-competition practices as per the report of the investigative agency."[49]

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dismissed the prosecutor's case as the latter failed to initially establish the market powers of respective defendants.

[46] USAID Report, at 60.

[47] Harqa, at 48.

[48] Adhikari & Knight-John, at 14.

[49] *Ibid*, at 15.

Art.12 of TPP establishes an "Investigation Commission". They are ppointed by the Prime Minister upon the recommendation of the Minister of Trade and Industry. Members of the Commission are drawn from three organs – government, private sector and consumers associations.[50] Though named the "Investigation Commission", the Ethiopian Trade Practices Investigation Commission is not, an investigatory body. It is rather an adjudicatory body whose power, according to pertinent provisions of the TPP, is to adjudicate[51]) of complaints submitted to it by any aggrieved party, subject to the requirement of approval of its recommendations by the relevant authority.

As there is no independent investigatory body comparable with the European Competition Commission or the Office of Fair Trading of the United Kingdom that would act as the police of a competitive market, the Ministry of Trade – to which the Trade Practices Investigation Commission is answerable – has sometimes acted as an investigatory organ. Yet, the prosecutor of the Ministry of Trade and Industry has so far seemed to take care of the investigation of some competition cases related in particular to hoarding – which, under the law, is abuse of dominance – to which the Ministry has been sensitive. Otherwise, aggrieved parties are practically in their own in so far as making their own case is concerned.[52] This may perhaps be the most serious weakness of the Ethiopian competition regime. To begin with, proving cartels and abuses of dominance are sometimes hard, if not impossible, even to well-equipped competition authorities let alone individual victims who may at times happen to be vulnerable to reprisal from the relatively powerful undertakings. Moreover, victim customers/consumers who more often than not are less organised are unable or unwilling to face the ups and downs of investigating RBPs and subsequently challenging the same. These, in turn, may lead to further entrenchment of anticompetitive practices in the yet fragile market.

[50] Art.13, TPP; yet, members have mainly been drawn from the government. It now appears the Commission is functionally non-existent due to internal crisis. Otherwise, it has been composed of five commissioners all of whom are drawn from the ''government''; it has been chaired by an MP, a former Minister of Justice, and has included chief economic advisor to the Prime Minister, governor of the National Bank of Ethiopia, governor of the Quality and Standards Authority of Ethiopia, and commissioner of the Federal Cooperatives Commission.

[51] Stating one of the powers of the Commission, art.15 (1) (a) misleadingly use the term "investigate". It should rather be read "adjudicate".

[52] This has been the case in some competition cases entertained before the Trade Practice Commission.

Apart from this, the involvement of the Ministry of Trade and Industry in investigation is ironic. The fact that the adjudicatory body – the Trade Practices Investigation Commission – is answerable to the same Ministry coupled with the investigatory function of the prosecutor of the Ministry apparently makes the Ministry the investigator and arbiter of competition cases. Thus, the crucially sought separation of adjudicatory and investigatory functions of competition agencies is seemingly absent in Ethiopia.[53]

The commissioners, assuming primarily other responsibilities, meet regularly once in a month unless extraordinary meeting is called.[54] The Commission, which does not have its own budget, may be assisted by experts whose employment/ appointment has to be, of course, approved by the Minister of Trade and Industry – to whose ministry the Commission is answerable.[55] With this limited time and resource, the Commission entertains competition cases along with non-competition ones. This, as rightly noted by some commentators,[56] may impact on the overall efficiency of the Commission whose success has already been doubted on grounds of independence and competence.[57]

Decisions given by the Commission, upon approval by the Ministry of Trade and Industry, are appealable to the Federal High Court. However, appeal seems to be available *only* with respect to administrative measures and/or penalty decisions and *not* against any Commission decisions on points of facts and/or law.[58] This, coupled with the limitations stated above, may hinder the rendition of impartial judgement.

A new draft trade practices law has been initiated by the Commission with a view, *inter alia,* to improve the effectiveness of the antitrust regulatory

[53] The practical fusion of adjudicatory and investigative functions into the organs of the Ministry of Trade and Industry has been a cause for some concern. The temptations of the Ministry to have its cases decided (by the Commission) in its prosecutor's favour is evident in the Ministry's instructions to the Commission in a letter dated 6 Tir 2000 E.C. The letter sought the reconsideration of the Commission's two recommendations dated Hedar 27th 2000 E.C. and Tahsas 11th 2000 E.C based on the Legal Opinion of Ministry's Prosecutor. These two recommendations involved a total of eight cases.

[54] Art.14, TPP.

[55] Art.15 (1)(f),TPP.

[56] USAID Report, at 63 *et seq*.; Kibre, at 20 *et seq.*

[57] *Ibid*; established in 2004, the Commission has passed a ruling on only one third of the cases brought to it as of Nov.2008 [according to a news report by *Fortune*, 2 Nov., 2008].

[58] See Art.17, TPP.

body.[59] To the best knowledge of the author, however, the Commission – whose investigative and adjudicatory limitations are to be remedied with a purported endorsement of the new draft – is currently out of function. Hence, there are glooms over optimistic developments relating to the structure of the competition agency.

Conclusion

Antitrust regulations are mainly directed at problems related to monopoly power. They aim at rectifying impediments posed (by monopoly power) on efficiency and consumer welfare through rules that impact on the economic behaviour of business firms. The efficacy of the rules in meeting the desire to prevent deadweight loss, however, depends on many factors such as their scope of application, the relative specificity of the rules, and the room left to economic analysis of alleged violations.

Though it may appear premature to judge the success or otherwise of the new antitrust regime of Ethiopia within only few years of its foundation, some limitations have already been noticed. First, exemptions available to certain undertakings have unnecessarily left the scope of inapplicability of the law wide. Second, additional rules are still needed to squarely address, *inter alia*, (1) mergers (2) vertical agreements and (3) effect cases. Though efficiency friendly mergers and practices need not be punished, care should be taken not to allow mergers and anticompetitive practices which have restrictive effects on competition. Third, the very objectives of the law would be nuanced by the application of the rules on abuse of dominance to all undertakings without prior market definition and establishment of dominance within it, even though contextual interpretation may partly and tentatively solve the problem. Finally, the legal structure of the Trade Practice Investigation Commission – which is an adjudicatory body – and its current institutional crisis coupled with the absence of an independent investigatory body have practically made the antitrust regime handicapped.

Comparative analysis of some of the existing limitation of the regime reveals that the problems may temporarily be tackled by, for example, (1) contextual interpretation of ambiguous provisions and (2) replicating experiences of other jurisdictions, in particular those from where the law has drawn its material sources. For the long run, however, the inadequate Ethiopian antitrust regime needs to be revisited for legislative and structural improvement.

[59] *"Office to endorse new Trade Practices Law soon"*, Walta Information Centre (4, Nov., 2008) [available at www.amharic.waltainfo.com; accessed at 4 Nov.2009].

MAKING LEGAL SENSE OF HUMAN RIGHTS:

The Judicial Role in Protecting Human Rights in Ethiopia*

Tsegaye Regassa**

Introduction

Of late, there is a profuse and generous recognition of human rights in constitutions. Such recognition is accorded in Ethiopia in its 1995 Federal Democratic Republic of Ethiopia's (FDRE) Constitution. A quick glance at chapter three of the text of the Constitution will beckon us to the fact that almost all types of rights recognized in the International Bill of |Rights[1] are granted a constitutional status. Such recognition is of immense significance in setting the standards and laying down the foundation for the growth of a vibrant human rights culture. It also establishes the fact that in Ethiopia any violation of human rights, if tolerable at times, is a mark of our falling short of our constitutional commitments. It signals a collective rejection of the idea

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[1] The International Bill of Rights (IBR) is a short hand for the plethora of international human rights instruments that came into existence since 1945 and has become a ubiquitous body of 'laws' that serve as the morality of governance everywhere in the contemporary world. The instruments that form the core of the IBR are: the United Nations Charter (UNC), especially its human rights provisions such as those in art 1, 55, etc.; the Universal Declaration of Human Rights (UDHR) of 1948; the International Covenant on Civil and Political Rights (ICCPR) of 1966(1976); and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) of 1966(1976). The UNC is a treaty that internationalized human rights and even served as the basis of the UDHR and subsequent human rights treaties. These instruments that make up the IBR have been magnified and multiplied in their echoes through the numerous regional human rights instruments adopted in Europe, the Americas, Asia, Africa, and the Middle East.

that one can defy human dignity with impunity. More positively, it states in explicit terms that we, as a country, are one that honours, and is constrained by, the humanist value that human dignity and worth is fundamental to our system of governance. Nevertheless, the task of concretizing these rights and converting the same into legally consumable commodities[2] is yet to be done. This piece seeks to raise some questions that help us think fruitfully about how to make a legal sense of human rights in Ethiopia.

In any country with democratic governance (aspirationally theoretically or immediately practically), the judiciary, as part of the *trias politica*, is one of the most important institutions of human rights protection. The judicial branch is at the forefront of the effort at discharging the protective responsibility of the state apropos of human rights. In this piece, I seek to inquire into the role of the judiciary in the effort to make a legal sense of human rights in Ethiopia.

In order to do that, I will first –in section one—discuss the concept, features, and types of human rights in general. I also dwell upon why they matter to us. In section two, I make a call for looking beyond cynicism and fundamentalism as we advocate for a better protection of human rights. This is because in the process of making a legal sense of human rights, it is important to be realistic about a number of factors that constrain our performance in relation to the promotion, protection, and fulfilment of human rights. In section three, we delve into the more concrete and practical steps, methods, and techniques needed for making a legal sense of human rights in a particular legal system. In section four, I focus on the specific roles of the judiciary with regard to the protection of human rights. That will be followed by some concluding remarks.

This study, it is important to note, is a study of the normative framework for the judicial protection of human rights in Ethiopia. The study is thus limited in scope to the analysis of the constitutional and other relevant legal texts. Consequently, this study does not make a case-based, or empirically informed, analysis of the human rights situation. Any reference to practical issues, if any, will be only tangential and is meant for the purpose of illustration. It is important to note, however, that a case-based and empirical inquiry into the matter is necessary. This study—regrettably--does not do that nonetheless.

[2] By this I mean rights that one can take to court to assert them as concrete legal claims, rights that can be litigated and deserving remedies when the argument in their favour has won.

1. Human Rights: What are they and why do they Matter?

1.1-Definition

The question regarding what human rights are and how they should be defined has attracted a number of thinkers who advance a diverse array of theories[3] on the nature of human rights into the details of which it is not the purpose of this piece to go. At a very basic level, human rights can be defined as entitlements that all human beings assert merely because they are human. As such human rights are basic moral claims invoked for the purpose of enjoying a decent human life rooted in dignity. Often linked to the nature of human kind, they are also asserted as 'natural' rights.[4] Consensus among human rights scholars reflects that they emanate from fundamental human dignity and worth.[5] Mariek Piechowiak recognizes and reinforces the consensus when she defines human rights as rights of all human beings acknowledged independently of law.[6] Amparo Tomas,[7] discussing human rights in the context of his argument for human rights based approach to

[3] Indeed, a number of theories can be identified on the nature of rights. Prominent among these are the *will theory*, the *interest theory*, the *claims theory*, the *entitlement theory*, and the *entitlement-plus theory*. For a crisp summary and the details of their differences from one another, see James W. Nickel, *Making Sense of Human Rights* (2nd ed). Oxford: Blackwell Publishing, 2006. An excerpt of the earlier version of the same book entitled, "Making Sense of Human Rights" (revised edition), 2004 is available at: http://www.uio.no/studier/emner/jus/humanrights/HUMR4130/h05/undervisiningsmateriale/Nickel%25sense%2014%20sept/%202004.doc. The theories referred to herein above are available on pp. 34-46.

[4] Tied to human nature or human reason, human rights are often, rightly, conceived as antedating government and law. Consequently, human rights are viewed not as grants from government as an expression of the charitable nature of governments but as basic standards for human treatment that all governments need to recognize. Human rights are thus not gifts from government. They are not conferred on citizens by state; they are merely guaranteed by states. Reflecting this connection of human rights to human nature, the Universal Declaration of Human Rights (UDHR), in its article 1 says that "All human beings are born free and equal in dignity and rights".

[5] This consensus is reflected in the UDHR both in the preamble (which recognizes "the inherent dignity" of all members of the human family) and article 1 (which stipulates that all human beings, being born free and equal, are "equal in dignity and rights"). Note that the language of the UDHR has shaped this consensus.

[6] Mariek Piechowiak, "What are Human Rights?: The Concept of Human Rights and their Extra-legal Justification," in Hanski, R, and Suksi, Markku (eds), *An Introduction to the International Protection of Human Rights: A Text Book*. (2nd Rev ed). Turku/Abo: Institute of Human Rights, Abo Akademi University, 1999. P.3

[7] Amparo Tomas, "A Human Rights based Approach to Development: Primer for Development Practitioners. [NP, n. pub], 2005. P. 3.

development, defines human rights as "*universal legal guarantees that belong to all human beings and that protect individuals and/or groups from actions and omissions of the State and some non-State actors that affect fundamental human dignity.*"[8]

1.2-Features

The most common features identified as attributes of human rights include the following: universality, inherence (in human dignity), inalienability, and equality.[9] In a similar vein, Tomas identifies the following as attributes of human rights: a) that they are rooted in and exist for fundamental human dignity; b) that they are universal (belonging to all human beings); c) that they are legal guarantees against state actions and omissions; and d) that they protect both individuals and groups[10].

A few words are in order by way of a comment on the attributes. *Universality* refers to the applicability of human rights to all people everywhere at all times. This positioning of human rights as universal is often questioned and debated upon among scholars of relativist convictions who argue that human rights are relative.[11] But, as Piechowiak says, often, the debate between Universalists and relativists is in the abstract. So while "universality and inherence are contested in theory", they are "acceptable in practice"[12]. As evidence, she cites state practices and the Vienna Declaration and Program of Action of 1993[13] which states, in unequivocal terms, that

[8] This definition also reverberates in most other UN Human Rights manuals such as *Human Rights and Law Enforcement : A Trainer's Guide on Human Rights for the Police*. New York/Geneva: UN, 2005, p. 13.

[9] Piechowiak, *supra* note 6, pp.5-8.

[10] Tomas, *supra* note 7, pp. 2-3.

[11] The debate as to whether the concept of human rights is universal or particular/relative to specific cultures started early in the history of the modern human rights movement. See the American Anthropological Association's concern with the draft of the UDHR in the statement it issued in reaction to the draft of the UDHR in 1947 (in Steiner and Alston, *International Human Rights in Context: Law, Politics, and Morals* (2nd ed). Oxford/New York: Oxford University Press, 2000, pp. 372-374). See also Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House, 2002, pp. 221-233. Since then, the debate was extended to the varying conception of human rights in the West and the Muslim world. (See An-Naim, "Human Rights in the Muslim World" 3 *Harvard Human Rights Journal* 13 (1990) on Islam on/and the concept of human rights.)

[12] Piechowiak, *supra* note 6, p 5.

[13] The Vienna Declaration and Program of Action on Human Rights [hereinafter the Vienna Declaration], although not legally binding on states, expresses the consensus

human rights are "the birth right of all human beings" and that "The universal nature of these rights and freedoms is beyond question." Universalism rejects their particularity in essence. It also underscores the fact that they are *trans-temporal* and, as such, pre-exist laws and states.

Inherence refers to the existence of rights independently of the will of either an individual human being or a group of people. Thus, "they are neither obtained nor granted through any human action" (p.6). They exist in spite of the fact that one has the will or capacity to exercise them.

Inalienability implies that nobody can deprive anyone of these rights and nobody can renounce these rights by himself. This is because the uniqueness of being human-- the substance in which the whole idea of human rights is rooted—being, the ground for assigning dignity to each and every human being, cannot allow an infringement or outright violation. Inalienability is partly grounded in taking every human being as an end rather than as a means to further other ends[14].

Equality as an attribute of human rights reminds us that everyone is entitled to rights "not as a consequence of, for example, being able to exercise free choices or to think logically" but rather because "there are no human beings which are more human than others"[15]. It is perhaps because of the salience of the above mentioned features of human rights that the 1993 Vienna Declaration has had to stipulate that *all human rights are universal, indivisible, interrelated and interdependent*[16].

Apart from this, one does well to stress the fact that human rights tend to be emancipatory in their rhetoric. It is common place to hear any resistance movement to invoke human rights as the 'utopia' they aspire to enjoy subsequent to the success of their struggle while also considering their violations as the motivating and mobilizing cause behind their struggle.

As *moral claims*, human rights pose a challenge to states both internally (from within) and externally (from without). As a result, neglect or abuse of rights often provokes a pressure on a state both politically and legally. Moreover, human rights impose limits on the exercise of power by

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that all human rights are equally significant: "[a]ll human rights are universal, indivisible, interdependent and interrelated. ..." Section I, Paragraph 5. (June 1993).

[14] There is an established belief among philosophers that as ends, human beings cannot be used as mere tools employed to advance other goals. This belief contrasts with the idea maintained among those who assume that the advancement of economic growth requires the sacrifice of some fundamental rights of some members of the society.

[15] Piechowiak, *supra* note 6, p. 6

[16] The Vienna Declaration, *supra* note 13.

governments; in effect, they discipline power. Furthermore, in history, it tended to be biased towards the individual right to freedom from undue state intervention[17].

1.3-Development of Human Rights Norms

Human rights laws developed in reaction to massive state abuse of human beings. The modern concept of human rights has also drawn impetus from the experiences of World War II (WWII). As such it is rooted in the experiences of 'legal lawlessness' that characterized the activities of some oppressive regimes[18]. In response to such lawlessness, the international human rights regime developed since WWII. The milestone in the history of the development of the international human rights system is the adoption at the United Nations General Assembly (UNGA) in 1948 of the Universal Declaration of Human Rights (UDHR).[19] The adoption of the subsequent

[17] In the evolution toward the modern human rights movement (which finally led to the International Bill of Rights [IBR]), the first category of rights (often referred to as civil and political rights) imposed a negative duty on state. As a result, the view that human rights are synonymous with such rights became predominant. See Danfred Titus, "The Generation of Fundamental Human Rights" in Nel and Bezuidenhoute (eds), *Policing and Human Rights* (2nd ed). Lansdowne, SA: Juta & Co. Ltd, 2002, pp. 85-102) on the generational classification of human rights.

[18] Developments leading up to the holocaust in Pre-War Germany are taken as examples of 'legal lawlessness' (See Tomas, *supra* note 7). In the domestic setting, the apartheid regime of South Africa is also taken as an example for such a state. See Richard Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980-1994*. New York: Routledge, 1995 on the route back to a human rights-sensitive system in South Africa.

[19] The UDHR, meant to serve as "*a common standard of achievement for all nations*", is *the single most important instrument that shaped the post-war human rights movement*. Today, *it forms the core of the International Bill of Rights (IBR*). Although it is a declaration of mere 30 articles, it embodies the list of all rights that can be viewed as first, second, and third generation of rights. The UDHR is viewed by scholars as one of the most magnificent achievement of the modern human civilization. Glendon, *supra* note 11, p. xvi) says that the UDHR "gave expression to diffuse, deep-seated longings and lent wings to movements that would soon bring down colonial empires. Its thirty concise articles inspired or influenced scores of post war and postcolonial constitutions and treaties, including the new constitutions of Germany, Japan, and Italy. It became the polestar of an army of international human rights activists, who pressure governments to live up to their pledges and train the searchlight of publicity on abuses that would have remained hidden in former times. ... It is the *parent document*, the *primary inspiration*, for most rights instruments in the world today." (Italics added.) Note also Jack Donnelly, "The Universal Declaration Model of Human Rights: A Liberal Defense"(Human Rights Working Papers) available at :

covenants on Civil and Political Rights (ICCPR) and on Economic, Social, and Cultural Rights (ICESCR) in 1966 (to come into force in 1976) was a gradual but immense stride toward completing what later came to be the regime of the International Bill of Rights (IBR). Through these and other important instruments, the UN has discharged its responsibilities to set normative standards on human rights while also working with specialized UN bodies (e.g. the United Nations High Commissioner for Human Rights [UNHCHR] and the Committees) to develop mechanisms of monitoring and better implementation of rights.

1.4-Taxonomy of Rights?

Obviously there is a diverse array of rights that human beings claim, be it by virtue of the strength of laws or of morals. The classification of these diverse rights has generated a degree of controversy among human rights law scholars. Karel Vasak[20], drawing from the motto of the French Revolution of 1789--which propagated the principles of *liberte*, *egalite*, and *fraternite*—developed the generational division of rights. Thus, he came up with the idea of "*First Generation*" rights of civil and political type, "*Second Generation*" rights of economic, social, and cultural type, and "*Third Generation*" rights of development, peace, environment, and others. His generational division of rights has led to the emergence of the idea of what are called *liberty rights* (i.e., civil and political rights), *equality rights* (i.e., economic and social rights), and *solidarity rights* (i.e., rights to development, environment, and peace).

Rights are also classified based on the kind of duties that they impose upon the duty-bearers (which, often, is the state). Thus, scholars identify rights that impose *negative duties* on the state, (i.e., the duty to keep away from the free exercise of rights by citizens unhindered) and those that *impose positive duties* (i.e., the duty to act to protect or promote or/and fulfil some rights)[21]. It is important to note that civil and political rights often impose

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http://www.du.edu/humanrights/workingpapers/index.html last accessed in May 2009 where he says that "the global human rights regime is rooted in the 1948 Universal Declaration of Human Rights and its later elaborations, especially the 1966 International human Rights Covenants." P.1.

[20] Karel Vasak, "Human Rights: A Thirty-year Struggle—The Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights," *UNESCO Courier* 30:11 (Nov. 1977). Paris: UNESCO, 1977.

[21] It is important to note that there are critics who argue that rights that impose positive duties should not be legalized (constitutionally and internationally). See for instance Sunstein, "Against Positive Rights"2/1/ *East European Constitutional Review* 35 (1993) p. 35 in Steiner and Alston *supra* note 10, pp. 280-282. Sunstein argues that

duties of the former kind while economic, social and cultural rights tend to impose duties of the latter kind. From this division come the difference between obligations to respect on the one hand and obligations to protect, promote, and fulfil on the other.[22]

Depending on the nature of obligations, rights can also be classified as those which impose *obligations of result* or those which impose *obligations of conduct.*[23] Moreover, rights can be self-executing (subject to automatic and immediate exercise) or programmatic (subject to progressive realization) depending on the ease with which they can be enjoyed[24]. Rights are also categorized into "*individual*" and "*collective"* depending on their active subjects (or beneficiaries), the latter being associative or organic groups as the case may be[25].

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constitutionalizing economic and social rights threatens the two important values of: a) liberal rights such as "free speech, voting rights, protection against the abuse of the criminal justice system, religious liberty, barriers to invidious discrimination, property and contract rights"; and b)market economy. This is because, Sunstein seems to suggest, constitutionalizing them allows the creation of too big a government that we cannot subsequently tame.

[22] Obligations to respect are obligations to refrain from doing violative acts. Obligations to protect, promote, and fulfil impose obligations to act in certain ways so that states can create conditions for a decent human living within which to exercise even civil and political rights.

[23] Obligations of result demand the delivery of particular goods and services while obligations of conduct require merely an effort towards ensuring the enjoyment of the right in a definite range of time. It is important to note that some rights (e.g. education) might impose both obligations of result and conduct.The right to free (and compulsory) elementary education imposes an obligation of result whereas the right to tertiary education (= state duty to expand higher educaton) is a form of obligation of conduct.

[24] 'Self-executing' rights can be exemplified by classical rights such as those to life, liberty, and security of the person (or physical integrity). 'Programmatic' rights are often the socio-economic rights such as the right to work, fair wage, trade union rights, adequate living standards, housing, health, education, and others. (See Titus *supra* note 16 p.88)

[25] Marlies Galenkamp, *Collective Rights versus Individual Rights*. Rotterdam: PhD Thesis, Erasmus University of Rotterdam, The Netherlands, 1993. Galenkamp holds that collective rights, while they can be ascriptively made legal rights--rights by consensus—cannot be moral (and hence human) rights. Reason: collectivities do not have a moral agency that individuals have. This seems to assume that all collectivities are associative groups derived from the free association of free individuals on the choice of the latter. This in turn tends to ignore involuntary associations that may be called 'anthropological persons' such as ethnic, racial or generally identity-based groups. For more on this, see, for example, Will Kymlicka, *Muticultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Clarendon Press, 1995.

Writing in relation to freedoms that are necessary for development (and in a context that is different from the usual human rights discourse), Amartya Sen[26] makes a distinction between *constitutive freedoms* (e.g. rights to substantive freedoms such as the right to be free from want) and *instrumental freedoms* (e.g. political liberties, economic facilities, and social opportunities).

In the process of the development of the International Bill of Rights, although the Universal Declaration of Human Rights (UDHR) of 1948 had a comprehensive catalogue of rights with *no hierarchy among them*, the division between civil and political rights on the one hand, and the economic, social, and cultural rights on the other, came out to be pronounced in the international covenants that emerged subsequently bearing the names that echo the division we stated above[27]. Hence, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[28]

In closing this section, it is important to stress that human rights do matter because human dignity and worth matter. Human beings as an end, rather than a means, do matter. Violation of human rights thus amounts to defiance of the inherent human dignity. To violate them is in a sense to punch human dignity in the face.

2. Human Rights in Ethiopia: Looking Beyond Cynicism and Fundamentalism

There is no gainsaying that human rights are generously recognized in the contemporary constitutional system of Ethiopia. In this, the FDRE Constitution of 1995 marks a departure from the past. Ethiopia's constitutional past suggests that the concept of human rights was not developed and that the practice of human rights was not one that is a cause of legitimate pride[29]. In the era of unwritten constitutions, i.e., in the time preceding 1931, citizens were mere subjects of the Emperors having privileges and benefits emanating from the Omni-benevolent Emperors

[26] Amartya Sen, *Development as Freedom*. Oxford: Oxford University Press, 1999.

[27] The IBR is principally a sum total of four human rights instruments namely: the UDHR, the ICESCR, the ICCPR, and the First Optional Protocol to the ICCPR. See Titus *supra* note 17, p. 89.

[28] It is interesting to note that the 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE) hints at a distinction between "Human Rights" and "Democratic Rights". See art 10 (2) and parts I and II of the Human Rights Chapter, i.e., chapter three, of the FDRE Constitution.

[29] Reports of massive violations of rights abound especially in the era of the Derg.

merely on their goodwill.[30] Citizens are not assumed to have rights in the sense of entitlement although they do assume duties towards the emperors (personally) and the government (officially).

2.1-Historical Sketch

In the era of written constitutions since 1931, this trend continued unmitigated. The 1931 Constitution being an Imperial grant (to the beloved subjects), it did not recognize human rights as such. Rather, it stressed duties while the notion of their being "entitled" to special privileges and benefits depending on the whims and conjectures of the Emperors from whom all benefits and privileges, and all justice and power, flows was maintained. The state is considered to owe no duty to the people. There was hardly any constitutional limit to state power save that which is tacitly imposed by religion and tradition (the principal sources of legitimacy in Ethiopia for centuries)[31]. As a consequence, even after Ethiopia was ushered into the era of written constitutions, the Monarchy was, at least theoretically, absolute[32].

In the Revised Constitution of 1955, continuity (rather than change) was dominant. The monarchy continued to be absolute. The state (and the bureaucracy) tended to be aristocratic. In spite of the fact that there was a stride made to embrace the ideals of rudimentary democracy[33] and human rights, there was much to be desired in practice in this regard. There was recognition of a number of human rights in the constitution (including the right to assembly, association, and election, etc) but often constrained by the claw back clauses marked by the phrase such as "in accordance with the law",

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[30] The emperors in traditional Ethiopia are the sources of all goodness and bounties. So, rights, like the constitutions, are grants *given* to the subjects.(See the preambles to the 1931 and the revised 1955 constitutions of Imperial Ethiopia.)

[31] Note that in Ethiopia force, religion and tradition are the triad sources of state legitimacy. See Ugo Matteii, "The New Ethiopian Constitution: First Thoughts on Ethnical Federalism", 1995 for this. But see also the official nomenclatures of the Ethiopian emperors: "Conquering Lion [to mean mighty in force] of the Tribe of Judah [to invoke genealogy, tradition], Elect of God [marking the importance of religion], King of Kings, Emperor of Ethiopia."

[32] Practically, due to factors such as poor infrastructure, poverty, and weak bureaucracy, they hardly governed the peripheries asserting absolute power. See generally James C.N Paul and Christopher Clapham, *Ethiopian Constitutional Development: A Source Book* (Vol 2). Addis Ababa: HSIU, 1972 on the theoretical omnipotence, Omni-presence, and Omni-benevolence of the Ethiopian monarch.

[33] The lower house was constituted of members elected directly by the people although there were no political parties at the time. There was also property limitation for being a candidate. See Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect*. Asmara/Lawrenceville: Red Sea Press, 1997 for details.

or "as shall be determined by law". One of the pressing problems of the time was the lack of access, on the part of the peasants, to economic "facilities" (such as land) that undermined the economic freedoms of large proportion of the population[34].

In 1974, the cumulative effect of long held popular discontents, the increasing radicalization of the intelligentsia, and the progressive activism on the part of the (often underpaid) military, led to a socialist revolution[35] that dethroned the Emperor, suspended the constitution, dismissed the parliament, and established, eventually, a Provisional Military Administrative Council (PMAC) of a committee (*Derg* in Amharic) of junior military officials who ruled the country for about 13 years without a formal body of law one can conventionally call a constitution[36]. During the time from 1974 to 1987, the state of human rights deteriorated both conceptually and practically. One should note however that there was an emphasis, in rhetoric at least, on the importance of respect for socio-economic and cultural rights although they are not couched in words that reflect the notion of human rights. The redistribution of land and urban houses emboldened some aspects of socio-economic rights. The secularization of the state led to the declaration of equality and non-discrimination on the basis of religion albeit much less to freedom of religion. Recognition of linguistic and cultural equality led to the denunciation of discrimination on linguistic and cultural grounds.

This trend to emphasize socio-economic and cultural rights was continued in the 1987 Constitution of the Peoples' Democratic Republic of Ethiopia (PDRE). Nevertheless, the constitution was overtaken by the nascent liberationist struggles that started in the wake of the 1974 Revolution and mounted a pressure on the government until it fell in 1991.[37] While there was

[34] Land or its produce was owned by Land Lords. In the south, owing to the *gult* system, peasants had no rights over land. See generally, Desalegn Rahmato, *The Peasant and the State: Studies in Agrarian Change in Ethiopia 1950s-2000s*. Addis Ababa: Addis Ababa University Press, 2009.

[35] There is a veritable body of literature (both in Amharic and English) that show that all the student and other ethno nationalist movements of the time drew inspiration from socialist icons such as Marx, Lenin, Stalin, Mao Ze Dong, etc. Kiflu Tadesse *That Generation* (Amharic) (2 vols) 1997, 1998 and Andargatchew Assegid, *Long Journey Cut Short* (Amharic, translation mine) (2000) are only examples.

[36] For 13 years, although there was no constitution, there were a number of fundamental public law legislations that served the role of a constitution. See generally Fasil, *supra* note 33.

[37] The Eritrean People's Liberation Front (EPLF), the Tigray People's Liberation Front (TPLF), the Oromo Liberation Front (OLF), the Ethiopian Peoples' Democratic

a protectionist state[38] that put a high premium on the importance and primacy of economic, social, and cultural rights, there hardly was the concept of human rights as entitlement, especially among the populace. As a result, there was hardly a vibrant human rights culture that specially fostered the assertion of civil and political rights.

After the fall of the *Derg* in 1991, the new regime promulgated a Transitional Charter which served as the interim constitution of Ethiopia for the time of the inter-regnum[39]. The Charter, although a terse document that was primarily viewed as a pact[40] among various liberationist movements that toppled the Derg[41], extended guarantee to a host of rights as recognized by the UDHR and other international instruments[42]. The accent was on Civil and Political rights. And yet the practice left much to be desired even in these times.[43]

2.2-The FDRE Constitution

After a prolonged transition[44], a Federal Democratic Constitution was adopted in 1994 to come into force in 1995. This constitution was dubbed the constitution of the Federal Democratic Republic of Ethiopia (FDRE). The FDRE Constitution is a compact document with an admirable degree of clarity and conciseness. It has 106 articles packed in 11 chapters. In its chapter three (the chapter that can qualify for being the Ethiopian Bill of

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Movement (EPDM) which later changed itself into Amhara National Democratic Movement (ANDM), etc were some of those ethno-nationalist movements.

[38] The *Derg* regime had run a tightly controlled economic system that is typically of a command type. Important resources such as land were owned by state.

[39] The Charter being "the supreme law of the land" was the de facto constitution of the time.

[40] A pact is an agreement among warring factions. Such agreements are often viewed as peace instruments.

[41] Almost all of them (except, for example, the trade unions, and the university and others) were representatives of ethno-nationalist groups.

[42] The preamble and article 2 invoke the UDHR as the basis on which all human rights are guaranteed. Political rights of association, assembly, demonstrations constituted the list of rights that dominated the early provisions of the Charter.

[43] There were frequent prohibitions of demonstrations and meetings. There were imprisonments without due process, for example, in relation to the cases of the alleged perpetrators of the Red Terror.

[44] As per the Transitional Charter, the transition was to be complete in two years. The transitional times were brought to a closure in 1995, two years later than promised. See Terrence Lyons, "Closing the Transition: The May 1995 Elections in Ethiopia," *Journal of Modern African Studies*, Vol. 34, No. 1 (1996), pp. 121-142 on the transition.

Rights), it offers a long list of rights that are divided into two categories, namely that of 'Human Rights' and 'Democratic Rights'[45].

In its *Preamble*, it embodies the principles of self-determination of collectivities, rule of law, democracy, development, fundamental rights and freedoms (of individuals and peoples), equality and non-discrimination, peace, affirmative action, etc. In its chapter two, the chapter stipulating the jural postulates[46] of the new dispensation, the chapter on the "Fundamental Principles", five principles namely, the principles of sovereignty of the Nations, Nationalities, and Peoples of Ethiopia (art 8); constitutionalism and constitutional supremacy (art 9); sanctity of human rights (art 10); secularism (art 11); and accountability and transparency of government (art 12) were recognized.

By virtue of the *principle of popular sovereignty*, the principle of democracy[47] (the power to make, run, and even break one's own government) was recognized. The perusal of art 8 gives the impression that direct, indirect, and participatory democracy is anticipated[48]. The *principle of constitutionalism* enshrined in art 9, stresses that there shall be no ascent to, and exercise of, power except in accordance with the constitution[49]. In this, it spelled a departure from Ethiopia's constitutional past in which *force, religion, and tradition, not law as such,* were the sources of legitimacy[50]. Art 9 also enshrined the *principle of constitutional supremacy* thereby superimposing the constitution on all other competing forms of law or practice. Consequently, all laws, decisions, and practices that were incompatible with the constitution are rendered of no effect[51]. Rather curiously, this article also recognizes the fact that international treaties

[45] Arts 13-44 are devoted to "Fundamental Rights and Freedoms" in general. Arts 14-28 are dubbed "Human Rights" while arts 29-44 are dubbed "Democratic Rights".

[46] "Jural Postulates" are the self-evident basic legal axioms underpinning the system. See Heinrich Scholler (2005).

[47] The constitution uses the term "nations, nationalities, and peoples" to refer to ethnic groups that it ascribes sovereignty to. (See arts 39(5) cum art 8).

[48] Art 8(3) says: "[The] sovereignty of [nations, nationalities, and peoples] is expressed through their *representatives* elected in accordance with this constitution and through their *direct democratic participation*." thereby sanctioning representative (or indirect) and participatory democracy although the latter is done directly by the people. The provision seems to lump direct and participatory democracy together although the two are not quite the same.

[49] Art 9(3).

[50] Mattei, *supra* note 31, says that sources of state legitimacy in historic Ethiopia are force, tradition, and religion.

[51] Art 9(1)

adopted by Ethiopia are part and parcel of the legal system thereby suggesting the idea that Ethiopia's is an open constitutional system[52]. But the status of such treaties in the hierarchy of laws is not clearly enunciated as a result of which the issue remains unresolved to date[53].

The *principle of sanctity of human rights* (art 10)--the principle that is most pertinent to the discussion in this paper--stipulates the inviolability and inalienability of fundamental rights and freedoms of 'mankind'. It is this principle that, in a compact way, establishes the idea of inherence, universality, indivisibility, and inviolability of human rights. Hence, the term 'sanctity of human rights'[54].

The *principle of secularism* (art. 10) establishes that state and religion are separate, that there is no religion particularly favoured by the state, and that the two realms are mutually exclusive in the sense that one does not interfere in the business of the other. The separation of state and religion and the abolition of state religion is a remarkable departure from Ethiopia's past (which ennobled the Ethiopian orthodox faith as the state religion). It also ushered in the era of inter-religious equality. The principle of mutual non-interference of the secular in the sacred and of the sacred in the secular is also another remarkable departure from the past in which state action depended, to a large extent, on religion for its legitimacy[55].

The *principle of accountability and transparency* of government (art 12) establishes that government must be both responsible and responsive to the electorate while also making its operations public, open, and accessible to citizens[56]. The notion of making government responsible for its misdeeds, which was alien to Ethiopia's constitutional past, goes a long way in helping

[52] Art 9(4)

[53] The issue of the *status* of international treaties is controversial because the constitution does not say whether they are as supreme as the constitution. The term 'law' in art 9(4) can also be taken to mean "proclamation, regulations, or directives" as a consequence of which treaties take the position of an ordinary law if and when ratified by the parliament. But it is also important to note that art 13(2) stresses the need to interpret human rights provisions in conformity to international instruments ratified by Ethiopia. At this juncture, one asks if international (human rights) instruments are even superior to the constitution's human rights chapter.

[54] Art 10

[55] The Ethiopian Constitution seems to favour the *strict separation model* as distinct from the *established church model*, or the *free exercise and non-established church model* of the relation between state and religion. But a closer reading of the Constitution shows the existence of elements of the latter as well. But of course the practice is far more vague and blurred than this.

[56] Art 12 (1-3).

Ethiopians to take a financial, power/mandate, and time audit of the government. It also forces the government to prove itself in crisis management by being responsive to the demands and needs of the people during "its season in office". The transparency flank of this principle requires that the state officials and offices be accessible to citizens and that their manner of operation be open, thereby requiring that they make information available to the public on demand (or otherwise). This helps: a) to facilitate the principle of good administration by fostering rational legitimacy to state action; and b) to empower citizens who, having been informed of the operation of government, will know that they are in control of their matters thereby preventing helplessness and the consequent despair.

The cumulative effect of these five fundamental principles is that they create a congenial environment for a better protection of human rights in Ethiopia. One notes that these principles shape, influence, and control the behaviour of legal and political actors in the public life of Ethiopia as they provide a framework of understanding the system. It is within this context that the detailed rules (or provisions) of the constitution make sense. This is also true of the efforts to make sense of the human rights norms in the Constitution.

The foundational principle that undergirds the normative structure of human rights in Ethiopia is the principle of sanctity of human rights enshrined under Article 10 of the FDRE Constitution which reads as follows: (1) "Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable. (2) Human and democratic rights of citizens and peoples shall be respected." This article enunciates the principle of sanctity of human rights in unequivocal terms. A closer examination of the words of the article suggests that: a) human rights are i*nherent* in the nature of human kind (although the word used to refer to human kind is the narrower "mankind"); b) they are universal (i.e. applicable to every human); c) they cannot be subject to any legitimate violation; and d) they are indivisible. One can thus note that the principle at once spells a host of significant prescriptions about human rights. Thus one notes that they are, in essence, at once *inherent, universal, indivisible, and even absolute*. This gives the moral force that shapes and influences laws, decisions, practices, and actions taken in the public life of a society.

Rather curiously, the second sub-article of article 10 seems to reinforce the inviolability principle when it said that they "shall be respected". If it is there merely to reinforce the inviolability principle, one would surmise, then it is superfluous. But one suspects the existence of something more to it than the emphasis and reinforcement of the principle. The phrase "human and democratic rights" seems to make a distinction between the two thereby

pointing to the classification of the list of rights in chapter three into two parts named "Human Rights" (Arts 14-28) and "Democratic Rights" (Arts 29-44).[57] The important thing about this provision of principle, however, is that all categories of rights are coequally to be respected without one having any superior claim to the other in terms of being prioritized or subordinated. However, one remains wondering as to the wisdom of dividing the list of rights into these two broad categories when there is no prescribed mode of differential treatment of the two categories of rights and especially when one notices the fact that the classification used is not congruent with some of the traditionally accepted classifications. Is the distinction of mere descriptive significance, or does it have a prescriptive value? We do well to leave this question open for now.

Apropos of the *institutional structure*, the primary institutions responsible for the protection, promotion , and enforcement of human rights in Ethiopia are: the *legislature* (both the House of Peoples' Representatives [HPR] and the House of Federation [HoF]), the *executive* (especially those institutions such as the police, prosecution, prisons who administer civil and political rights and those who are in charge of providing public goods and services such as education, health, social welfare, clean environment, clean water, etc), and the *judiciary* (which includes the institutions with the responsibility to adjudicate cases over constitutional disputes such as the Council of Constitutional Inquiry [CCI] and HoF)[58]. Thus, one can note that the primary institutions that are custodians of the human rights norms in Ethiopia are the mainstream institutions in charge of rights administration. The consequence of this is that any attempt at strengthening the institutional framework for the better protection of human rights must start with strengthening these mainstream institutions.[59]

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[57] The minutes of the discussion over the draft constitution and at the Transitional Council of Representatives indicate that human rights are those one is entitled to because he or she is merely human whereas 'democratic rights' are those one asserts only if and/or because he/she is a citizen. See Minutes of the Discussion on the Draft Constitution at the Council of Representatives, May 1994 (Amharic).

[58] The *Legislature* can make protective laws. Through its budgetary and control powers, it can also press the Executive into deference for negative rights and facilitation of the enjoyment of positive rights. The *Executive*, on its part, has the role of respecting human rights and preventing violations by others. The *Judiciary* enforces rights by determining entitlements, punishing violators, and by redressing the victims. Usually courts are viewed as the *custodians of human rights*. In Ethiopia, because of their limited role in constitutional interpretation, this role is undermined.

[59] Strengthening law enforcement institutions and courts will go a long distance in the effort to better human rights protection.

In addition to the above mentioned institutions, one can refer to the *Ethiopian Human Rights Commission (EHRC), the Institution of the Ombudsperson*, and some similar institutions as *special bodies* that serve as 'patrons' of the human right norms in Ethiopia. It is important to stress that these institutions have *a secondary role* compared to the role of the mainstream rights administration institutions[60]. The EHRC, for instance, is an institution whose promotional task looms larger than its protection and remedial tasks[61]. Besides, one notes--based on the law promulgated to establish the Commission, Proclamation No. 210/2000--that it attends to a systemic problem rather than specific cases which might be taken as aberrations. Moreover, it is crucial to note that the sanction that the HRC (or the Institution of the Ombudsperson) has at its disposal is *the mobilization of shame on institutions that perpetrate abuse (or neglect) of rights through publicizing a report while also doing the best it can to liaison with institutions working towards securing relief to specific victims of abuse.* Considering these factors, it is only safe to conclude that these institutions serve as *consciences of the system prodding the system into doing more* towards a better protection of human rights in Ethiopia. They serve as *lubricants* to the system that might run coarse as a result of being overworked and/or mindlessness emanating from being bogged down by the routine of government machinery.

This said, we should not neglect the important role of *non-governmental organizations (NGOs)* and their immense contributions towards the betterment of human rights situations[62]. These institutions help in fostering the human rights culture (through training, education, and dissemination of information—although universities and higher educational institutions also share this responsibilities), in invigorating the state commitment to the human rights values (through technical assistance and capacity building schemes), and in making interventions to facilitate the enjoyment of some rights by the

[60] We should always keep in mind that these institutions cannot replace the mainstream institutions such as the courts; they can only complement the work of these institutions.

[61] See Frans Viljoen, "Mechanisms for Realising Rights under the Bill of Rights" in Nel and Bezuidenhout (eds), *Policing and Human Rights* (2nd ed). Lansdowne: Juta &Co, 2002. Pp. 75-83 for a discussion of the various mechanisms used for realizing human rights under the South African Constitution.

[62] This is in addition to non-judicial institutions such as the office of the Public Defender, other commissions (e.g. the Federal Ethics and Anti-Corruption Commission), etc. See also Viljoen, *supra* note 57 p. 79 on the role of civil societies (e.g. Trade Unions, Newspapers, churches) and NGOs, etc.

public (such as through counselling and legal aid services to victims, through conducting policy research and lobbying, etc)[63].

As has been hinted at earlier on, the constitution seems to distinguish between two "classes" or clusters of rights, namely "Human" and "Democratic". Most civil and political rights such as the right to life (arts 14 and 15), liberty (arts 14 and 17), security of the person (arts 14 and 16), rights against torture, slavery, forced labour and related vices (art 18), rights of arrested (art 19), accused (art 20) , and detained (art 21) persons, rights against retroactive laws (art 22), double jeopardy(art 23), rights to honour and reputation (art 24), equality (art. 25), privacy (art 26), religion, belief, and opinion (art 27), and rights against crimes against humanity (art 28) are all enumerated in "part one" which is a category of "Human Rights".

Other rights such as those to thought, opinion, and expression (art. 29), assembly, demonstration, and petition (art 30), association (art 31), movement (art 32), nationality [alias citizenship] (art 33), marital, personal, and family rights (art 34), access to justice (art 37), vote and be voted for (art 38), property (art 40), economic, social, and cultural rights (art. 41), dignified labour (art 42), development (art 43), environment (Art 44), rights of women (art.35), children (art 36), and nations, nationalities, and peoples [*alias* organic collectivities] (art 39) are enumerated under "Part Two", the part rubricated as "Democratic Rights".

Considering the list of rights in the two parts of chapter three, one quickly notices the fact that traditional civil and political rights are rampant in both parts although most economic, social, and cultural rights are found in part two. So, it seems that there is not much of a method into the classification. (The 'received' wisdom with regard to the rationale behind the division is that while 'human' rights are entitlements bestowed on us by virtue of our being human, 'democratic' rights are rights we claim only as a consequence of our being members of a political community (i.e., citizens). Of interest to us is the fact that no matter where a right is placed, there hardly is any consequence flowing from it as there is no hierarchy among rights.

2.3-Twin Pitfalls: *Cynicism and Fundamentalism*

Having noted the normative and institutional framework for human rights in Ethiopia, it is important to underscore the need to avoid the twin mistakes often made in relation to the call for a more robust implementation of human rights laws (or lack thereof), namely that of fundamentalism and cynicism.

[63] A host of NGOs involve in these kinds of tasks (e.g. counselling, legal aid, and mostly training).

Human rights fundamentalism, poised as it is to view human rights as religion, tends to manifest a mood that breeds dogmatism. Human rights cynicism, poised as it is to view human rights as mere rhetoric and politics, tends to manifest a mood of despair. We need to avoid both[64]. We need to be optimistic enough to keep doing what we can to respect, protect, promote, and fulfil all human rights always. But we also need to be realistic enough to expect neglect and abuse of human rights in an imperfect world that suffers from constraints of diverse sorts. In particular, we need to note that in their exercise human rights are bound to be limited, especially by governmental bodies. But so doing must always be done in accordance with a law promulgated as necessary in a democratic society, guided by the need to protect the rights and freedoms of others and to promote the general welfare within the context of peace, order, safety and security.

3. Making Legal Sense of Human Rights

3.1- Human Rights: From Political Rhetoric to Legal Reality

In order to make a legal sense of human rights, it is imperative that we move away from the platitudes of political rhetoric to the vagaries of legal reality.

[64] These two pitfalls seem to be part of David Kennedy's "*two related dangers of human rights work*," namely "the tendency toward *idolatry*, toward enchanting the tools and norms of practitioners of human rights" and "the tendency toward *pragmatism*," the preoccupation with the "tools of policy analysis, instrumental reason and savvy evaluation of the costs and benefits of human rights initiatives." Kennedy prescribes pragmatism for the dangers of idolatry and "a return to ethics"—idolatry—for an excessive pragmatism. See his, "Two Sides of the Coin: Human Rights Pragmatism and Idolatry" (Keynote Address at the Interdisciplinary Conference on Human Rights of the London School of Economics, 24 March 2006) (italics mine), available at: http://www.lse.ac.uk last accessed in July 2009. See also Michael Ignatieff who seems to be sensitive to these two pitfalls when he speaks of human rights "as politics and idolatry" arguing for a more modest agenda for human rights. He argues that human rights must not become idolatry, and that we should balance our idealism with a sense of practical reality. See his, *Human Rights as Politics and Idolatry* (Amy Gutmann, ed). Princeton: Princeton University, 2001, chs 2, and 3. In a call for what Anthony Dworkin called "a human rights realism", Ignatieff admonished us not to regard human rights "as a secular religion" which tends to be morally self-righteous and rhetorically over-reaching. See Dworkin, "Human Rights Realism: A Review of Michael Ignatieff's Recent Book, Human Rights as Politics and Idolatry," available at: http://writ.news.findlaw.com/books/reviews/20011019_dworkin.html, last accessed in August 2009.This realism that Ignatieff calls for come out increasingly more strongly and forcefully in his more recent books such as *The Lesser Evil: Political Ethics in an Age of Terror*. Princeton: Princeton University Press, 2005 and *American Exceptionalism and Human Rights* (Michael Ignatieff, ed). Princeton: Princeton University Press, 2005.

For this, we have to identify specific measures that need to be taken at the various steps in the process of realizing a particular right. These measures may vary from those that help legalize human rights (i.e., press what are essentially moral rights into legal ones) to those that help actually make them exercisable by litigating them in court.

3.1.1-Steps in Making Sense of Human Rights

Converting moral claims into legal rights requires a process of concretization of rights so that first and foremost the rights secure a *constitutional guarantee* in the legal system. Assuming that the constitution is the supreme law of the land, such incorporation in the constitution helps entrench human rights so that they are granted an elevated but also a foundational position in the legal system. The constitutional position helps impose a specific obligation on the state. In their best, they form a set of ideals that limit the power of government. Once constitutional guarantee is secured, it is important that for their protection, *legislative framework* is designed. Both horizontal and vertical violations can be put to account only if there is a legislative protection. The process of concretization becomes more robust when it is backed by *judicial application* especially in the face of violation. The concretization becomes complete when there is a possibility that, once a judicial pronouncement is made on the legitimacy, content, and scope of the right, there is a sanction entailed to violation through *executive implementation*. When there is a commitment and will often on the part of law enforcement officials to see to it that violators are penalized and victims are provided with the commensurate remedy, then we say the process towards making legal sense of human rights is set and on course. Then, of course, we also say we have come to see all the steps in concretization: from constitutional guarantee to legislative protection to judicial application, and finally, to executive implementation.

In the course of protecting human rights in a domestic setting, the tasks that are involved can thus be summarized as follows: a) constitutional guarantee; b) legislative protection; c) judicial application; and d) executive implementation. These tasks entail a process of *concretization* of the principle of sanctity of human rights. One can also call it a process of progressive legitimation of interests in a legal system[65]. Constitutional guarantee is about extending recognition to a particular right in the most fundamental law of a

[65] Tsegaye Regassa, "Courts and the Human Rights Norm in Ethiopia" in Tsegaye Regassa and Assefa Fiseha (eds), *Courts and the Constitution: Proceedings of a Symposium on Courts and the Enforcement of the Constitution, June 2000*. Addis Ababa: Ethiopian Civil Service College, 2001.

polity. This helps to grant a more elevated status to the right as a consequence of which restriction, suspension, or deviation from it becomes difficult, if not totally impossible. Legislative protection ensures that no (horizontal or even vertical) violation can occur with impunity. Thus, this task of state usually incurs the duty to proscribe any act or omission that poses a threat to rights. Judicial application gives an assurance that in cases of violations, there is a possible remedy (or redress) by taking one's cases to courts. Executive implementation relates to the certainty that all judicial injunctions and orders that vindicate one's rights are to be heeded to thereby leading to an actual redress for the victim and a real sanction on the perpetrator of the violation or abuse. All *these tasks are inter-related and interdependent one on the other*. From the above, one can see that the task of any state that takes human rights seriously is a stupendous one.

3.1.2-Making Legal Sense of Human Rights: Levels of Protection

Protection of human rights is done at various levels requiring various tasks and involving various steps. The *levels* of "protection" are often expressed in terms familiar in the fields of international human rights law such as the *duty to respect, protect, promote and fulfil*. The duty to *respect* requires that we do not abuse rights or act to prohibit or deny the right in anyway. In other words, the duty to respect entails an ethic of non-interference. The duty to *protect* requires that we act in order to prevent violation or abuse of rights by others in the society. This duty might entail the duty to act at the legislative, executive, and judicial level in a state. This duty involves the power to proscribe abusive or violative acts or omissions. On occasions, it might also involve the provision of (judicial, administrative, or other) remedies in the face of violations although providing remedies is mainly in the realm of enforcing rights.

The duty to *promote* entails the responsibility to propagate the notion of rights (and the sanctity thereof) to the wider society. It includes the responsibility to translate human rights instruments into local vernaculars; publication and dissemination of such instruments; organizing sensitization programs; running awareness trainings; expanding (formal and informal) human rights education; conducting researches on specific areas of concern; advocating advancement of the human rights cause in the public sphere; networking with communities, civil society organizations, academics, activists, and local, national, regional, and international actors; identification of "pathological" spots where rights deficits are visible with a view to preparing necessary legal instruments (or bills); working in collaboration with diverse institutions of the state thereby offering assistance in the area of capacity building both technical and infrastructural); cooperation with business institutions to encourage them to care for human rights as they go

about investing and trading; and others. In short, at this level, massification of the knowledge of human rights is done.

The *duty to enforce* imposes responsibilities much like the ones that the duty to protect entails. It involves the need to redress the victim as much as to punish the violator. This duty often requires *strong administrative, judicial, and law enforcement organs* that can impartially and efficiently work towards redressing the victim and penalizing the violator. Strong, effective and non-corrupt police and security force; strong, impartial judiciary[66]; and efficient and neutral civil service and administration are the *sine qua non* of the duty to enforce human rights.

With regard to economic, social and cultural rights (and development-related rights in general), the levels at which to protect human rights are generally similar but with a slight difference, especially with regard to the duty to fulfil. To respect, for example, development related rights, the duty-bearer should not interfere with all the "instrumental freedoms" that facilitate the generation and preservation, for instance, of means of livelihood. Thus the duty-bearer does well not to restrict liberty, movement, privacy, expression, assembly, association, private property, free choice of work, etc. To protect, the duty-bearer is expected to come up with a legal and policy framework that facilitates access to "economic facilities" [alias resources such as land, market, etc; regulate quality, adequacy, and prices, etc] and "social facilities" [alias education, health, and others]; etc[67]. To promote such rights, the duty-bearer does whatever it would do to promote other human rights. To fulfil, the duty-bearer undertakes the task of financing the provision of the rights.

3.2- Steps in Making Judicial Sense of Human Rights: Procedural Matters, Substantive Matters, Remedial Matters

For lawyers, the steps towards enforcement of human rights via litigation in a judicial institution require that they first deal with procedural steps in which they settle issues relating to *jurisdiction* (question of whether the court has competence), *standing* (question of whether the party has a vested interest), and *justiciability* (whether the matter is adjudicable in court). Secondly, once

[66] The UN admonishes us in this regard through its *Basic Principles on the Independence of the Judiciary* (UNHCHR, 1985), adopted by the 7th Congress on the Prevention of Crime and Treatment of Offenders, Milan, 26 August-6 September 1985, and endorsed by the General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of December 1985. These principles set the standards for independence of judiciary, although they are merely hortatory in their consequences.

[67] Terms such as "instrumental freedoms", "economic", and "social" "facilities" are all borrowed from Sen, *supra* note 26.

they have overcome the challenges of procedural matters, they deal with interpretation (trying to settle issues related to the establishment of the content and scope of the right). Thirdly, they deal with matters related to remedies.[68] A brief set of comments is in order on each step.

Procedural Steps: at this stage, the litigant tries to establish, inter alia, the *jurisdiction* of the tribunal over his/her case. The *standing* of the parties (i.e., whether they have a cause of action, or a vested interest) is assessed and determined at this stage. The issue of *justiciability* is also settled at this stage of the proceedings. At this stage, the lawyer does well to make sure that the right is *ripe* (i.e., not too early) and *not moot (i.e., not so late as to become merely academic or inconsequential)* and that the right is process-able in court.

Substance: Determining the Content and Scope of Rights: This is the stage where the content and scope of the right is determined. It is at this stage that we make an ***interpretation*** of the text that embodies the right trying to determine the scope of the right along with its limitations, if it entails any. It is also at this stage that the usual subject-object-addressee analysis is done with a view to fleshing out the exact meaning of the right and the duties it entails.

Remedy Matters: After establishing the content and scope of a right, then comes the stage where we have to decide on the remedy or relief sought by the victim of the abuse. At this stage, it is decided that abuses or violations be discontinued, violative laws, decisions, acts, and practices be annulled, redress (be it in the form of compensation or in the form of a free exercise of the rights) be enforced.

It is important to note that when we worked our way through these stages, then we can rightly say that we have taken the necessary steps towards making a judicial sense of human rights in order for citizens to realize the rights that are constitutionally promised to them.

3.3-Application of Human Rights Provisions: Direct and Indirect

Normally, in order to make human rights justiciable, a clause is inserted to the effect that it is resolved as to how the human rights chapter is to be applied in the legal system. Thus, constitutions predetermine if the human rights chapter

[68] These are more or less the steps taken in systems where human rights are rendered constitutionally justiciable and entrenched in a legal system. South Africa is a shining example of this kind of system. See, for example, De Waal, J., Currie, I., and Erasmus, G., *The Bill of Rights: Handbook* (4th ed). Landowne: Juta & Co. Ltd, 2001.

is going to have a *direct application*, i.e. to be directly applied to cases in court proceedings as a special regime of law entailing a special regime of remedies. The more frequent practice is that the constitutions allow an *indirect application*, i.e., application of the human rights chapter not directly to cases that are presented before a court but rather as tools that indirectly influence laws, decisions, actions, and practices. In situations where indirect application is opted for, the human rights chapter permeates the system from behind. It impacts the laws, decisions, policies, actions, and practices in such a way that they take account of the sanctity of human rights. Thus the human rights chapter serves as *a framework of understanding, a tool of interpretation, a guide to public decision-making, and a threshold for public behaviour*. In other words, it serves as the spirit that propels the system in the direction of better sensitivity to human rights. Thus, in practice, the human rights chapter serves as the standard against which the propriety (i.e., the constitutionality) of laws, decisions, actions, and practices are measured. They serve as one of the grounds based on which we annul a certain law, decision, action or practice for unconstitutionality. It is important to note that in the case of indirect application, the human rights chapter will get implemented through the instrumentality of other laws or decisions made in tune with the ethos of human rights.

In the FDRE Constitution, the issue of application is dealt with under art 13 (1) which reads as follows: "All Federal and State legislative, executive, and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter." One can see from this article that it spells out the principal duty bearers to be the state organs[69]. But it does not tell us about whether we go for direct or indirect application. But since not all organs of government are involved in the task of adjudication, there obviously is no chance for them to directly apply chapter three to resolve a dispute. It is thus safe to conclude that while courts might be expected to face the challenge of direct application, much less is expected of the other two organs. Nevertheless, it is clear that by virtue of indirect application, all organs are expected to be mindful of human rights in all their decisions and actions as they go about discharging their daily responsibilities.

[69] Indeed, one can say that article 13(1) is merely a statement of the reach of application of the provisions of chapter three, i.e. a statement as to who is bound by the obligations emanating from the chapter. Consequently, from a strict reading of the provision, one quickly notes that non-state actors are not so bound. But note the argument from art 9(2) which, by assigning the responsibility to obey and ensure observance of the constitution (including chapter three) to "all citizens, organs of state, political organizations, other associations as well as their officials", tends to extend the reach to state and non-state actors alike.

3.4- Determining the Content and Scope of Rights: Towards a Subject-Object-Addressee Analysis

Determining the content and scope of rights requires the making of a subject-object-addressee analysis. In order to make a successful subject-object-addressee analysis of any right, the core questions we ought to ask are the following:

a) Who is the *subject* of right, i.e., who is the *beneficiary*?

b) What is the *content and scope* of the rights? What is it that the beneficiary can rightfully claim? What is the substance of the entitlement sought? (Conversely, what is the demand that rights impose on the body responsible for their protection?) What is the *limit*, if any, to the exercise of a particular right or set of rights? In other words, what is ***the object*** of the right? Associated with these set of questions is also the question regarding remedies. Thus we ask: "What can a beneficiary do in the face of neglect or abuse of his/her rights? What *remedies* can be sought? And how"

c) Who is the duty- bearer? To whom are they addressed? From whom can one claim the right? Against whom can we assert the rights? In short, who is the ***addressee***?

These questions help to make a subject-object-addressee analysis of any human rights we seek to exercise. The subjects (i.e. the beneficiaries) are identified by the universality-marking words such as words "Everyone…", "Every person," "No one shall be…," "All persons…" or particularity-marking words such as "Every citizen…", "Persons arrested…", "Accused persons…", "Women…", "Every child…", "Every nation, nationality, and people in Ethiopia", "Ethiopian farmers and pastoralists", "Workers…", etc. The addressee is easily identifying by referring mainly to the application clause namely art 13(1). The object (the content and scope of the right) is understood from a close reading of each rights provision which, subject to variation from right to right, imposes a duty to respect, protect, or enforce and/or fulfil. This kind of analysis in turn helps to turn human rights from mere rhetoric to legally consumable commodities. In short, it enhances their justiciability and enforceability. These questions need to be asked in a more pointed manner especially in relation to the right to economic, social and cultural rights and the right to development as they help to overcome the ambiguity associated with them.

3.5-Limitations on the Exercise of Human Rights

In spite of the claim to universality and inalienability, human rights are not exercised in an absolute manner[70]. There is a limitation imposed on the exercise of rights for the sake of making an optimal "utilization" or enjoyment of rights[71]. But "What are limitations? Why are they imposed? When? What forms do they take? And how are they imposed?" are all questions that need to be answered in order to clarify our view of human rights further.

Limitations are *lawful infringements* of rights[72]. They are acceptable or 'justifiable' violations. They are deviations from the standard manner of dealing with rights imposed primarily to facilitate optimal use or exercise of rights in a context of scarce public resources, space, and time. Societies need to impose limits (not as a matter of luxury but as a matter of necessity) to overcome constraints imposed primarily by scarcity. Sometimes one has to limit the exercise of rights in order to overcome the excesses produced by the conflictive nature of rights as between themselves[73]. Thus limitations can also be viewed as harmonization schemes[74], mechanisms through which we mediate between competing rights of different types or intended to be exercised by different beneficiaries.

Limitations become especially necessary when disaster strikes as a consequence of natural catastrophe, war, and epidemic, general breakdown in the provision of public goods and services, breakdown of law and order, civil strife, or terrorist attacks, and others. These circumstances put a strain on the

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[70] Gordon Hollamby, "The Limitation Clause" in Nel, F. and Bezuidenhout (eds), *Policing and Human Rights* (2nd ed). Lansdowne: Juta & Co. Ltd, 2002, pp 103-118. Here, Hollamby says, "Human rights are not absolute: they can be limited or circumscribed." He also says, "it is trite that virtually no right, whether entrenched or not, can be absolute: its boundaries must be set by the rights and freedoms and the interests of others." I would argue otherwise as follows: while human rights can be absolute in essence, their exercise and/or enjoyment cannot be as absolute given the fact that we live in a world burdened with scarcity of resources (e.g. space, time, finances, etc). Hollamby's positioning of human rights as non-absolute makes the inviolability claim vulnerable.

[71] *Ibid*.

[72] Only the legality makes limitations different from outright violations.

[73] Rights tend to compete with, and confront, each other. The state does the balancing through limitative laws.

[74] Hollamby, *supra* note 70.

modes of exercise of rights as a consequence of which limitations of a special type, i.e., derogation and suspension, become necessary[75].

Limitations can take various *forms* such as restriction, suspension, or derogation from. Each of these forms affects the exercise of rights in different ways and to a varying degree. Thus *restrictions* circumscribe the manner, or place, and the extent to which rights can be enjoyed or exercised in a particular set of circumstances, often in normal times. *Suspension* leads to the temporary non-application of one or more rights because of an unusual difficulty in which a state finds itself. *Derogation* refers to the possibility of acting in a manner deviating from the accepted standards of behaviour vis-a-vis rights. It entails acting like there are no human rights at all[76]. The latter two come into play in extra-normal situations.

But there are *limits to limits*. Limitations imposed on the exercise of rights are not without limits[77]. How are they imposed? When are they imposed? The answers to these questions clarify the fact that, in a rational society[78], limits cannot be imposed arbitrarily. Thus it is often underscored that limitations should meet the requirements of the principles of: a) legality; b) necessity; c) rationality; d) proportionality; and e) sanctity of life, dignity, and equality.

In other words, in order to fulfil the requirements of *legality*, all limitations need to be imposed through the instrumentality of a law that is procedurally and substantively legitimate. Also, the law issued must be *necessary* in a democratic (i.e., open and tolerant) society. It is said necessary when the existence of a country is likely to be shaken to the core, or the system is so destabilized as to lead to a crisis in governance. Thus, limitative laws are said to be necessary if the exercise of the right is a threat to public order, public morals, public health, public peace, safety and security, or to the

[75] Note that although they are of the same species, limitations in the strict sense are not the same as derogations and suspensions. The word "limitation" can be used as a generic name that, within it, has *restrictions*, *suspensions*, and *derogations* as species of limitation. While they are similar to this extent, they are not the same. Limitations are often those imposed in normal times, whereas suspensions and derogations are those imposed in emergency situations. See Hollamby, *Ibid*, p.106.

[76] Acting as if human rights do not exist, or no bill of rights exists, because the exigencies of the time force them to act the way they do.

[77] One cannot be arbitrary in imposing limits. One needs to be reasonable, justified, effective (i.e., giving effect to the nature and purport of the right), and proportionate.

[78] A rational society, being a democratic society, operates on the basis of the doctrine of the Rule of Law where, among other things, citizens have the right to written reasons. See De Waal, Currie, and Erasmus, *supra* note 63 on this right in South Africa.

rights and freedoms of others[79]. Moreover, in order to fulfil the requirements of *rationality*, one must establish the existence of a cause-effect relationship between the exercise of the right and the impending harm, and/or between the limitative action and the impending harm intended to be prevented by such action. The requirement of *proportionality* is met through comparing the impending harm intended to be prevented on the one hand and the gravity of the limitative action or decision on the other[80]. The length of time during which the limitation stays in force, the physical area within the bounds of which limitation is imposed, the kind of rights that are restricted, suspended or derogated from, etc should be considered to in order to weigh proportionality. And ALWAYS, limitations cannot be imposed to defy *the sanctity of life, dignity, and equality of all human beings*. One can limit rights without subjecting a person to humiliating and degrading treatment or punishment, or without discriminating against them arbitrarily, or without taking their lives without due process of law.[81]

In Ethiopia, there is no separate provision in the Constitution dealing with limitations that can be imposed on the exercise of human rights and the manner in which these limits can be imposed. The absence of such a general 'limitation' clause might, at first blush, give the impression that human rights are not subject to limitation in Ethiopia. But it is important to note that the absence might also lead to the arbitrary imposition of limitations giving the right holder no recourse to ensure that the limitation is a justified and reasonable one.

Nevertheless, there are specific limitations built into the provisions recognizing the rights. These limitation clauses are often known as claw-back phrases. And so, some rights such as the right to freedom of religion (art 27), expression (art.29), or assembly (art 30) are subject to a specific variety of limitations. While the existence of these provisions clarify matters as to how, what kind of limitations can be imposed upon the exercise of a particular right, there was no way of weighing the legitimacy (or not) of any limitative law, measure, decision, or actions.

In what looks like a basic guideline as to how limitations (i.e., derogations and suspensions in this context) are imposed, art 93 of the FDRE

[79] See Syracusa, Principles on interpreting of limitation clauses; see also the 1996 Constitution of the Republic of South Africa, Section 36.

[80] Note that weighing proportionality is about balancing divergent interests based on a rights claim.

[81] In most countries death penalty is abolished because it is contrary to the right to life; Optional Protocol II of the ICCPR is also about banning death penalty. Note that Ethiopia has not yet signed this Protocol.

Constitution, regulating the manner of declaration of emergency, stipulates the principles of necessity and proportionality (art 93(4)a) as essential in times of suspension and derogation of rights. It is remarkable that in the same article (93(4) c)), rights that are not subject to any limitation (be it suspension or derogation) are listed. These rights are the right against cruel, inhumane and degrading treatment or punishment (art 18), right to equality (art 25), and self-determination (art 39(1) and 39(2)). The other provision that is not subject to suspension or derogation is the provision regarding the name of the country (art 1). One notes the conspicuous absence of the right to life from among this list of rights[82].

3.6- Interpreting Human Rights Clauses

Like all laws, laws on human rights (whether they be international instruments or domestic constitutions and legislations) are bound to need interpretation at one time or another in the course of being utilized. Interpretation is one of the most vital steps towards making sense of human rights. But "what is interpretation? When do we need to do it, and how?" are important questions to address as we discuss interpretation.

Defined in simple terms—and at the risk of oversimplification—interpretation can be viewed as the art of determining the meaning (or constructing a meaning out) of a text. We need interpretation when texts (or provisions) are not clear.[83] Texts are said to be unclear when they are ambiguous, silent, apparently inconsistent, or even absurd. In all other cases, i.e., when a text's meaning is clear beyond any disagreement or debate, then we proceed to apply it. Apparently, interpretation or construction results (and benefits) from disagreement.

From traditional rules or canons of interpretation[84], one notes that when a text is ambiguous, i.e., when it is riddled with equivocation that leads to more

[82] It is interesting to note that some of the state constitutions (e.g. SNNPRS, Oromia, Amhara, and Tigray, etc) extend non-derogability to the right of life, security of persons; freedom of thought, conscience, and beliefs; the right of detainees and prisoners to dignity; the right of every human person to recognition as such; and even the right to one's honor and reputation.

[83] The idea is that when texts are clear, the interpreter applies the text to the facts of the case. But one quickly notes the difficulty of resolving the issue of how—and by whom-- we determine whether a particular text is clear or not. This issue invites a meta-interpretive (pre-interpretive) discourse which is inevitable whether we tackle it explicitly or tacitly.

[84] See, for example, V.H.Patil, "General Rules of Statutory Interpretation," *IT Review* (July 2001) for a discussion in the context of India. See also Avitar Singh, *Introduction*

than one meaning to be ascribed to it, we use various techniques to overcome the ambiguity. In principle, literal interpretation[85] is taken. Thus we look for the literal meaning of the word or phrase that is ambiguous. For this etymological definition[86] and dictionary definitions[87] might help so that we can define the ambiguous term as an ordinary person would understand it. When literal interpretation is not helping to overcome the ambiguity, we proceed to use contextual interpretation, i.e., interpretation by looking at the words or phrases or provisions or sections or texts that come before and after (the antecedents and subsequents of) the ambiguous word. When textual context fails, we look into historical, social, or political, context (as the case may be) so that we can embellish the word and make sense out of it. If the context fails us, then we proceed to give effect to the meaning intended by the makers of the document. To find 'legislative intent' as it is often termed, we are advised to read the minutes of the meetings, the debates, the preliminary drafts, etc. When the ambiguity sticks even after this, we resort to a positive interpretation, i.e., interpretation to give effect to the general poise of the law. The latter is also associated with purposive (teleological) interpretation.[88] When a law is silent, analogical interpretation is employed to fill the gap left open by the silence.

When a law is absurd, or contrary to the demands of reason, common sense and human justice, then we resort to reason, natural justice, and equity. More importantly, we look into the spirit of the law (the motive that inspired the law in the first place) so that the literal application of the law might not end up in being self-defeating. It is in these circumstances that teleological interpretation might also be resorted to.

When a law is inconsistent, first we need to determine the nature of inconsistency. If it is inter-temporal, then we go for the more recent law.[89] If

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to Interpretation of Statutes (Reprint Ed). Agra/Delhi: Wadhwa and Co., 2007 for an extended discussion of interpretation, albeit chiefly from an Indian perspective.

[85] Literal interpretation demands strict fidelity to the letter of the law.

[86] Etymological definition is definition by resorting to the origin and/or root of the word.

[87] Dictionary definitions normally give us meanings of words in the way they are understood by lay people. But professional dictionaries can give us more technical uses of terms.

[88] Purposive interpretation is used to give effect to the purpose of the provision. Teleological interpretation relates to the attempt to obtain meaning by resorting to the end (*telos*) of a rule (or a right).

[89] Inter-temporal conflict among laws is conflict between old and new laws. In such instances, the new prevails over the old. Hence, the principle *lex posteriori derogate lex priori*.

it is inter-legal, then we go for the hierarchically superior law.[90] If the inconsistency is intra-legal, then we go for the special provision,[91] unless it is violative of the most sacred of principles therein.

If, having considered all these techniques of interpretation, we still remain with doubts as to how to go about doing it, then we adhere to the dictum, *in dubio, pro libertate*, i.e., in case of doubt decide in favour of liberty[92].

Anyone acquainted with interpretation of texts is familiar with the idea that much of the interpretive task is coloured by the identity of the interpreter.[93] As a result, there is a debate on who has to interpret constitution,[94] at what level, and following what modes. Owing to the extensive, intensive and intractable nature of that debate even in Ethiopia,[95] I opt to omit the discussion of that debate in this article.

In international human rights law, interpretation is advised to be done in such a way that no interpretation is contrary to the effective utilization of the right recognized in various instruments[96]. In this regard, it suffices to note, for

[90] Inter-legal conflict exists when there is conflict between laws of varying status. In such cases, we give effect to the hierarchically superior law.

[91] Intra-legal conflict is that which exists between laws of the same status but varying degree of generality or specificity. In these situations, the special prevails over the general. Hence, the principle *lex specialis derogat lex generalibus*.

[92] This is often termed as liberal interpretation, liberal because it is in favour of rights/liberties.

[93] Partly this is because interpretation involves construction not only in line with the context of the intent of the author but also with the perspective and context of the reader.

[94] The debate gets expression in relation to whether, and to what extent, a state should adopt judicial review.

[95] The debate in Ethiopia is as to whether and to what extent the ordinary courts are left with the power to interpret the constitutional provisions on human rights given the textual fact (as per art 62 of the FDRE Constitution) that one of the tasks of the House of Federation (HoF) is constitutional interpretation. This debate has been part of the 2000 symposium at ECSC on courts and human rights. See Tsegaye Regassa and Assefa Fiseha *supra* note 60. See arts 62, 82-84 of the FDRE constitution. See also Proclamations No. 250 and 251 of 2001. For an interesting recent discussion on this, see Yonatan Tesfaye, "Whose Power is it anyway?"*Journal of Ethiopian Law*, Vol. 22, No 1(2008). For a more trenchant discussion on the debate regarding interpretation of human rights provisions, see Tsegaye Regassa, "What does it Mean, Who Says it, and Why does it Matter?: Interpreting Human Rights Provisions of the Ethiopian Constitution"(forthcoming 2009).

[96] Art 30 of the UDHR maintains that "Nothing in this Declaration may be interpreted as implying for any state, group, or person any right to engage in any activity or to

example, art 30 of the UDHR which stresses the need to do interpretation in a way that is not subversive of any of the rights recognized therein.

As has been hinted at repeatedly, interpretation of the human rights chapter is key to an effective protection and enforcement of human rights. This is mainly because it is through interpretation that we determine the content, scope, and limitation of a particular human right. The questions as to what interpretation is, when we need it, and how do we do it, are very crucial in the discussion on interpretation of a human rights text. These questions prefigured in the more lengthy discussion above regarding interpretation in general. We now turn to a discussion of the Ethiopian scenario.

In Ethiopia, the supposedly interpretation clause of art 13(2) does not say much as to the who, the when, and the how of interpretation of chapter three. Art 13(2) says: "The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia." Apart from telling us the need to ensure our interpretations are in conformity with the principles of the International Bill of Rights (IBR), this article does not tell us as to whose responsibility it is to interpret, when we need interpretation, how (based on what principles and techniques) we should interpret it, etc. The result is that we are still in a state of confusion as to the proper mode, method, principle, and technique of interpretation of not only the human rights chapter but also the entire constitution in Ethiopia. This problem is accentuated especially because there is no comprehensive rule of (statutory) interpretation in the legal system—which has resulted in lack of consistency in ordinary legal interpretation in the legal system. (In recent times, partly out of the concern for this interpretive fragmentation, a law is issued to make the decisions of the Cassation Division of the Federal Supreme Court binding on other similar cases on matters of legal interpretation.[97])

So, the question remains: how do we interpret the provisions of chapter three? But first: who interprets it? This is a very difficult question bound to raise a lot of controversies. The reason it is so wedded into controversies is because of the atypical mode of constitutional interpretation in Ethiopia: The House of the Federation (HoF) is in charge of adjudicating *all constitutional disputes* (art.62 cum 83 of the FDRE constitution and Proc. 251/2001). The Constitutional Inquiry Council (CCI) looks into and examines cases and

perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

[97] See Proclamation No. 457/2005.

presents its recommendations to the HoF for a final decision (art 84). One can thus argue that the human rights chapter of the constitution is also to be interpreted by none but the HoF (of course with the advisory support of the CCI). One can also argue for a judicial interpretation of the provisions of chapter three on the basis of an argument that takes the following format: a) interpretation of laws, including the constitution, is the cardinal task of the courts; b) the constitution in general and the human rights chapter in particular is a law that is subject to judicial interpretation unless it is explicitly provided otherwise; c) there is no explicit prohibition of judicial interpretation although there is the explicit recognition of the mandate of the HoF in this regard[98].

In practice, courts do interpret the provisions of chapter three that pertain to criminal procedural rights that are found in the Criminal Code and Criminal Procedure Code (often without making any reference to the constitution).[99] But the courts do not have a principled, consciously designed, and directed, manner of going about the task of interpretation. Whoever interprets the Constitution and, by extension, the human rights chapter, there are some widely applicable techniques of (legal) interpretation that one must heed to.[100] These are:

a) That it must be established that there is a degree of unclarity (caused by ambiguity, inconsistency, silence and/or absurdity) that invites interpretation;

b) That when the cause is ambiguity, a literal (textual, contextual) interpretation is made often by also considering the legislative intent, purpose (*teleos*), and spirit;

c) That when the cause is inconsistency, first we establish the nature of inconsistency (whether it is inter-legal or inter-temporal); and when the conflict is between hierarchically related laws, then we decide in favour

[98] This kind of argument helps to judicialize the interpretive task.

[99] Apparently so doing is merely legal interpretation or application, rather than constitutional interpretation.

[100] In the business of interpretation, the first thing to do is to establish that there is unclarity in the law. The second thing to do is to identify the cause of unclarity. Thirdly, we must carefully choose the principles, theories, methods, canons, and/or techniques that are appropriate to help solve the problem of unclarity. Fourthly, we need to apply the principles, theories, methods, canons, and/or techniques of interpretation chosen to be applicable in step three to the facts in the case at hand. Finally, we need to write out the judgement, the decisions, and the orders--as the case may be—in a manner that discloses the reasons for the chosen steps and formulae of interpretation.

of the superior law; when the conflict is between general and specific types of laws, the specific law prevails; if the conflict is between old laws and new laws, the new laws, the more recent laws, prevails over the old laws;

d) That when the law is silent, we construct the existing law in such a way that it is made to cover the new situation (through what is traditionally called analogical interpretation);

e) That when the law is absurd, we interpret the law through recourse to reason, equity, and natural justice to give a positive effect to the spirit and end (teleos) of law; and

f) That if, after all is said and done, the unclarity still persists, then we decide in favour of the right (in accord with the dictum: *in dubio, pro libertate*[101]!).

3.7- Entrenchment of Human Rights

Entrenchment has to do with the difficulty associated with amending the human rights provisions of an instrument. Often such documents are made to be difficult to amend. The reason is because human rights are viewed to have enduring value owing to their trans-temporality. As a consequence of their enduring value, often the human rights chapters (otherwise known as the Bill of Rights Chapters) of constitutions are made hard to amend. The mode of formal amendment[102] and the procedures thereof are so stringent that no ordinary legislature can have its way if it makes an inroad to the list or the scope of the rights that are already recognized. Meeting the requirements of the procedures for amending ordinary statutes does not suffice to amend a constitutional provision apropos of human rights. Thus, often approval of the proposed amendment in the legislatures of the constituent units of a federation (if the polity is a federation) and a qualified majority of the joint or both houses of the national (or federal) legislature is sought in order to effect such an amendment.[103] In some cases, approval in a referendum might also be

[101] To mean: in case of doubt, decide in favour of liberty (or freedom=rights).

[102] Formal amendment is amendment done by the body assigned the task of amendment sitting for the specific purpose of amending the constitution with the conscious, deliberate and intentional effort towards effecting amendment in accordance with the procedures constitutionally set for it. See S. N. Ray, *Modern Comparative Politics: Approaches, Methods, and Issues*. New Delhi: Prentice Hall of India, 2003 pp.116-129. It is often contrasted with informal amendment, one in which various organs of government effect amendment in the course of discharging their daily responsibilities (such as law-making, implementing, or interpreting.)

[103] See Arts. 104 and 105 of the FDRE Constitution for instance, especially 105 (1).

required.[104] All this, it is presumed, is in deference to the trans-temporality and the universality of human rights.

A human rights provision is said to be entrenched when the procedure for its amendment is stringent. In Ethiopia, according to Art 105(1), amendment to the provisions of chapter three is effected when the following requirements are met:

a) When the proposed amendment is approved by a majority vote of the legislatures of all the nine states;

b) When the federal legislature approves the proposal by a two-thirds majority vote; and

c) When the HoF approves the proposal by a two-thirds majority vote.

This shows the degree to which the amendment of the "bill of rights" is difficult, thereby rendering the constitution one of the most rigid constitutions in the world. From this, one can conclude that human rights are fairly entrenched in Ethiopia[105]. It needs to be underscored at this juncture that this entrenchment marks the fact that human rights are taken seriously in the Ethiopian legal system.

4. The Role of the Judiciary in Protecting Human Rights

The role of the judiciary in the protection of human rights is so immense that it cannot be exaggerated. Often, they are rightly presented as "the bulwark against abusive governmental practices".[106] In most jurisdictions, they are the primary bodies to which victims of human rights violations look to obtain formal redress. That is perhaps the reason it is often said that "undoubtedly, the protection of constitutional rights and freedoms is the objective of all courts."[107] Of course one cannot deny that the courts do have shortcomings in this role. All its shortcomings notwithstanding, the court's role in the

[104] This is the case for example in Australia. See generally Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law*. New York: Foundation, 1999 on various modes of constitutional amendment.

[105] This rigidity, while it is preservative of the list of rights now recognized and is as such a good thing, might have a negative consequence in keeping out new set of rights which society might deem so important as to deserve inclusion in the constitution. So, entrenchment might, in effect, make constitutionalization of new rights difficult.

[106] Lawrence Friedman, "Turning to the Courts: Human Rights before the Bench" (Book Review), *Harvard Human Rights Journal*, Vol. 13 (2000), p. 316.

[107] Khalnar Hajiyev, "The Role of the Constitutional Court and Ordinary Courts in the Protection of Human Rights" (Paper presented on a conference on "Human Rights Protection Systems", Bishkek , 21-22 November 2002), p. 3.

protection of human rights can never be over stated. In the sections that follow, we try to shed light on some of the key roles of the courts in this regard by trying to posit its role in the context of the state responsibility regarding human rights in general.

4.1-State Role Regarding Human Rights

It has already been hinted at the fact that state role can be classified into three categories, namely that of respect, protect, and fulfil. The *duty to respect* requires that the state does nothing to adversely affect the free exercise and enjoyment of rights by citizens. The *duty to protect* requires making protective laws, setting up protective institutions, employing qualified protective professional actors, allocating the necessary wherewithal (noting that rights are very expensive), and procuring the necessary logistical and infrastructural facilities. The *duty to fulfil* requires the state to go beyond the call of ordinary duties to ensure that citizens are capacitated to enjoy their rights. It calls for compassion of the highest order (the kind which says *I am my brother's keeper, I am my sister's keeper)* from the part of the state to make sure that especially the more unfortunate sections of our societies are brought to the level where they can enjoy a *decent life of dignity*. The state must thus plan and strategize to make sure that citizens are *free from want*[108] by working towards eradicating such social ills as poverty and illiteracy, and by combating those factors that negatively impact their environment and peace.

The judiciary as part of the three major organs of the state, the *trias politica*, is one of those institutions that have these triune duties to respect, to protect, and to fulfil the exercise and enjoyment of human rights. In the Ethiopian constitution, the courts are identified as one of the three organs of the state that have "the responsibility to respect and enforce the provisions of this [i.e., the Human rights] chapter."[109] The major brunt of the duty to protect, as we shall see shortly, rests on the judiciary.

[108] The phrase "free from want" evokes the memory of the Four Freedoms speech of Franklin Delano Roosevelt in 1941 in which he postulated his vision of the world that ensures the exercise of freedom of expression and worship and freedom from fear and want for all citizens everywhere.

[109] Art 13 (1), the provision regarding state duty for human rights, reads as follows: "All Federal and State legislative, executive, and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter."

4.2-The Judiciary and its Roles in General

The judiciary, being staffed with judges who are viewed as the oracles of the law, is primarily the protector of the weak from the strong, the poor from the wealthy, and the powerless from the powerful. The protection of "the worst and the weakest amongst us" is one of the cardinal duties of the judiciary. In a case decided in the Constitutional Court, Justice P. Chaskalson of South Africa is noted to have said the following regarding the eminent role courts play in this regard:

> The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislations in the courts, was *to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process*. Those who are entitled to claim this protection include *the social outcasts and marginalized people of our society*. It is only if there is willingness *to protect the worst and weakest amongst us* that all of us can be secure that our on rights will be protected[110]. (Italics added)

In a similar vein, Justice Jerome Frank is reported to have said that "the test of the moral quality of a civilization is its treatment of the weak and the powerless"[111]. The judiciary's primary task is to "to pursue justice"[112]. The courts have it in their tradition to do justice without fear, favour, or prejudice. That is one of the reasons that courts need to be independent. Doing justice in the words of one of the prophets of old requires that we "administer true justice; show mercy and compassion to one another. Do not oppress the widow or the fatherless, the alien or the poor."[113] This pricks our attention to the causes of social justice that the instruments on socio-economic and cultural rights seek to advance. Needless to say, while the court needs to be objective, neutral, and dispassionate in as much as it can, in all its dealings it must also side with the truth (of facts) and the soundness of the interpretation of the law invoked. The need to be dispassionate should not blunt the need for it to be compassionate to the oppressed.

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[110] *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC)

[111] In what echoes Frank's statement, Justice Hugo Black is also reported to have said, "The worst citizen no less than the best is entitled to equal protection of the laws of his state and of his nation" in *Bell v Maryland*, 378 U.S. 226 (1964) AT 328.

[112] This is also often claimed by professional associations of lawyers e.g. the American Bar Association, as their slogan. In deed all lawyers have it in their role to advance the horizons of freedom and to aspire toward the ideal of justice.

[113] Zechariah 3: 9-10, *Holy Bible* (New International Version). Zondervan: Grand Rapids, 1973/2001 (Rev), p. 525. It is of course noted that to demand the active engagement of courts for the cause of social justice is to demand more judicial activism which is not equally tolerated in all jurisdictions.

In the *trias politica*, the court's symbol is that of the scales, the scales of justice and fairness. It is often contrasted to the legislature, which commands the purse, and the executive, which commands the sword. Because it commands neither the sword nor the purse, it is said to be the weakest organ of state. Its weakness is taken as its strength and often it is given the task of watchdog over the powers of the more powerful institutions of the state. As Hamilton said in those inimitable words:

> [T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. … The judiciary, …, has no influence over the sword or the purse; no direction either of the strength or the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgement; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements. [114]

One of the chief tasks of the judiciary is to normalize politics and bring balance to it. In this capacity, it tends to preserve the health of the political machine in a polity. It does so by protecting the integrity of the rule of the game of politics, i.e., the constitution.[115] In most systems, the court serves as "the arbiter of what is and what is not legal or constitutional." The courts are often viewed as indispensable to a vibrant democracy. They act as a check to politics especially when the latter goes awry. They are the voice of reason, the voice of conscience, in a democratic politics that tends to be blinded by the voice of passion of the majority. In this, it establishes sanity on the excesses of majoritarian democracy. They are custodians of the principle of rule of law. In a constitutionalist system that recognizes judicial review, they act as the guardians of the values of the constitution, the custodians of the ideals of the founding fathers. In this, they have the potential to serve redemptively as the voice that calls us back to the ideals the constitutions has set for us.

Cardinal to the success of their work is their independence (both institutionally as a court and personally as judges). This is reinforced by the UN *Basic Principles on the Independence of the Judiciary.*[116] The Basic

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[114] See these timeless words of Alexander Hamilton in the Federalist Papers No 78. Hamilton, Madison, and Jay, *The Federalist Papers* (Charles R. Kesler and Clinton Rossiter, eds). New York: Mentor, 1969/1999, p. 433.

[115] See Michael Gallagher, Michael Laver, and Peter Mair, *Representative Government in Modern Europe: Institutions, Parties, and Governments* (4th ed). Boston: McGraw-Hill, 2006, p.86.

[116] UNHCHR, *Basic Principles on the Independence of the Judiciary* (1985). UNGA Res 40/32 and 40/146 of 1985. The principles represent a global consensus on what

Principles describe the seven key components necessary for judicial independence as follows: a) guaranteed term of office; b) finality of decisions; c) exclusive authority; d) ban against exceptional or military courts; e) fiscal autonomy; f) separation of powers; and g) enumerated qualifications (e.g. academic qualification, ability, integrity, efficiency, etc).[117] Indeed, the judiciary's role as an institution of effective remedy lies in its independence. In order to ensure independence, improper influences on judges should be prohibited; care must be taken in the proper qualification, training and selection of judges; tenure and conditions of service must be provided; immunity must be guaranteed; disciplinary measures need to be taken only in accordance with the law[118]. It is also to be noted that the technical competence of the judges and the degree to which they bring about professionalism and sophistication to the practice of human rights is important for the effective protection of rights through the instrumentality of the courts.

4.3- The Judiciary and its Roles in Ethiopia

The judiciary in Ethiopia has no less important task than the one outlined for courts elsewhere. The constitution (in its arts 78-81) recognizes the establishment of a three-tiered independent judiciary which is vested with all judicial power. Owing to the federal nature of the polity, the establishment of state judicial bodies is envisaged by the constitution. Consequently, the states have constitutionally established a three-tiered court in their jurisdictions. In most states, there are also social courts that are increasingly granted a constitutional recognition although they have a dubious position in the judicial hierarchy. The federal supreme court has a cassation division whose decisions have an authority and precedential value over lower courts in the hierarchy (as of 2005). The state Supreme courts, too, have their own cassation divisions whose decisions, however, do not have a similar authority over lower courts in the states.

One of the major features of the Ethiopian judiciary is that it does not have the ultimate say on the meaning of the constitution. Nor does it have the power to rule over constitutionality of laws. This power is granted to the House of Federation cum the CCI (arts 62 cum 82-84). But the courts can decide on an issue in which constitutionality of a law is contested without its

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judicial independence is and should be. See Linda C. Keith, "Judicial Independence and Human Rights Protection in the World" *Judicature* Vol 85, No 4 (2002) p. 196.

[117] Keith, *supra* note 107, pp.196-197.

[118] On this, see, for example, OSCE, "Protection and Promotion of Human Rights" (Supplementary Human Dimension Meeting, 12-13 July 2007, Vienna.)

decision having the effect of annulling the law as unconstitutional. The perception among most judges and lawyers (as well as the politicians and the lay public), however, is that the constitution is beyond the reach of the ordinary courts[119]. But this is simply counter-intuitive because: a) the courts have judicial power (art 79(1)); b) judicial power includes the power to find and declare the law; c) a law that is repugnant to the constitution is of no effect (art 9(1)); d) thus the courts can, in their day-to-day business of resolving disputes, can enforce constitutionality without the need to take the platform of constitutional interpretation and the need to ban an unconstitutional law. This is particularly important in the area of human rights law which, although emanations of the constitution, are presented to courts couched in the languages of procedural laws (especially that of criminal procedure).

While the significance of the judicial power in the process of normalizing politics is less and while its position as the guardian of the constitutional values is even less, the courts in Ethiopia, like everywhere else, have the important responsibility of doing justice without fear, favour, or prejudice. They have the responsibility of making themselves accessible (financially, physically, and culturally/procedurally). They also need to respect the human rights of citizens that, as parties or otherwise, find themselves in their sessions. More importantly, they must enforce the rights of citizens against violations (horizontal or vertical). These being the basics of the judicial task, they cannot do anything less.

4.4- The Judiciary and its Role of Protection of Human Rights: From whom and How?

It is by now clear that the judiciary must protect human rights. But protect from whom? First and foremost, they need to protect it *from themselves*. The courts have the responsibility to respect human rights. They are thus expected to respect, for instance, the rights to fair hearing, bail, due process, appeal, expression, representation by a counsel, etc. By so doing, i.e. through extending respect, they protect human rights from themselves. Secondly, the courts have the responsibility to protect human rights *from vertical violators, i.e., governmental bodies who administer rights*. Such are the police, the prosecution, the correction and rehabilitation centers, or administrative agencies, etc. To protect citizens from governmental actors is not easy

[119] This observation is not made based on an opinion survey. The general frame of discussion on the matter with legal professionals, law students, judges, and officials in the HoF on diverse occasions and pieces on weeklies (e.g *The Reporter*, *Addis Neger*, etc) seem to suggest this.

because the courts depend on the selfsame executive bodies for the enforcement of their judgements (or orders, or decrees). The judges are expected to be very innovative in designing mechanisms by which they can make the executive accountable for their violations of the rights of citizens who are under their custody (such as that of arrested, detained, accused, and sentenced persons). They must also use a rigorous scrutiny into the activities of the executive, especially the law enforcement officials, when ruling on matters pertaining to arrest, bail, investigation, remand, detention, and imprisonment. But they also must seek and earn understanding, respect, and cooperation from these bodies.

One of the things that the judges have to do in this regard is to bring demonstrable professionalism and technical competence in the area of human rights. In particular, they need to know the steps, techniques and methods by which human rights are concretized. In particular, they need to have a principled approach to the interpretation of legal texts that embody or implicate human rights. They need to bear in mind that rights clauses must always be interpreted liberally whereas power clauses must be interpreted more literally and strictly. They need to manifest dexterity in fleshing out the content and scope of a right by making a subject-object-addressee analysis. They also need to be efficient in determining reasonable limitations that can be imposed (or not) on the exercise of rights. They need to master the nuances and subtleties of the practical implications of the enforcement of rights. They must realize that "human rights protection is ultimately a practical exercise."[120] They must also understand the limits of their powers in this regard.

The third category of persons from whom the courts must protect human rights is *other people*. Other people do what is often termed 'horizontal violation of human rights'. This can be done of course if there is first a legislative framework that protects rights from other individuals or non-state actors. Here, often, the task is to penalize the violator and to redress the victim of the violation.

4.5-The Limits of Judicial Power to Protect Human Rights

By far the greatest limitation of the courts in their endeavour to protect human rights is that they depend on the sword of the executive and the purse of the legislature, although much less the latter. In Ethiopia, the fact that they are

[120] John McMillan,"The Role of the Ombudsman in Protecting Human Rights" (paper presented on a conference on 'Legislatures and the Protection of Human Rights' at the University of Melbourne, 21 July 2006), p. 9.

not the ultimate arbiters on constitutional matters might undermine their position vis-à-vis the other organs in the *trias politica* to act in defense of constitutional human rights.[121] Even if (and when) this second limitation is overcome, the fact that the country's public resources are patently meagre make it difficult for the courts to order this or that kind of remedy for human rights violation. But one quickly notes that governments will never *have* resources for human rights; they *make* resources available for them because our constitutional and international commitments demand no less than that. After all, human rights are not luxuries as many people would assume; they are basic necessities for a decent human existence.

Conclusions

The aim of this piece was to explore the mechanisms through which we can make a legal sense of human rights. It aimed at raising some questions concerning the task of making human rights a set of legally consumable commodities. It sought to make a call to look beyond human rights fundamentalism and cynicism which legislate utopian dogmatism and political despair respectively. It sought to challenge us to take steps to move from political rhetoric (centred on the constitution) to legal reality (centred mainly on the judiciary). Noting that human rights are moral entitlements that all human beings claim as such, we sought to see ways through which we can concretize them by making a legal and judicial sense of human rights. The key features of human rights—inherence, inalienability, inviolability, universality, trans-temporality—were identified. The various ways in which we can classify them is also discussed. Why they matter to us is also stressed.

The position of human rights in the past and present constitutions of Ethiopia was also briefly explored. The fact that the past of the Ethiopian public law has little to commend about human rights is noted. The fact that in the contemporary constitutional law of Ethiopia human rights (both the

[121] The lack of conceptual clarity about the judicial role in a legal system that generally leans to the civilian tradition of continental Europe—whether the judges are neutral umpires in a proceeding or active agents of public policy enforcement –also contributes to the limited role courts play in taking a more robust stance with regard to the protection and enforcement of human rights. One notes that if one conceives his/her role as one of the former, then there tends to be little for the court to do in any type of case, whereas if he/she conceives of his/her role as one of the former, then there is the likelihood that they will take it as their responsibility to look after human rights in their judicial role. For the difference in the role of judges in the two traditions, see generally Mirjan R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to Legal Process* (2nd ed). New Haven, Yale University Press, 1991.

principle and the details) loom large is also noted. The fact that a wide range of rights recognized in the IBR are incorporated in the Ethiopian Bill of Rights is underscored. The reach and application, the interpretation, the limitations, and the entrenchment of the provisions of chapter three, and some of the specific rights embodied in the chapter are discussed along with the institutional framework for their protection.

In an attempt to make a legal sense of human rights, we looked at the options we have in order to move from mere political rhetoric to actual legal reality. The steps of concretization—from constitutional guarantee-to legislative protection-to judicial application-to executive implementation – and the levels of protection (the duty to respect, protect, and fulfil) are all explored. In an attempt to flesh out the steps toward making a judicial sense of human rights, we examined the procedural, substantive and remedial steps we might need to undergo in human rights litigation. Issues related to the reach (state or non state actors?) and application (direct or indirect?), determination of the content of the rights through making a subject-object-addressee analysis, determination of legitimate limitations that can be imposed on the exercise of human rights, interpretation of human rights clauses, the entrenchment of rights clauses that results from their trans-temporality are all examined one after the other.

Against this background, the role of the judiciary in the protection of human rights is discussed. The role of the judiciary in the *trias politica* as the institution that does justice without fear, favour, or prejudice is stressed. The state's role in the protection of human rights in general (responsibility to respect, protect, and fulfil) and the judiciary's take on that is noted. Its role as the voice of reason, the normalizer of politics, the protector of the weak from the strong, the poor from the rich, and the powerless from the powerful is also underscored. The courts' role to protect human rights from the judiciary itself, from vertical and horizontal violators is also put in perspective. Some of the limits of the judicial power in its endeavour to protect human rights are also noted. These thoughts, it is hoped, will contribute to clarity of our conception of how to make legal sense of human rights in Ethiopia and to our vision of the court's role in this regard. ■

SHARING THOUGHTS

French, English, Amharic: The Law in Ethiopia *

Roger Briottet[1]

The language of the law is difficult to translate because words or expressions in a particular language often carry concepts which do not exist in another. In this respect, the dissimilarity between French and English laws is striking. The difficulties further increase when either of these two legal systems - or both - is used as a basis for yet another system which adheres to its own legal traditions. Ethiopia is a particularly good example of such a thorny problem. In the 1950s Emperor Haile Salassie undertook a thorough reform of the legal system. At the time little thought seems to have been given to the confusion likely to result from the introduction of the French approach into the existing Ethiopian system. The interpretation of these antiquated codes is proving increasingly difficult because law practitioners cannot access French sources. In this particular case, language is shown to be a key factor in the understanding and correct use of the law.

* * *

Translation is always a challenge. The better the translator, the more secretly tormented he/she is about the quality of the translation. Many factors come into play. Quite apart from an adequate knowledge of both languages, the

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quality of the finished product in literary terms and, above all, the understanding and rendering of the untranslatable raise seemingly intractable problems. This is particularly true for the language of the law which often carries concepts with no exact equivalent in another given language. 'In general (legal) texts are not a mere assemblage of words and phrases...they serve as an organ of collective perception linked to a certain culture and extract the way their meaning is produced' (Vlachopoulos 2004: 100).

Moreover, legislators differ in their approach to legislative drafting. 'Ainsi, le code civil suisse est considéré comme l'exemple du code rédigé dans une langue accessible à tous. A l'inverse, les rédacteurs du code civil allemand, le BGB, ont opté pour une langue dite scientifique, s'adressant aux spécialistes du droit.' (Pelage 2000: 3) [Thus, the Swiss Civil code is regarded as the example of a code drafted in a language accessible to everyone. In contrast, the drafters of the German civil code, the BGB, opted for a so-called scientific language destined to legal experts]. In other words, the law cannot be distinguished from the technical language which expresses it. This is why it is commonly said of judges that they 'disent le droit' [declare the law], i.e. they interpret the legislator's text in words and phrases which will bind lower courts. 'Judges create worlds with words and require us to inhabit them.'(Raymond: 2004 in Harvey 2005; 64). They are law-makers (Taylor 2005: 117). Moreover, the words expressing or defining legal concepts must be construed within the historical context which gave them their original meaning and, sometimes through many centuries, gradually led to their present accepted signification. For example, In English Common Law, the word 'torts' refers to wrongs not arising out of contract for which an action in compensation or damages can be brought. Within this wide definition, the law distinguishes between different torts (trespass, negligence, etc.,) to which specific rules and conditions apply. For instance, in the case of negligence, the injured party must show that he/she has suffered a quantifiable damage whereas this is not required in the case of trespass. The word tort came from the Latin "tortum" and was a legal term in Roman law. It is used in French with a similar meaning (*demander réparation d'un tort*) [to request that a wrong be redressed] though it has lost its precise legal relevance. A decision by the High Court of Montreal (Mart Steel Corp. v R.) made it clear that 'by using the term *tort* the Crime Liability Act was intended to have no application in the province of Quebec, where the concept of *tort* is foreign.' (Šarcevic 2000: 1-7) Indeed, the law of torts is regarded by some French jurists as '*un maquis déroutant*' [a disconcerting maze]. This is probably because the French - and similarly other Romano-Germanic systems - have developed a general theory of civil liability based on three articles of

the Civil Code (art. 1382 to 1384) which does not distinguish between separate "torts" as does the Common Law.

In this respect, it is interesting to note that legal dictionaries encounter problems which they are not always able to solve adequately. For instance, the legal dictionary of the Office québécois de la langue française [Quebec French Language Board] translates the French word "cause" used in French contract law by the English word "consideration", used in English Common Law. In an attempt to clarify the matter, it gives a definition of each of these terms. ' Dans les droits Romano-Germanic, la *cause* de l'obligation de l'une des parties est la prestation de l'autre partie (la contre-prestation).' [In Romano-Germanic legal systems, the *cause* of the obligation of one of the parties is the benefit received from the other party (the counterpart's benefit).] 'La *consideration* est une notion propre aux droits anglo-saxons. Pour qu'un contrat soit susceptible d'exécution forcée, la contrepartie doit pouvoir être mesurable financièrement.' [Consideration is a concept peculiar to Anglo-Saxon law. In order for a contract to be enforceable, the expected benefit must be financially quantifiable.] It follows that, according to these definitions, the only difference between *cause* and *consideration* seems to be that the expected benefit must be financially quantifiable for the latter but not for the former. However, these definitions are somewhat misleading as they avoid the complexity of both these legal terms and their differing legal effects, which only lengthy notes - amounting to a course in contract law! – could satisfactorily clarify. If we now check the English word 'consideration', using the same dictionary but starting from the English language section, the French word given is 'contrepartie' rather than 'cause'. 'Contrepartie' is closer to consideration than 'cause' but cannot be used in French law as its synonym, since the concept of 'cause' is much wider than the mere benefit expected from the other party in a contract and even extend to the intention of a donor who can expect no consideration (or *contrepartie*) from the donee. In other words, there is no proper translation of these words in the other language because they express different concepts within two distinct legal contexts.

So far, I have dealt with the tricky problem of legal translation which requires the understanding of a different legal system. I now want to look at the influence of foreign languages on the evolution, understanding and practice of the law. In order to do this, I shall consider the ancient legal system of Ethiopia and analyse the impact of the French and English languages on its evolution and, in particular, the substantial if somewhat incoherent legacy of their introduction in the domestic system they were intended to improve.

The law of Ethiopia – A historical and linguistic approach

Ethiopia, with the exception of Eritrea now independent, has never been colonised by foreign powers. In its long history the country has seen the gradual consolidation of a feudal empire based on the Tygrenyan and Amhara aristocracies of the North whose languages, Tigrinya and Amharic, stemmed from the archaic Ge'ez which to this day remains the language of the Christian orthodox Church, just as Romance languages largely originated from Latin which still constitute the backbone of Roman Catholic liturgy. Although more than 80 languages and many more dialects are spoken in Ethiopia Amharic, the written language of past ruling classes, became the official language of the country under the powerful centralising authority of the emperors in the XIXth and XXth centuries. Ethiopian law was mostly expressed in the form of 'Proclamations' or imperial edicts although, as in feudal Europe, many local, largely unwritten customs continued to exist. The resulting system was a complex and sometimes contradictory imbroglio which resisted change and modernisation.

Emperor Haile Selassie, who found refuge in England whilst his country was occupied by Italian forces from 1935 to 1941, resolved to unify and modernise the law of Ethiopia, which could no longer cope with the demands of a society attempting to adapt to a post-war world in rapid evolution. To that effect, in 1954, he appointed a Commission of Codification whom he entrusted with the task of consolidating, revising and codifying most aspects of Ethiopian law. René David, professor of comparative law at the University of Paris, was asked to prepare the work of the Commission charged with drafting a new Civil Code. In parallel, the same Commission's mandate was extended to the drafting of a Code of Commerce. The two codes were meant to complement each other. Although the drafts were written in French, the Commission was at great pains to produce texts which would fit the Amharic legal tradition, represented by the *Fetha Nagast*, and use the Amharic language to the exclusion, whenever possible, of foreign words or phrases. In his report to the Emperor, René David explains:

> En ce qui concerne la langue du code civil, la commission s'est abstenue, par principe, d'adopter des mots français ou d'une autre langue, qui n'auraient pas eu de sens pour la majorité des Ethiopiens. Lorsque des mots étrangers ont été, de façon exceptionnelle, employés, c'est le plus souvent parce que d'ores et déjà, on faisait usage de ces mots en Ethiopie dans la pratique courante. Le code est écrit en amharique, et il ne fait qu'un minimum d'emprunts aux langues européennes. Lorsqu'un mot français, employé par l'expert dans son avant-projet, n'avait pas d'équivalent en amharique, or lorsque son équivalent risquait de causer une méprise, la commission s'est efforcée, plutôt que d'adopter le mot français, de trouver un mot ge'ez qui

> puisse le traduire…La technique employée conserve au code civil son caractère national, et rattache le code aux traditions anciennes (David 1960 : 668-681).
>
> [Regarding the language of the Civil Code, the Commission refrained, as a matter of principle, from using French words or words from another language, which would have been incomprehensible to most Ethiopians. Where foreign words have exceptionally been used, it is usually because these words were already currently used in Ethiopia. The Code is written in Amharic, and it borrows very little from European languages. When a French word used by the expert in his draft text had no equivalent in Amharic, or when its equivalent might have led to a misunderstanding, the Commission endeavoured to find a *Ge'ez* word which could translate it...The technique thus used maintains the national characteristics of the Code and ties it to ancient traditions.]

The important point here is that the Amharic version, not the original French text, has force of law, the English translation being subsidiary. According to S. Šarcevic 'all authenticated translations (i.e. those legally recognised as valid translations of the original text) are just as inviolate as the original text(s). Hence they are not regarded as "mere translations" but as originals and are not even referred to as translation' (Šarcevic 2000: 1-7). However, in Ethiopia, the law does not 'authenticate' the translation of the original French text which had no legal status to start with. Rather, it decrees that the Amharic version is the only authentic version which gives it the force of law. Unfortunately, law practitioners have little or no knowledge of the French language, let alone French law, and are thus deprived of access to an essential source of present Ethiopian positive law.

As to the contents of these codes, the commission referred to various sources, including common law digests, international instruments, judicial precedents and learned studies. All in all however, the main inspiration of the projects can be traced to the Romano-Germanic tradition and, more specifically, to French legal principles and judicial practice.

The code of civil procedure was drafted, also in French, under the direction of another expert, Dr Graven, a professor of criminal law at the University of Geneva, and completed after the above two codes had already been approved. In criminal law, two new codes were promulgated: the penal code in 1957 and the criminal procedure code in 1961 (Graven 1965: 2-6). In contrast to the civil, civil procedure and commerce codes, these last two codes, although inspired by the Swiss code, owe a great deal to the Common Law. This is probably because the introduction of an inquisitorial system on the continental model would have required the creation of new institutions, such as the ancestral investigating judge (the *juge d'instruction*), which were

alien to the Ethiopian tradition and practice in criminal matters. However, as no equivalent to the English Director of Public Prosecution was introduced, the new system was not in line with an important element of Common Law practice.

Nevertheless, the reform put at the disposal of judges, legal practitioners and scholars a modern, comprehensive and codified legal system produced in Amharic, the national language. The English translation also published in the *Negarit Gazeta*, the official compendium of Proclamations or laws, gave those with imperfect knowledge of Amharic a parallel access to legislative texts.

The legacy of the reform - linguistic pitfalls and legal confusion

Fifty years have passed since the extensive reform of the Ethiopian legal system. As we have seen, the Codification Commission was acutely aware of the importance of language and strove to express the law in clear and c**o**ncise Amharic. Further updating which led – *inter alia* – to the new criminal code of 2005, followed the same principles. Yet, neither the Commission nor its followers seemed to have been aware of the major problems facing the implementation of the reform. These problems are closely linked to the language in which the law is written. Even more importantly, they relate to the sources of the law which, expressed in a different language, carry concepts, traditions and meanings not necessarily understood without reference to these sources. This is why, in any country and in various degrees, judges and attorneys study judicial precedents, consult learned commentators and generally speaking keep abreast of the evolution of the law in any given field. This is not new; in the early 1800s, commentators agreed that Roman law was becoming indispensable to interpret the new (Napoleonic) codes. Unfortunately, this is precisely what most Ethiopian lawyers can no longer do, since few are proficient in French, let alone Latin! Moreover those who can read French find very few legal French books in the university or court libraries, and commentaries in Amharic or in English dealing with French law are rare and often superficial or obsolete. The Internet, which could direct to some French sources, is not yet easily accessible to practitioners and students. As a result the law, cut off from its roots, ceases to be fully intelligible. Ironically, former colonies, because they inherited the coloniser's legal system which was forced upon them, can easily refer to that system in a language they understand and practice. This is not of course always true, especially when a novel political and linguistic influence had displaced the language and the law imposed by the former coloniser. In East Timor for instance, Portuguese was partly superseded by English when the United Nations briefly became the legal government after independence from

Indonesia thus imposing an entirely new language to the lawyers who had to deal with the United Nations administration and World Bank contracts! By the time power was transferred to an East Timorese administration, the English language was fairly well established and no doubt carried with it elements of Common Law which may in time displace local customs and Portuguese law. In Commonwealth countries, a measure of coherence and consistency can be preserved since, in some circumstances, the Privy Council in London can hear appeals from their courts. In French speaking countries, lawyers and judges can sometimes refer to French precedents because the common language and an understanding of a common legal heritage make it possible. It is the case for instance in Haiti, which gained its independence from France as early as 1804, but where important domestic cases are still commented in the light of the Paris *Cour de Cassation*'s decisions although there is no judicial link between the Haitian and the French judicial systems.

Ethiopian lawyers are aware of the problems posed by the discontinuity between past sources and current law due to language limitations. Girma W. Selassie, writing in the Mizan Law Review explains:

> For much of the time I was associated with the Addis Ababa University Law School, Legal French was a compulsory course. The reason is that several of our codes, including the Civil and Commercial codes, were drafted by French men and they drew heavily on French law. Therefore a fuller understanding of a substantial portion of our law requires going back to the primary source. Although some may consider this a luxury, I still believe a smattering of the French language to be a useful tool to any Ethiopian lawyer worth his salt (Selassie 2007:127).

It was different when the reform took place. For instance, the Ethiopian Minister of Justice requested a French version of the new code of commerce which was duly handed over and published in Paris with an introduction by Alfred Jauffret who had assisted the Commission of Codification (Jauffret 1965: 2-6).

The problem was further aggravated by several factors. First, between 1974 and 1991, under the regime of Colonel Mengistu, a number of Ethiopians went to the Soviet Union or to other East European countries to study various subjects, including law. Although this is hardly noticeable now, the use of an East European language and the knowledge of a socialist legal system which fitted the Ethiopian regime of the day but was alien to the Ethiopian legal tradition have no doubt influenced a generation of lawyers. Second, the way law is taught in Ethiopia has created problems of its own. Since the change of regime in 1991, five new universities were created. They all include a law school which generally follows the curriculum of Addis Ababa University (AAU). As finding a relatively large number of competent

teachers became increasingly difficult the government, as it did in the 1960s when AAU was created, called upon foreign lawyers who can teach in English, the only foreign language that all students can understand, taught as it is in secondary schools, although Girma W. Selassie (op. cit) laments:

> Students are supposed to supplement that (classroom learning) with a substantial dosage of reading on their own. But the lamentable state of our libraries gives them a ready excuse not to. Yet, that is not the real or, at least, principal reason. Too many students simply do not have the requisite vocabulary to read and understand a textbook in English, a language that we continue to pretend to be the medium of instruction (Girma W. Selassie: 127).

These lecturers are mainly American and Indian lawyers, financed by their government or by private legal institutions, who tend to teach their own brand of common law as practised in their country. Books and other teaching materials are also often imported from their country of origin. As a result, not only did French sources become inaccessible, but they were replaced by a common law approach which varies according to the nationality and experience of the teachers, and is often at variance with the law of England which had inspired some of the legislation codified in the 1950s. This is particularly true of criminal law and procedure. The problem is particularly acute in criminal courts where the understanding of the procedure governed by the old 1961 Criminal Procedure Code reveals differences of interpretation between the Amharic and the English texts. Often the English version is used, not because it is necessarily clearer, but because it can be linked and explained by reference to the common law system taught in law schools. The lacunae of the Criminal Procedure Code, such as the lack of provisions governing the admissibility of evidence, are often covered by reference to common law treatises or cases decided in England or elsewhere without reasoned argument as to their relevance to the corpus of Ethiopian law. As the European Union observer of the Opposition's trial at the Federal High Court in 2006-2007, I noted that Judges, Prosecution and Defence, rather than citing largely unpublished Ethiopian precedents, referred on more than one occasions to American or Indian judgements which seemed to have little relevance to the case but were expressed in a legal English which appeared to give them authority!

Foreign legal experts invited by the Ministry of Justice to assist with the seemingly permanent process of legal reform often unwittingly compound the problem. Few have any idea of Ethiopian law, let alone Ethiopian culture and language and, generally speaking, do not have enough time to acquire it whilst they stay in the country. They also bring with them a legal language filled with untranslatable concepts which is met by lawyers and civil servants

alike with respectful appreciation, patient incomprehension, muted commiseration or outright opposition.

The way forward:

A comparative legal approach recognising the essential contribution of languages to the evolution of modern Ethiopian law

The initiative taken by Haile Selassie in the 1950s and the comprehensive reform of the justice system launched by the present government all aim to consolidate existing laws and modernise the codification of the legal system. Ethiopian lawyers recognise the essential role played by foreign languages in the evolution of the law. Senior judges and civil servants of the Ministry of Justice regularly travel abroad to acquaint themselves with foreign legal systems. Some undertake doctoral or post doctoral research in Europe, especially in the United Kingdom, and the United States. In most cases, the medium of study and research in Ethiopia and abroad is the English language. The hiatus between the French sources of the codified positive law and its understanding and implementation is therefore patent and probably irreversible. The solution to this very difficult problem involves a combined linguistic and legal approach. English, as a teaching medium in law schools will of course continue to be used in parallel with Amharic in the teaching and the interpretation of the law. But the reform of the legal system in which the Ministry of Justice is currently engaged may offer an opportunity to tackle the two problems already mentioned: the understanding of Romano-Germanic sources of current law and the harmonious combination of the two legal systems which, together with Ethiopian tradition, inspired the codification. The process of legal harmonisation within the European Union present similar problems and may therefore be of help in the Ethiopian situation. EU directives are transposed into national law by national legislation. The European Court of Justice (ECJ) provides a uniform interpretation of these transposed directives by national courts (Taylor 2005:121). In practice, this means that national courts will be bound to adopt the ECJ's version of any given directive, notwithstanding the language in which it is received by the national courts or the legal system in which it will be applied. In other words, the translation of the directive having been 'authenticated' has therefore acquired the force of law.

In Ethiopia, the objective is to establish a sound legal system taking account of the three historical sources and providing a coherent mechanism to clarify ambiguities and enable practitioners to solve present legal problems. This could be achieved by a team of Ethiopian and foreign comparative lawyers with a good knowledge of the three legal languages and systems

which influenced the modern evolution of the law. Such a proposal was made in 2005 by the expert team of judges and other legal experts sent by the Center for International Legal Cooperation (CILC), on the Ethiopian government's invitation, to assist with the Justice Reform Program. In its final report of 2005 CILC recommended – *inter alia* – a review of the legal system including its consolidation, and a review of the legal terminology used in the two languages, Amharic and English. In this respect, a judicial body could be set up to pronounce on the interpretation of texts and practices originating in foreign (French and English) systems in a manner similar to the procedure used by the ECJ.

Whatever is decided in Ethiopia in the years to come, there is no doubt that languages will remain at the heart of any reform of the Ethiopian legal system. The solutions which will be found to solve these difficult problems may inspire linguists and lawyers confronted to similar situations in other parts of the world. ■

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COMMENT

A CRITIQUE OF POSITIVISM AS A BELIEF SYSTEM

James Krueger*

Our prevailing understanding of law is built largely on positivist premises and is focused mostly on the coercive processes of the State. Positivism attempts to separate the coercive processes of the State from other forms of coercion like religious injunctions and social pressure.[1] Looking at the issue from a historical and sociological perspective, R.M. Unger identifies a point at which "the division between state and society has been established."[2] It is at this point that positive law emerges. Positive law "is a law deliberately imposed by government rather than spontaneously produced by society."[3]

Thus, positivist legal theorists have taken a largely top-down approach to law and have generated the belief that the law is something to be directed by professionals acting on the authority of the sovereign and functioning somewhat apart from ordinary citizens who are the subjects of the law. The police are part of this group of professionals and enforce laws on the State's authority and against citizens. The actions of the police are to be distinguished from mere social pressure, which is part of the administration of morals and more of a bottom-up enforcement technique in the sense that everyone is involved in enforcement.

Positivism is a belief that is held so closely that it has become difficult to imagine any alternative.[4] There are alternatives, however. Simply because a State has a government with posited laws, that does not mean that it has a positivist system. In many senses, the laws of earlier times were merely the written expression of a people's sense of right and wrong. The writing itself

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[1] *See e.g.* H.L.A. HART, THE CONCEPT OF LAW 6-8 (1961). This central idea has become known as the "separation thesis" and requires a strict separation of law and morality. *See e.g.* JOSEPH RAZ, THE AUTHORITY OF LAW (1979).

[2] R.M. UNGER, LAW IN MODERN SOCIETY (1976).

[3] *Id.*

[4] Positivists themselves bemoan this fact and long for a dissenting voice to give positivism something new to say. *See* Brian Z. Tamanaha, *The Contemporary Relevance of Legal Positivism*, 32 AUSTRALIAN J. OF LEGAL PHILOSOPHY 1, 2 (2007).

did not make a right or a wrong. Rather, the written law gave a more permanent expression to the commitments of the community. The very idea of the common law is that law can be reasoned out and discovered by judges after the incident in question in a case has occurred. For positivists, the law should be published first and then applied. This is how most people now think of the law – it comes from legislators and is applied to the populace.

The primary role, then, has been given to the legislator who appears to mold the behaviors of citizens and who is voted into office often on ideological grounds in the hope that he or she will mold the behaviors of citizens in the right way. It is surprising then that positivists for the most part avoid discussing the legislator's role and avoid evaluating the contents of his or her laws. This exact issue came up when, after the collapse of Nazi Germany, some scholars concluded that positivist theory had the effect of making Germans living under the Nazi regime more obedient to "law as law."[5] Positivists like Hart countered that positivism actually encourages greater scrutiny of laws – and less obedience – because it separates law and morality and allows a person to look back on the law and evaluate it from a moral (and personal) perspective.[6] Whether or not this is true in theory, it is certainly not the case that positivists have spent much time in their scholarship discussing the morality of various types of laws. Hart himself claimed to be doing "descriptive jurisprudence" rather than "interpretative jurisprudence" and subtly disparaged the moral "evaluative" discourse of theorists like Ronald Dworkin.[7]

In fact, as with Auguste Compte's less popular type of "positivism," legal positivists are concerned with science, not morality. The first positivist Jeremy Bentham attempted not so much to separate law and morality as to replace traditional morality with a new idea, with a utilitarianism based on scientific principles. Bentham narrowed people's life choices down to one: "Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as

[5] This point was made in a 1946 article by Gustav Radbruch, a German scholar who experienced first-hand the horrors of the Nazi regime and in reaction disavowed his positivist beliefs. *See* Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, in GUSTAV RADBRUCH, GESAMTAUSGABE (A. Kaufmann ed., 1990).

[6] *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

[7] Hart clearly disavows what he calls an "evaluative" enterprise: "My account is descriptive…: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law…" HART ("Postscript"), *supra* note 1, at 240.

well as to determine what we shall do."[8] Seemingly, Bentham is offering advice – that people should be guided by the principle of utility – and at the same time relating a command of Nature that utility will determine their behavior anyway, whether they accept his advice or not.[9] This illogical proposition is not significant as a representation of positivist thought – indeed positivists later moved away from utilitarian views such as this – but it well demonstratives the general and pervasive desire of positivists to supersede normal moral considerations with Newtonian-type forces. When it later became apparent that this desire could not be fulfilled, most positivists simply dropped the simplistic assumptions of Bentham's utilitarianism and gave up evaluating the contents of laws. It is noteworthy in this regard that, although Bentham and the Utilitarians were law reformers, later positivists have contributed very few suggestions for legal reform.

Positivists instead have focused on the procedures necessary to pass valid law. It is easier to describe procedure in objective scientific terms. Positivists say that they do not care what the lawgiver does and what type of law he or she creates so long as it can be classified positively as "law" or "not law." This avoids any non-scientific discussion of what the lawgiver should and should not do. So although Hart lays out "rules of change" that tell the lawgiver *how* he or she can pass laws, there is no rule of policymaking that tells the lawgiver what laws are best. Again, positivists like Hart do not engage in moral "evaluative" discourse.[10]

Mostly, positivists do not offer moral guidance to lawmakers and furthermore do not discuss in detail the forces governing the lawmaker's decisions. Thus, turbid conclusions like those of Bentham are avoided. There are two interesting exceptions in this regard, however. First, Ronald Dworkin attempts to draw attention to the "principles" of a judge that come from the judge's conscience and that influence judge-made law.[11] Dworkin's overall position really only makes sense when situated within a positivist conversation, and, unfortunately, Dworkin is thrown off course while attempting to engage positivists on their own terms. In the end Dworkin's "principles" sound like a natural force akin to gravity rather than a moral

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[8] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Burns and Hart, eds., 1970).

[9] As will be seen, this is not a matter of mere historical interest. Many modern economists take Bentham at his word and adopt his assumptions about human behavior. *See e.g.* GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976).

[10] HART ("Postscript"), *supra* note 1, at 240.

[11] *See* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

choice.[12] Second, law and economics theorists have taken the lawmaker's role seriously and have attempted a more sophisticated elaboration of Bentham's ideas. The decisions of a lawmaker bring him a certain positive utility. Richard Posner explains that, for judges, a decision in a case is like a vote, and voting is a consumption activity that people enjoy.[13] According to Public Choice theory, legislators also work for their self-interests.[14] The problem with such descriptions is that they oversimplify lawmakers' motives and do not account very well for why we might prefer one type of legislation – or one type of legislative process – rather than another.

Positivism, then, appears to be a program to avoid moral discussions about the law. This in fact strengthens the positivist position that there is a separation between law and morality and that the law is simply what is written in our statutes. It is not appropriate, however, to engage positivists in a discussion about whether their propositions are true. In fact, positivist "descriptions" are also "prescriptions" for a certain way of doing things. To the extent that positivism has become the predominant theory – implicitly accepted by legal professionals – it has made its own propositions true. In other words, positivism has become a very popular belief. A more relevant question would be, is positivism useful, or would some other belief be more useful?

Likely positivists would say that they do not have a belief system at all but rather merely share a critical perspective. Positivists, although originally utilitarian in policy, claim that they can be pluralistic in their policy positions. They say that it is legal moralists who have a belief system and are intolerant of other ideas.[15] In fact, a belief in the value of self-criticism is still a belief,

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[12] Thus Dworkin is overly concerned with judges instead of legislators and gets caught up in discussing the rules that govern decision-making. *See* Dworkin *id* at 45-46. When Dworkin first distinguishes principles from rules, he makes principles seem flexible. "[A principle] does not necessitate a particular decision." *Id* at 26. Then, when Dworkin elaborates on his theory of how principles function in the law, the principles become rigid. "[T]here is nothing in the logical character of a principle that renders it incapable of binding [a legal official]." *Id* at 35. Dworkin's attempt to balance these two positions is unsatisfying, and he lands on the conclusion that the judge will weigh competing principles but then, if they are not of equal weight, "he *must* decide accordingly…" (emphasis added). *Id* at 36. Thus, if principles are weighed correctly, the result will dictate the judge's decision.

[13] Richard Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 SUPREME COURT ECONOMIC REVIEW 1, 12 (1993).

[14] *See e.g.* James M. Buchanan, *What is Public Choice Theory?* 32 IMPRIMIS No. 3 (2003).

[15] Hart maintained that the positivist separation between law and morality allows positivists to be more critical of law and policy because positivists do not assume that

and it is, I think, a belief that anyone can have, not only positivists. (It is the same thing to say that humility is a valuable character trait.) Positivists have beliefs, and they are beliefs that strongly affect the thoughts and actions of their adherents.

Positivists believe that it is important to define "law" clearly and distinguish between legal obligations and other types of obligations like moral obligations. The unstated implication is that morality is a lower level obligation – less reliable and less consistent. This understanding forms part of the positivist criticism of natural law. It is because moral views are so variable that they cannot provide a good basis for law. If a citizen can rebel against any law that he happens to find immoral, then there will be no law. "…[T]he natural tendency of such doctrine is to impel a man, by a force of conscience, to rise up in arms against any law whatever that he happens not like."[16] Law – understood as *posited* law – is something we can know and enforce. Morality is vague and vacillating and, therefore, weak.

Positivists also believe that people will not obey their own rules without some external force. In this, the positivists take up an understanding of human nature going back to St. Augustine that people are born greedy and selfish rather than good and law-abiding. Philosophers in this long tradition contrast the passions and natural inclinations of people with "law" and morals which are things external to people to be imposed on them.[17] This explains, I think, the positivist concern with enforceability. Without real enforcement mechanisms there will be no regularity of law. If people or nations obey certain laws without being forced, then this must be explained by reference to some other deterministic factor such as self-interest.[18] The idea of people or nations obeying laws because they *want* to obey or because they share common beliefs is completely foreign to positivist thinking.

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law is somehow inherently "right." This argument was raised in response to criticisms of positivism that came out of the experience of Nazi Germany. *See* Hart, *supra* note 6.

[16] JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (James H. Burns & H.L.A. Hart eds., 1988) (1776).

[17] This point is made clearly by Hobbes when he describes the state of nature as a kind of anarchy. THOMAS HOBBES, LEVIATHAN (Michael Oakeshott ed., Collier 1962) (1651). Later writers in the capitalist tradition – apologists for luxury like Bernard Mandeville and David Hume – also thought of people as being by nature full of lawless passions.

[18] A recent theory of international law follows this exact logic. To explain the apparent conformity of States with international rules despite the absence of enforcement mechanisms, the theorists posit four possibilities: coincidence of interest, coordination, cooperation, and coercion. All four are tactics in pursuit of self-interest. *See* JACK L. GOLDSMITH, ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

Positivism presents obvious problems for the international system. There is no international sovereign government that can enforce international laws. For positivists, if there is no enforcement by a government in a top-down manner then there is no law. This has been explained by positivists themselves, as for example when John Bolton says, "International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits."[19] Such a belief as Bolton's detracts from the credibility of international treaties and customs. Mr. Bolton himself as a policymaker has come out against U.S. participation in the United Nations and U.S. adherence to treaties and customs that are against U.S. interests.[20]

In this we see the dynamic aspect of positivist theory. In posing the question, "Is international law really 'law'?" positivists do not merely inquire into the current state of the international legal system but also prescribe an attitude that officials should bring to future policymaking, namely that, since international law might not be "law" and since other nations are not likely to treat it as such, the U.S. should feel free to break its international commitments to suit its own interests. People's beliefs are affected by the writings of scholars and prevailing opinion. Thus, positivists are not reciting an already existing truth about international law; rather, they are creating a belief system and making their truths true.

Oddly, international law has attempted to embrace the very philosophy that is killing it. Authority in the positivist scheme flows from the sovereign as head of State. Unfortunately there is no international sovereign, so we must look to individual State sovereigns to create international laws. Under positivism, then, it has become necessary to show the consent of each State to every international rule.[21] In point of fact, international law existed before this fiction of "State consent" was devised. Originally, "sovereignty" meant the exclusive control by the State over its internal affairs and its relative

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[19] John R. Bolton, *Is There Really 'Law' in International Affairs?* 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 48 (2000).

[20] *See* John R. Bolton, *The Risks and the Weaknesses of the International Criminal Court from America's Perspective*, 41 VA. J. INT'L L. 186. Bolton says that "[t]he idea that nations and individuals can be bound through 'international law" is "naïve" and "in many instances simply dangerous." *Id* at 192.

[21] *See* Jonathan I Charney & Gennady M. Danilenko, *Consent and the Creation of International Law*, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA 23 (Lori Fisler Damrosch, Gennady M. Danilenko & Rein Mullerson eds. 1995). For an interesting account of the historical shift in focus from natural law to State consent, *see* William S. Dodge, *The Story of the Paquete Habana: Customary International Law as Part of Our Law*, in INTERNATIONAL LAW STORIES (Laura Dickinson et al. eds., 2007).

autonomy at the international level vis-à-vis other States. If a State was thought to be free with respect to other States, it was not thought to be free with respect to greater principles. The sovereign was bound by higher laws like that of Nature and God, whether the sovereign consented or no.[22] It is hard to think that State consent is necessary for international law if international law existed before State consent became so important to international lawyers. This is clearly the case of a philosophical perspective changing people's attitudes about an existing legal practice and thereby changing the practice.

As part of international law, international custom too has shifted from a law based on what is "natural" to a law based on the consent of the sovereign. The new view requires proof of States' practice as evidence of those States' consent. It is consent by action. Since custom is binding on all States in the world, one would expect that courts would want unanimous consent of all States. This does not happen, however, in part because it is simply too much to ask a court to look at State practice from all States and in part because no one takes seriously the idea that unanimous consent is required. In the end most States are bound by customs that they never practiced or "consented to." Some scholars have responded to this criticism with the idea of tacit consent – that the States that said nothing during the formation of the custom expressed agreement by their silence. This explanation is somewhat forced. In the first place, if this explanation were to hold, then courts would be required to tally the number of silent consents. This the courts do not do. Second, there are States that cannot consent, evenly tacitly, because they are not in existence during the formation of the custom. These States nonetheless are bound by the custom. More to the point, it seems that if we really want consent, we should just ask for it. Why not jettison customary law altogether and rely only on clear expressions of consent like treaties? In fact, this is something that positivists have suggested that we do.[23]

Unfortunately, similar problems arise in international treaty law. At first glance, treaty law lends itself well to the positivist idea of an international system based on the consent of sovereign States. In some ways, this explains the excitement over the increased use of treaties to express international rules. In reality, however, positivists are as critical of treaties as they are of international customs. The problem again is with sovereignty and State consent. A treaty may express State consent very clearly on the day it is

[22] J.L. BRIERLY, THE LAW OF NATIONS 10 (H. Waldock, 6th ed. 1963).

[23] Jeremy Bentham himself felt that increasingly fine-meshed treaty agreements would resolve most international disputes. *See* Anthony D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1, 4-8 (1983).

signed. What will happen over the long term though? A treaty cannot provide for its own bindingness any more than a house can be built up on thin air. A sovereign that by definition has the power to consent seemingly has the power to remove consent at any time. A sovereign may agree to "bind its own hands" so-to-speak, but who will tie the bonds? A sovereign that can tie the bonds can untie them as well. A State that consents to a treaty today may remove its consent tomorrow and simply take the bad consequences. When the treaties in question are agreements between equally powerful States, then the treaty is more secure because enforcement by use of force is realistically possible for both sides. One wonders what the point of the treaty is, however, if force will accomplish the same thing as the treaty from moment to moment. In the past what made treaties binding was the generally-accepted belief that it is good to be trustworthy as a State much the same as it is good to be trustworthy as a person. This is the international custom *pacta sunt servanda* – a kind of international pressure to keep one's promises. A State does not *consent* to keep its promises; a State is compelled to keep its promises.

To understand why positivism is so unhelpful in international relations, one has to imagine what affect an alternate belief would have on the behavior of officials and, hence, States. Let me give two examples. In ancient times, superstitious leaders made pacts with foreign nations by swearing to the gods. The belief was that a violation of the pact then would bring down the forces of divine retribution. The belief changed people's behavior in that it made the parties more likely to keep the agreement. A more complex example comes out of European history of the early modern period. European leaders often floated in the same social circles, and certain behaviors in war were considered barbaric and ungentlemanly by those social circles. Thus, an individual officer who pursued brutal tactics would lose his reputation in society. The basic belief in "civilization" gave effect to standards of warfare, at least as concerned upperclassmen.

Another area where positivism fails us is in legal reform projects in developing countries. By the positivist logic, a central government needs to promulgate rules and invest in an extensive legal infrastructure to see to the enforcement of those rules. The greater the infrastructure, the better the enforcement, the more successful the laws at regulating human behavior. There seems to be a misunderstanding out there that, because the largest and most complex legal machinery is found in developed countries, then that means that this legal machinery must be part of the advance of civilization from less to greater law-abidingness.[24] This is to ignore certain basic facts,

[24] There are better explanations for why economically developed countries have greater legal infrastructure. For example, economic development has negative effects on social

such as the lower crime rates in cities in certain developing nations where the legal infrastructure is rather weak.

Some have claimed that legal reform will lead to economic development, as though in this area also behavioral changes can be accomplished best by top-down imposition of the law.[25] Unfortunately, laws designed to promote economic development often are undermined by persistent social practices and mafia-like influence that continue in "free" markets. In fact, great economic progress has been made in countries like China and Vietnam where legal infrastructure is weak.[26] This would seem to argue against the positivist notion that law and order – or at least the law and order necessary for economic development – come from the application of force by the State.

In certain developing countries, governments have spent years trying to enforce laws adopted from European countries. Most such projects have failed.[27] It is true that some countries like Japan and India have copied European laws with limited success, but it is hard to attribute this success to the process of drafting, adoption, and police enforcement that makes for posited law. In Turkey, for example, western commercial law was imposed with little difficulty whereas western family law was resisted.[28] One suspects that this difference was not because Turkish family law judges were singularly incompetent but rather because the Turkish people had a different attitude towards western family law than towards western commercial law. Transplanted laws usually fail because of the problem of "legal absorption."[29] People choose not to obey the new laws. That is, the laws are ignored in practice because most people believe in something else.

Ethiopia gives us one example of the problems of transplanted law. A legal reform project was begun in Ethiopia with the adoption of laws beginning in the 1950s modeled largely on the French code. The principal drafter of the Ethiopian Civil Code, René David, took the position that

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order, and thus more legal infrastructure is necessary as the "functional complement of a weak posttraditional morality." Jürgen Habermas, *Between Facts and Norms: An Author's Reflections*, 76 DENV. U. L. R. 937, 938 (1999).

[25] *See* Richard Posner, *Creating a Legal Framework for Economic Development*, 13 THE WORLD BANK RESEARCH OBSERVER 1, 2 (1998).

[26] *Id* at 2.

[27] This is especially true of Westernization projects in sub-Saharan Africa. *See* Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 542 (1999).

[28] *See* K. Lipstein, *The Reception of Western Law in Countries of a Different Economic and Social Background with Special Regard to Problems Arising Out of Industrialization*, 6 ANNALES DE LA FACULTÉ DE DROIT D'ISTANBUL 10 (1956).

[29] *See* Beverly I. Moran, *Homogenized Law: Can the United States Learn from African Mistakes?*, 25 FORDHAM INT'L L. J. 361, 371 (2001).

whatever he wrote in the code was the law of Ethiopia.[30] This is a distinctly positivist perspective. Someone less influenced by positivist philosophy might have deferred more to the morals and customs of the people. Instead, David looked forward to the slow and steady implementation of the code by the Ethiopian courts and police. Ten years after the adoption of these new laws, a study found that they had made little impact.[31]

It was understandably difficult for David to incorporate customary laws into the new code. The customs of Ethiopia varied from region to region, and the task given to David was to make Ethiopian laws uniform. In addition, very little was known or published about the different Ethiopian customs at the time.[32] David himself had the modest expectation that the Code would be implemented gradually, starting with the major cities.[33] The point is not that customs should have been incorporated wholesale into the positive law but rather that the positive law should have been less exclusively positive. The positive law in Ethiopia could have given more discretion to local courts to apply local customs in particular situations. Something similar has been done in the Uniform Commercial Code in the U.S. which allows courts to consider customs and practices in the particular industry concerned.

The fact that the Ethiopian code has not been implemented successfully in Ethiopia now after fifty years should tell us something about the positivist ideas on which it is based. What is surprising is that positivists – normally so critical – have not confronted such failures. Rather, like other true believers, they make excuses for bad results and go on believing.

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[30] *See* Norman J. Singer, *The Early Days of the Faculty of Law, AAU*, 2 MIZAN L.R. 137, 144 (2008).

[31] *See* John H. Beckstrom, *Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia*, 21 AM. J. COMP. L. 557 (1973). "[Empirical] evidence shows a country hardly aware of the new codes and a judiciary still struggling to comprehend them in basic particulars – even in the major urban areas." Id. at 582. Beckstrom himself was undaunted by his study and hinted that Ethiopia's code would be successful eventually if given enough time. *Id*. It is clear, however, that, looking back from 2009, the Ethiopian code continues to have the same problems of legal absorption.

[32] Even the Ethiopian members of the Codification Commission did not know the customs of their own regions. A summary of decisions by local bodies was put together for the use of the drafters of the code, but the summary was never translated from the Amharic. *See* Norman J. Singer, *Modernization of Law in Ethiopia: A Study in Process and Personal Values*, 11 HARV. INT'L L. J. 80, 85 n. 44 (1970).

[33] *See* René David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 TULANE L. REV. 187, 202 (1963).

VIOLENCE AGAINST WOMEN:

Inadequate Remedies under the CEDAW

Meiraf Girma*

It was not until the mid 20th century that human rights became a global agenda. Prior to the Second World War, states were considered to be the main subjects of international law and what happenned in their borders was outside of the scope of international law. The bloodshed and the massive human rights violations during the world wars were wakeup calls for the international community to deal with such atrocities. So, human rights, *i.e*, rights that persons are entitled to for being human beings, duly received global attention.

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), also referred to as the bill of rights of women, is considered to be one of the most important developments in human rights and the area of women's rights in particular. It is said to be one of the most comprehensive documents dealing with the rights of women.

1. Definition of Violence against Women and Implications

As defined in the Declaration on the Elimination of Violence against Women[1], violence against women means "*any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.*" [2] This

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[1] See UNGA, Res 48/104, Declaration on the Elimination of Violence against women, 1993, Article 1

[2] Report of the special Rapporteur on violence against women, its causes and consequences, United Nations, Economic and Social Council, Commission on Human Rights, New York, 1997(Unpublished doc. Number E)CN 4|1997|47) While describing violence against women, Radhika Coomaraswamy, UN special Rapporteur on violence against women stated that "[t]hroughout a woman's life, there exists various forms of gender –based violence that manifest themselves at different stages. Most of this violence is domestic, occurring within the home, perpetuated by those to

definition has various implications. States are very cautious to enter into treaties to protect the interests of third parties to the treaty, which are usually individuals. As Dixon noted, this would be an acknowledgement that "the state" is no longer the supreme, ungovernable entity that pure positivism suggests.[3] It has been a great shift to go from states being the only subjects of international law to bringing into being international organizations, corporations and individuals, though the status of individuals and corporations is still debatable.

For the purpose of this comment, the fact that human rights are rights that are given to human beings suffices, and whether individuals are subjects or objects of international law poses little problem. The point of focus of this comment is to highlight the extent to which CEDAW avails remedies against violence against women.

2. CEDAW's Gap in the Definition of VAWs

Needless-to-say, CEDAW stands against violence against women. However, CEDAW is a toothless instrument when it comes to the protection of women. My first argument is related to the scope of the CEDAW. Violence against women has been defined in the Declaration on the Elimination of Violence against women in 1993. Further elaboration has been given under Article 2 of the Declaration.[4] However, there is nothing in the text of the CEDAW that actually deals with this definition.

The second point that the reader may notice is that the definition given (which is 14 years younger than the CEDAW) is incorporated in a declaration. It is a fact that declarations, which are General assembly resolutions are usually not binding. This point has been verified by the ICJ in its advisory opinion on the definition of force.[5] And even if they were, this particular definition is not incorporated in the CEDAW itself and this would not serve the purpose of the CEDAW. It is true that rights against Violence

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whom the woman is closest. Even before birth, females in cultures where son preference is prevalent are targeted by the violent discriminatory practices of sex-selective abortion and female infanticide. Violence against the girl child manifests itself as enforced malnutrition, unequal access to medical care, as well as physical and emotional abuse…"

[3] See Martin Dixon, International Law, (Oxford University Press, 2005), p320

[4] See supra note 1, Article 2

[5] Developing countries wanted to adopt a wider definition of the term "force" while developed nations wanted the literal meaning of the term and in the General Assembly, the majority voted for the former definition and the ICJ affirmed that though the GA resolutions are not binding, they do show *opinio juris*.

Against Women (hereinafter referred to as VAWs) are human rights which have their sources in morality and ethics, and the question remains whether we can really expect positive results from states if the definition of the term itself is left to each of them.

First, it can be argued that states are capable of coming up with satisfactory definitions and laws as was intended by the CEDAW as the Convention is just a tool for governments wanting to improve their own laws by broadening the basic rights of women. [6] It can at the same time be observed that that there is cultural pluralism among states and, in effect, what may be considered as violence by one state may be a reflection of the way of life for another. Lack of specificity in the very definition of what constitutes violence is thus a major loophole for states not to recognize certain acts as VAWs.[7]

The CEDAW seems to be very carefully written and understandably so as it has taken more than 20 years to draft.[8] Apart from the substantive content, its vagueness on the definition of VAW seems clearly in support of equality of the sexes.

3. CEDAW's Reservation Clause

The second argument that can be made is in relation to its Part VI, specifically, Article 28 of the CEDAW which deals with reservations. It has been noted that there is no provision in the text that prohibits reservations as long as it is not against the object and purpose of the CEDAW. But who is to determine whether a particular reservation is against the object and purpose of the CEDAW? The answer would be the *states*. The same states which bear obligations towards their nationals and the same ones which would be held responsible for its breach.

It has been argued that states should not be placed in a position to decide whether reservations to human right provisions are or are not in line with the object and purpose of the document and that this power should be rightly passed to the Committee on Human Rights. However, this is clearly not the case. Under Article 28 of the CEDAW, it has been clearly put that it is states

[6] See http://www.womenstreaty.org/CEDAW%20Book-%20WHOLE%20BOOK.pdf

[7] For example, Ethiopia, which is a member state to the CEDAW has not criminalized marital rape though it is considered as a VAW by the Declaration on the Elimination of Violence against Women.

[8] It took twenty years beginning from 1945 when the Commission on the Status of Women started its work on the status of women worldwide to the four international conferences which started in New Mexico in 1975 to 1979 when it was adopted.

that will decide whether a reservation is against the object and purpose of the convention. That is why we have states that have ratified the CEDAW and still do not have laws on most VAWs.[9]

Various states (e.g. Saudi Arabia) have made reservations such as the non-applicability of the CEDAW in case of conflict with Sharia laws. According to many critics, Sharia laws treat sexes unequally in marriage, property as well as politics and education. Yet, such states are still allowed to be member states of the CEDAW.[10] Algeria and many other states have made reservations to Articles 2 and 16 of the CEDAW with no consequences except for a few objections from a number of states.[11] These provisions are particularly important since they embody most of the objects and purposes of the Convention. Article 2 deals with measures (both legislative and otherwise) that states have to take in order to bring about equality and impliedly alleviate the problem of VAWs while Article 16 deals with marriage and family rights.

The Committee itself recognizes the importance of these provisions in the following quote:

> "Articles 2 and 16 are considered by the Committee to be core provisions of the Convention. Although some States parties have withdrawn reservations to those articles, the Committee is particularly concerned at the number and extent of reservations entered to those articles."[12]

One may argue that the above problem could have been solved if there were prohibitions to certain reservations. Since there is no prohibition to reservations, many states are not willing to step forward and set standards as to when the object and purpose of the CEDAW has been affected since most states are making strikingly similar reservations.[13]

4. State Reports and the Challenge against Peer Sanctions

CEDAW has a system of state reports under Article 18. This provision requires states to report on the progress that has been made by their legislative, executive and judicial bodies as well as other organs. The report has to be submitted to the Secretary-general of the UN every four years after the initial report. The latter is expected to be made one year after the entry

[9] An illustrative listing (such as marital rape, sexual harassment etc.) has been provided by Article 2 of the Declaration on the Elimination on the Violence against Women.
[10] See http://www.un.org/womenwatch/daw/cedaw/reservations.htm
[11] See http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm
[12] *Supra* note 10, paragraph 6
[13] *Supra* note 11

into force of the CEDAW for that state. The purpose of this system is to assess progress of states concerning their duties in the elimination of discrimination and further investigate reasons (if any) for non-compliance.

This can raise two questions: First, since most states have made reservations in respect of Article 2 of the CEDAW, would the reports have a significant contribution?[14] The second issue would be in relation to the very meaning of these obligations. Is this obligation not asking us indirectly to tell the Secretary General of the UN if the states have breached the obligations that they have solemnly undertaken? What state would voluntarily do that, especially where it has not fulfilled its obligations?

States that have made reservations in respect to important provisions like Article 16 have also made general exclusion of the CEDAW when in conflict with laws such as the Sharia. In these countries, reports have either been delayed or not made as such.[15] This obligation would however not be totally pointless if there were a requirement of shadow reporting in which case non-governmental organizations would present reports as to whether states are complying with their obligations. This would somehow encourage states to be truthful in their reports as there are shadow reports which would not be "shadows" of their reports if they decide to include untruthful information.

Another question relates to the impact of reports. Article 21 of the CEDAW provides that the Committee has the responsibility of reviewing the reports submitted to it by states after which it will make recommendations and suggestions to the general assembly through the ECOSOC as to what should be done for future compliance. So, basically, even if shadow reports were made mandatory, they would be reported back to the states that made them, just under the different name of the general assembly (which is the composition of all state representatives).

Here, one may argue that these reports are presented to the UN General Assembly since states will have the opportunity to influence each other positively. A state where VAWs have been successfully eliminated can thus make amends and take certain influential measures against those states which are in constant breach of the same. At this point, however, it must be noted that the rationale for states to conform to international law rules may not always squarely apply to human right instruments because the latter do not

[14] It is to be noted that they have not agreed to change laws etc internally as demanded by Article 2.

[15] http://www.un.org/womenwatch/daw/cedaw/reports.htm

represent economic or other similar interests where there is *quid pro quo* exchange of rights and obligations between states.

We know that there is no international sovereign and a vertical system of governance in international law; the driving principle is thus consent of states. Be that as it may, states are in constant fear of being alienated for the breach of international obligations towards other states and there are other "non-legal" consequences for breaches. Taking these reasons into consideration, it may not be wise to say that states would resort to such means in relation to human rights as VAW is in existence in most parts of the world although the degree and type may differ.[16] In other words, most states have shortcomings in their own closet and would not dare to go and dig in other states' closets in the fear that their own maybe discovered in the process.

Another evidence of the ineffectiveness of the reports is the fact that states, which are required to make them every four years, do not respect such deadlines. It is not uncommon to find states which have combined two or three reports together and reported all at once or states like Afghanistan or the Bahamas that have never made any reports.[17]

5. The Non-mandatory Nature of Individual Complaints

The next point worth consideration would be that in the CEDAW, individual complaints are not mandatory; they are rather conveniently included in the optional protocol of the same.[18] As defined in Article 2 of the optional protocol, individuals or groups of individuals can submit individual complaints to the Committee only if the state to which this individual or group of individuals belongs has signed this optional protocol.[19] If a state makes laws that violate basic rights of women, would this state allow individuals to challenge it in front of the Committee thereby giving ammunition to individuals with the knowledge that it would eventually backfire? If our answer is no, then, a state would be taking the obvious and easier way out.

[16] In "The World's Women 2000: Trends and Statistics," the United Nations reports an estimated 100 to 132 million girls and women worldwide have been subjected to female genital mutilation (FGM).16 Approximately 2 million girls are genitally mutilated in some form each year. FGM is known to be practiced in 28 African countries and in parts of Asia, and is also reported among immigrant communities in North America, Europe, Australia, and New Zealand.

[17] See supra note 12

[18] See http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm

[19] IBID, Article 2 and 3

However, after having considered the considerable number of states that have opted for the optional protocol,[20] this argument may not always hold water but at the same time the preceding paragraphs have shown that violence against women is still a large problem worldwide. So, why did a number of states make this decision? I would say that though states have indeed opted for the optional protocol, the fact remains that the CEDAW does not really have that obligatory force that would make states responsible. Having this in mind, it would not be as such a huge commitment for states to sign in into this optional and yet inconsequential protocol.

Concluding remarks

The conclusion that can be drawn from the above is that the rights that are "protected" under the CEDAW can be disregarded by any country at anytime, and there is no effective compliance mechanism what would stop states from doing so. In the strictest sense, CEDAW can hardly be regarded as an international law rule. Henken stated that "most states respect most international laws most of the time". This may hold true for the classic international law rules which have definite legal consequences if breached. In the case of the CEDAW, however, the situation is different in that there really is no means of enforcement. As Vaughan Lowe noted, *"…If no consequences attach to [breach of international law], we should question whether they are rules of law or statements of policy or aspiration…"*[21]

Most human right instruments, including the CEDAW really do not have strict enforcement mechanisms. As Vaughan Lowe argued, human right instruments have no effective enforcement mechanism and this would mean that there would not be a strict state responsibility as such. This would lead us to the inevitable conclusion that without state responsibility, there would not be an effective rule of law but rather a set of aspirations which nearly reduce these human right treaties to New Years' resolutions to achieve certain goals that almost never transpire. CEDAW is bound to remain a set of such declarations of mere aspiration until it addresses its downsides as a toothless instrument in the actual protection of VAWs. ■

[20] http://www.un.org/womenwatch/daw/cedaw/protocol/CEDAW%20Ratification%20Table%20IV-8.en.pdf

[21] See Vaughan Lowe, International Law, (Oxford University Press, 2007) p 119

NOTES CORNER

CONSTITUTIONALISM

Maru Bazezew*

Meaning of Constitutionalism

Today, constitutionalism has become as important an issue as that of good governance. In ordinary parlance, constitutionalism may be defined as a 'belief in constitutional government.' But what does constitutional government refer to? Does is it refer to a government with a constitution or government established according to a constitution, or a government acting according to a constitution? The concept seems to lack clarity.

Constitutionalism can be defined as the doctrine that governs the legitimacy of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules.[1] In other words, constitutionalism checks whether the act of a government is legitimate and whether officials conduct their public duties in accordance with laws pre-fixed/ pre-determined in advance.

The latter definition shows that having a constitution alone does not secure or bring about constitutionalism. Except for a few states which have unwritten constitutions, today almost all the nations/states in the world have constitutions. This does not, however, mean that all these states practice constitutionalism. That is why constitutionalism is far more important than a constitution.

Features (Characteristics) of Constitutionalism

According to Barnett, constitutionalism embraces limitation of power (limited government), separation of powers (checks and balances) and responsible and accountable government.[2] Henkin[3] identifies popular sovereignty, rule of law, limited government, separation of powers (checks and balances), civilian control of the military, police governed by law and judicial control, an

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[1] Hilaire Barnett, Constitutional and Administrative Law 5 (London: Cavendish Publishing Limited, 3rd edi., 2000(1995)

[2] *Ibid*

[3] Michael Rosenfield ed., Constitutionalism, Identity, Difference and legitimacy, Theoretical Perspectives 4042 (Durham: Duke University Press, 1994)

independent judiciary, respect for individual rights and the right to self-determination as essential features (characteristics) of constitutionalism.

We shall thus focus on the following basic elements:

1. Popular sovereignty
2. Separation of Powers (checks and balances)
3. Responsible and accountable government
4. Rule of law
5. An independent judiciary
6. Respect for individual rights
7. Respect to self-determination
8. Civilian control of the military
9. Police governed by law and judicial control

1- Popular Sovereignty

Popular sovereignty envisages the fact that the public is the source or fountain of all governmental authority. The legitimacy of any governmental power is derived from the consent of the public. In other words, the government acquires its mandate from the people.

The source of all sovereignty lies essentially in the nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it.[4] Even though there is a certain sovereign entity which is empowered to govern, ultimate sovereignty resides in the nation. The power of such sovereign entity emanates from the public.

In other words, the public is involved in the decision making process which may take different forms. The most obvious one is election of representatives. The public is entitled to elect representatives who represent it. However, such election should be free, open (transparent) and fair. When the public loses confidence in its representatives and where the latter fail to represent the interest of the public, representatives may be recalled before the expiry of their term of office.

Referendum is the other mechanism by which the sovereignty of the public is manifested or expressed. Before a government makes a decision or takes any action which affects the interest of the public, constitutionalism requires it to consult the public and listen to what the public says. The case of France is worth mentioning. The President of the Republic may (on the basis of a proposal from the government when parliament is in session or on a joint motion of the two assemblies) submit to a referendum any government bill

[4] Article 3, 1789 French Declaration of Human Rights

which deals with the organization of the public authorities or with reforms relating to the economic or social policy of the nation or which provides for authorization to ratify a treaty although not contrary to the constitution.[5] The bill is promulgated by the President of the Republic provided that the referendum is in favor of such government bill.[6] However, if the outcome is otherwise, it may not be promulgated.

In some liberal democratic countries like USA, Uk, France, Federal Republic of Germany etc, the principal role of the public is to control the activities of the government and to exercise a sort of veto power which goes beyond mere participation.[7]

2-Separation of Powers (Checks and balances)

Under constitutionalism, power is not concentrated in any one organ of the state. It is diffused (divided) among the three organs of the state i.e., the legislature, the executive and the judiciary. If power is monopolized by any one organ of the state there could be abuse of power, tyranny and dictatorship. Nor can there be liberty. For example, the legislature, in addition to its law-making power is not allowed to exercise the roles of the executive; and the judiciary is not allowed to execute the laws which it interprets. These two powers are reserved to the respective organs i.e. the executive and the judiciary, respectively. Here-below, a comparative overview of four legal systems including Ethiopia is made on the basis of law making power and judicial review.

a) USA

In the United States of America, the three organs of state and their respective powers and duties are enshrined in the constitution. Similarly the system of checks and balances is embodied in the constitution. According to the US Constitution, Congress (i.e., the House of Representatives) and the Senate are the sole law making power. Any bill which is initiated in and passed by the House of Representatives shall be submitted to the Senate. The Senate shall deliberate on the bill. If the bill is accepted by the Senate, it shall be submitted to the President for approval. If the President approves such Bill or fails to make his objections within 10 days (excluding Sundays), the draft bill shall become law. However, if the President objects to the draft bill, he shall return the bill to the House where it originated together with his objection. This shows that the President is exercising his veto power on bills passed by

[5] French Constitution (1958) Article 11
[6] *Id*
[7] Finer, S.E, Comparative Government, (Penguin, 1970) pp 30-40

Congress. This clearly shows the system of checks and balances at work. However, even though the bill is returned to Congress, if two-thirds of the members of each house sitting separately pass the bill, it shall become a law despite the objection of the President. So Congress can override the veto power exercised by the President.[8]

After the bill becomes law, it can still be subject to the scrutiny of courts. Even though no inherent or express power is given to the courts by the Constitution, courts are empowered to check the constitutionality of such law. If it is found contrary to the constitution, it shall be declared null and void. Therefore, courts in USA are endowed with the power of judicial review.

The principal feature of the US Constitution is that it does not allow an individual to exercise different powers or act in different capacities at the same time. For example, members of Congress are not allowed to become members of the Executive or the Judiciary and the vice-versa except when the Vice-President chairs the senate and the Chief Justice presides over the Senate at the time when the Us President faces impeachment.[9]

b) France

France is another example where the three organs of the state are identified in the constitution. An Act passed by the parliament, before becoming law, shall be submitted to the President of the Republic. The latter shall promulgate the Act within 15 days. However, if the president has any objection, he may ask the parliament to reconsider the act or a section within the act.[10] Once the act is promulgated, it is not reviewable by ordinary courts, but it shall be subject to judicial or constitutional review. There is an "autonomous institution" called Constitutional Council. It is this institution which is empowered to check the constitutionality of acts passed by the legislature. The institution is composed of nine judges. Three of the judges are appointed by the President of the Republic. The other three are appointed by the President of the National Assembly and the remaining three are appointed by the President of the Senate.[11] The appointments seem purely political. Even the respective Presidents may appoint their own friends or those who match their political colour.

An act of Parliament may be referred to the Constitutional Council before promulgation so that its compatibility with the constitution can be

[8] USA Constitution, Article 3 Section 7
[9] *Id*
[10] *Supra*, note 5, Article 10
[11] *Id*

checked. It is the Constitutional Council which is entrusted with the power of judicial or constitutional review. The decision of the Constitutional Council is final and non-reviewable. The persons who are entitled to refer an Act to the Constitutional Council for review are the President of the Republic, the Prime Minister, the Presidents of the two houses and 60 (sixty) Deputies or Senators.[12] Ordinary citizens are not allowed to refer an act to the Constitutional Council. One of the reasons why the Constitutional Council was introduced is to protect the executive from encroachment by the parliament.

c) Germany

In the Federal Republic of Germany, the parliament is composed of the Bundestag which is directly elected by the constituency and the Bundesrat which represents the different Landers. Federal laws adopted by the Bundestag shall be submitted to the Bundesrat for its consent. It shall become law when the Bundesrat consents or fails to make a demand for a joint committee within three weeks (Articles 77(2) or fails to enter an objection within two weeks (Article 77(3) or withdraws its objection or if the objection is overridden by the Bundestag. [13]

The laws passed by the parliament after counter-signature by the federal Chancellor shall be certified by the president and are promulgated.[14] After promulgation, the law may be subject to constitutional/judicial review. The Federal Constitutional Court is empowered to check the compatibility of such laws with the Basic law. According to Article 93 of the Basic Law, even individuals are allowed to lodge their complaint to the Constitutional Court.

d) Ethiopia

In the three legal systems highlighted above, both houses are involved in the lawmaking process and laws passed by the parliament are subject to constitutional or judicial review. In Ethiopia, the FDRE Constitution identifies and states the respective powers and duties of the three organs of the state, i.e., the legislature, the executive and the judiciary. Compared to the aforementioned legal systems, the House of Federation does not have any role in the lawmaking process. The lawmaking process is absolutely unicameral. Moreover, once a draft law is discussed and passed by the House of People's Representatives, it shall be submitted to the President for signature. However, if the President fails to sign the draft law within 15 days, it shall become a

[12] *Id*
[13] German Basic Law, Article 78
[14] *Id*

law.[15] The provision does not allow the President to forward his objection to the House of People's Representatives.

Although laws adopted by the House of People's Representatives are subject to review, such review does not fall within the jurisdiction of ordinary courts. Our ordinary courts are eviscerated of the power of checking or reviewing the constitutionality of laws passed by the house. Such power is already reserved to the second chamber i.e., the House of Federation. The House of Federation is assisted by a technical group called Constitutional Inquiry.

Members of the House of Representatives are also members of the Executive. An individual is allowed to have two different capacities at the same time. These are thus some of the instances where the system of separation of powers or checks and balances are blurred under constitutions which pursue parliamentary form of governments as can be observed in the FDRE constitution. Such legal regimes (as in the case of UK) put in place the legal and institutional framework which ensures that the *origin* of appointment to executive offices does not allow members of the executive branch of the government to have legislative *functions* after they assume executive responsibilities.

3- Responsible and Accountable Government

> "If an American or English were asked what the first indispensable requirement of his government is, it is ten to one that would reply that his government was the servant of the people."[16]

In the democratic nations (countries) people perceive their government as their own servant. The government is there to serve their interest or act as the steward of their interest. The governments assume office in the name and on behalf of the public for the benefit of the public. Article 15 of the French Declaration of the Human Rights recognizes the right of the society to ask a public official to account for his/her administration. In the opinion of the writer, the relationship between the government and the public/ the citizen is analogous to the relationship between a principal and an agent. The agent is there to act in the name and on behalf of the principal. He is expected to act diligently in the best interest of the principal until such time that the period of authorization expires. When the agent fails to act in the best interest of the

[15] The FDRE Constitution, Article 57
[16] *Supra*, note 7

principal or fails to account for his performance or fails to act diligently, the principal may revoke the authorization

The same applies in the relationship between a government and the public. As a government assumes office in the name and on behalf of the public, it is directly accountable or responsible to the public. When a government (i.e., the agent) fails to act in the best interest of the public (i.e., the principal), the latter revokes authorization through the ballot box.

4- Rule of Law

Rule of law denotes a government of laws and not of men. Individuals working within the state machinery are expected to exercise their official duties and responsibilities in accordance with the law. In other words, rule of law represents the supremacy of law.

According to Dicey, [17] rule of law envisages the following:-

- No one is punishable except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land;
- No person is above the law;
- Courts play a vital role in protecting the rights of individuals.

A- *No one is punishable except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land*:-

The first component of rule of law is related to the principle of legality. If a certain behavior is not categorized as a criminal act by the constitutionally mandated lawmaking organ, it is not treated as a criminal act and is not punishable. It is treated as an innocent act.

Secondly for an act to be punishable, the act must be classified or identified as a criminal act by the legislature through the law-making process enshrined in a constitution and other laws. Finally, once a certain behavior is classified as a criminal act, the accused should be tried and punished by the ordinary courts. Ordinary courts refer to courts established in accordance with a country's constitution. It may not include any extra-judicial or extra-ordinary court not recognized by the constitution of the land.

B- No one is above the law

These words express the absolute supremacy of law over arbitrary power including widespread discretionary power of government. We are all human

[17] Albert Venn Dicey, Introduction to the Study of Law of Constitution 188 (London and New York, Macmillan, 1995)

beings created in the image of God, and we should be treated equally before or under the law without discrimination on the basis of status, wealth, race, nationality, gender, sex, etc. Every person from a president down to a shoe-shiner should equally become subject to the law.

Similarly, even though avoidance of discretionary power is totally impossible, the manner in which such power is to be exercised is strictly monitored. Discretionary power is one of the reasons for the prevalence of corruption. According to Professor Klitgaard, corruption is defined as monopoly of power plus discretion minus accountability.

C- Rights are based on the actual decision of courts

According to Dicey, the mere recognition of rights in a constitution alone does not secure or ensure the rights of an individual. The rights recognized by a constitution and other laws are to be protected or defended through the medium of courts whenever these rights are infringed.

5- An Independent Judiciary

In liberal democracy the individual is at the center, and "Judicial independence is the hallmark of liberal democracy".[18] The rights of individuals are ensured and respected. Courts play a vital role in ensuring and respecting the rights of individuals. An independent judiciary is the cornerstone of a free society and rule of law.[19] As it is already discussed hereinabove, rule of law envisages a government of laws. A government is obliged to act according to laws set by the legislature. However, if there is failure to adhere to the laws, an independent judiciary shall check such events.

An independent judiciary is also necessary to maintain the supremacy of a constitution. If the legislature comes up with a law which is contrary to the constitution, an independent judiciary, through the principle of judicial or constitutional review, has the power to declare it null and void. Hamilton in Federalist 78 stressed the role of courts in reviewing the constitutionality of laws passed by the legislative organ as follows;-

> Limitation of this kind can be preserved in …no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.

[18] Robert A.Goldin and William A. Schambra ed., The Constitution, the Courts and the Quest for Justice 25(Washington DC, American Enterprise Institute Press, 1999)

[19] Peter H. Russel &David M.O'Brien ed., Judicial Independence in the Age of Democracy 25(Charlottesvile, The University Press of Virginia, 2001)

As Hamilton expounded, although checking the constitutionality of laws passed by the legislative organ is not the only role or function of courts, courts are bound to review whether laws passed by the legislature are constitutional. The whole purpose of judicial or constitutional review is not to snatch the powers given to other organs or to create judicial despotism, but to maintain the supremacy of the constitution i.e., the supreme law of the land.

In addition, judicial independence helps judges to discharge their judicial functions without fear or favor. Bhagwati stated that Justice can become fearless and free only if institutional immunity and autonomy are granted.[20] Bhagwati stressed the autonomy of the judiciary as an institution; yet, the independence of the institution is inseparable from the independence of individual judges.

Moreover, the decision or judgment rendered by courts must be executed. If decisions are overturned by other organs of the state, the independence of the judiciary shall be at a risk. It is a threat to the very independence of the judiciary. The judiciary shall become like a lion without teeth.

Furthermore, the sitting of judges in particular benches should be handled by the courts themselves. Any external entity must not be allowed to order a court in the assignment of judges to cases.

6- Ensure and Respect Individual Rights

The incorporation of the rights of individuals in a constitution and other laws is essential, but not an end by itself. It is a means to an end. It must be seen that these rights are duly respected and protected.

Article 1 of the UN Charter included the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Similarly Article 55 of the UN Charter states that the United nations shall promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. In addition Article 56 of the Charter imposes obligation on member states to ensure the observance of Article 55 of the Charter.

A similar provision is enshrined in the International Covenant on Civil and Political Rights. Article 2 of the Covenant stipulates that "each state party

[20] H.M. Seervai, Constitutional law of India, 2617(Delhi:N.M Tripathi Private Ltd. Bombay, 4th edi., 1996)

to the present covenant undertakes to respect and to ensure to all individuals within its territory and subjects to its jurisdiction the rights recognized in the present covenant without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

There are certain basic rights which may not be derogated from even at the time of state of emergency. According to Article 4 (2) of the Covenant, the Articles dealing with the right to life, the right not to be subject to torture or cruel or inhuman or degrading treatment or punishment, not to be held in slavery and servitude, not to be imprisoned due to non performance of contractual obligation, not to be held guilty or convicted for any criminal offence which is not criminalized at the time of the commission of the crime and omission or imposing heavier penalty, the right to be recognized as a person and the freedom of thought, conscience and religion may not be derogated in time of public emergency.

By virtue of Article 4(1) of the Covenant, a state of public emergency must be officially proclaimed. Since it says proclaimed, it must be proclaimed by the legitimate organ or authority authorized to do so by the constitution. Secondly, the emergency must threaten the life of a nation as a whole. During a state of emergency, derogation from the obligations imposed by the Covenant is possible except as regards the aforementioned rights which are absolutely non-derogable. The derogation should be to the extent required by the exigencies of the situation. Such derogation shall not violate other international obligations imposed on the state concerned and would not be implemented by discriminating on the basis of race, colour, sex, language, religion or social origin.

Furthermore, pursuant to Article 4(3) of the Covenant, the state exercising state of public emergency is obliged to notify other state parties to the Covenant the provision which is derogated from and the time when such state of emergency is to cease.

7- Respect for Self-determination

Self-determination refers to the right of a people living in a territory to determine the political and legal status of the territory, for example, by setting up a state of their own or by choosing to become part of another state.[21]

[21] Akehurst's Modern Introduction to International Law, 326(London and New York: 7th edi., 1997)

However, this right is granted to colonies and dependent states. This is clearly stated under Article 1(2) and 55 of the UN Charter.[22]

The right to self-determination is also recognized under Article 1(1) of the International Covenant on Civil and Political Rights. It reads as follows:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

In the 1918 Soviet Union Constitution, the right of self-determination was recognized although it was not practicable until the Soviet Union broke up into different autonomous republics after the introduction of perestroika. According to Viladmir Lenin, self-determination in the sense of secession or forming an independent state is possible only for culturally distinct groups.[23]

8- Civilian Control of the Military

> "Our principle is the party commands the gun, and the gun must never be allowed to govern the party."[24] Mao Zedong.

According to the above statement, the party is sovereign or autonomous. It is the party which governs the gun (the military). To some extent the theme of Mao Zedong's statement seems to hold true in the contemporary world as well. In democratic countries, it is the democratically elected officials who are allowed to govern or control the military, although technical affairs are left to the military personnel.

Instead, if full autonomy or sovereignty is granted to the military leaders, they might divert the democratic decision-making process and may use force which may go the extent of coup or military dictatorship. The military may also crush democratic political opposition, through intimidation and use of physical force and interfere with domestic elections. Samuel Adams stated that even when there is a necessity of the military power, wise and prudent people will always have a watchful and jealous eye over it.[25] Elbridge Gerry, a delegate to the American Convention also stated that standing armies in time of peace are inconsistent with the principles of Republican Government, dangerous to the liberties of a free people and generally converted into destructive engines for establishing despotism.[26]

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[22] *Id*
[23] Wikipedia, the free encyclopedia
[24] *Id*
[25] *Id*
[26] *Id*

9- Police Governed by Law and Judicial Control

The prime responsibility of ensuring peace and order is borne by the police. It shoulders the duty of bringing wrong-doers to justice. However, when the police discharge such duties, constitutionalism requires them to honor and respect the rights, dignity and freedoms of individuals including wrong-doers and persons suspected of offences. It is to be noted that a suspect has the right to be presumed innocent until proved guilty by the competent court.

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights prohibit torture, cruel, inhuman and degrading treatment and arbitrary arrest and/or detention. Similar provisions are incorporated in the FDRE constitution:-

- Every person is to be protected from cruel, inhuman and degrading treatment(Article 18(1);
- Persons arrested are entitled to be notified promptly in the language they understood the reason for their arrest (Article 19(1);
- Persons arrested must be informed promptly of their rights to remain silent (Article 19(2);
- Persons arrested must be brought to court within 48 hours (Article 19(3).

In order to check whether the police adhere to and respect the above fundamental principles and rights of arrested persons, courts should keep an eye on the police. If, for example, any evidence is obtained through torture, the evidence is considered illegal and courts /reject the evidence.

In general, the police are expected to act according to the law. When, instead, the police violate the laws they are entrusted to enforce, the result turns out to be not only an assault on human dignity and the law itself, but the creation of barriers to effective policing.[27]

The practical effects of police violations are multifold : [28]

- Public confidence is eroded;
- Civil unrest is exacerbated;
- Effective prosecution in courts is hampered;
- The police is isolated from the community; and
- Results in the guilty going free and the innocent being punished. ■

[27] A manual on Human Rights Training for the Police, United Nations, New York and Geneva, 1997

[28] *Id*

NOTES ON RONALD DWORKIN'S THEORY OF LAW

Elise G. Nalbandian*

Introduction

Ronald Dworkin has based his theory of law on his on-going critique of positivist theories of law, especially the theory developed by Hart in "The Concept of Law", as Dworkin believed that Hart's theory was the "ruling theory of law".[1] Over the years, however, Dworkin's theory has evolved in the course of his response to critiques of his work or alternatively due to the fact that positivists in response to his criticisms, adapted the theory of positivism. From the 1960's onwards, this evolution of the anti-positivist theory can arguably be said to have occurred in three phases. Although it is possible to look at Dworkin's theory in various ways, this particular note will take the approach of understanding how these three phases of development in his theory evolved and changed while enriching his interpretive theory all the time focusing on his developing critiques on Hart's work.

1. Dworkin's vs. The Major Schools of Thought in Jurisprudence

Dworkin's original critique of Hart's model of rules in "The Concept of Law" revolved around the role of 'rules and principles' in law among other issues such as the role of customs as well as the problems of judicial discretion and retrospection. It is clear that Dworkin found Hart's theory to be "under inclusive".[2] This is due to the fact that, as per Dworkin, Hart fails to take into account concepts beyond rules and thus his "positivism is a model of and for a system of rules, and its central notion of a single fundamental test for law…forces us to miss the roles of...standards which are not rules."[3] In other words, by limiting the scope of law to only rules that can be identified by the rule of recognition, Hart fails to consider the role of the existing body of

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[1] Ronald Dworkin, "The Models of Rules I" 35 University of Chicago Law Review l 4 (1967-1968)

[2] James Donato "Dworkin and Subjectivity in Legal Interpretation" 40 Stanford L aw Review 1517 (1987-88)

[3] Penner, Schiff and Nobles, "Jurisprudence and Legal Theory: Commentary and Materials", Butterworths, Lexis Nexis, 2002, p. 337-338

customs (for example the royal assent and other prerogative powers in the British legal system[4]) in law, as well as concepts such as 'principles' that can influence judicial decision making.

While rejecting Hart's 'ruling theory of law', Dworkin also rejects the reasoning of Natural Law theorists that there are predetermined, absolute and metaphysical moral principles which determine the moral standards upon which the validity of all human laws are based. He is also opposed to the view that there is necessarily a close link between justice and the law which Natural Law advocates. Dworkin rejects such a proposition based on the concept that the fact of law is such that its validity must not be derived from the justice it can deliver or the injustice. It is therefore possible to observe that Dworkin's place in jurisprudence is one where he is neither a natural lawyer, nor is it possible to say he is a legal positivist as he theoretically rejects some of the most common and basic views of Natural Law theories while also being very critical about the positivists. His theory thus provides students of jurisprudence a theoretical forum for a middle ground between the two theories.

2. The Third Way…

Phase I

One of Dworkin's primary concerns in the first phase of the development of his theory was to distinguish principles from rules as his theory hinged on the fact that Hart had only considered rules and thus the master rule of recognition could not identify principles. He does this by saying that "rules are applicable in an all-or-nothing fashion"[5] or rather a rule is either valid or invalid unlike principles, which do not apply to cases quite so starkly. Principles have 'weight and dimension'. Thus a principle may be taken into account while deciding a case but will survive as a principle even when it is overridden as in cases of adverse possession where the principle of "no man shall profit from his wrong" is overridden but not invalidated. This distinction between rules and principles introduces Dworkin's most consistent criticism of the conventionalist[6] view of law.

According to Dworkin, positivists maintain that in certain 'hard cases' where there is no pre-existing rule that governs the outcome of the case, the judges have a 'strong discretion' to adjudicate and make new law. If this strong discretion existed, it would mean that the new law would act

[4] *Ibid*
[5] *Supra* note 2
[6] Dworkin tends to call the positivists "conventionalists"

retrospectively and the parties would be bound by a law that did not exist before their case as an unelected body of judges would be making the rules to fit the case and this would be undemocratic.[7] Therefore, Dworkin rejected the concept of 'strong' judicial discretion[8] and with the distinction between rules and principles in hand, indicated that when adjudicating in hard cases, the judges invoke a legal principle[9] and decide the outcome of the case accordingly. This distinguishes his concept of judicial reasoning from the positivist concept as the positivists would argue that legal rules are distinct from moral rules, whereas Dworkin is actually blurring the division between the two as principles can incorporate ideas of fairness, justice and morality.

Raz presented several counter-arguments against Dworkin's theory although he accepted Dworkin's opinion concerning the issue of customs by modifying Hart's 'rule of recognition.'[10] Raz, by using Dworkin's arguments against him, states that "principles presuppose,...direct and guide (judicial discretion)."[11] Raz also maintains that Dworkin has misunderstood the rule of recognition in that not only does (this rule) not recognise implicit law (principles) it also does not identify explicit law either. Thus the whole concept of principle is not an issue.[12] In response to these arguments in the second and third phases of the theory's evolution, Dworkin modified and enriched some aspects of his critique while modifying other aspects from the first phase.

Despite these criticisms, it is out of this discussion that Dworkin's "one right answer" thesis arose. Dworkin asserts that the law clearly cannot be made up of rules only but also other standards. These include standards such as policies, principles and the like. While these other standards are important and are as effective as rules in the legislative as well as executive processes, they differ in character from rules. However, rules, policies and principles together act as what Dworkin calls the "moral fabric"[13] of a society which protects interests which members of a society regard as valuable interests

[7] James Allan, "Legal Interpretation and the Separation of Law and Morality: A Moral Sceptic's Attack on Dworkin", 26 Anglo. Am. Law Review 405 (1997)

[8] Although he did concede that they had weak discretion in deciding how to approach the question and what law to use.

[9] Which can be regarded as 'legal' due to its substantive, moral and political content

[10] *Supra* note 3, p. 360

[11] As per Raz, supra note 3, p. 358

[12] *Ibid*, p. 421

[13] *Ibid*

which can be specified in terms of rights such as the rights to life, liberty and human dignity.[14]

For Dworkin, these rights and other rights valuable to specific societies are particular to each society and objectively demonstrate a certain type of 'morality' which can be empirically determined to indicate what is important to the society and therefore should be protected by the law. This therefore is the argument which he uses to argue that morality does and should have some place in the law particularly when determining disputes in the courts.

It was also in this discussion that Dworkin's distinction between rules and principles was first discussed. For Dworkin, in a case where a rule applies, it does so in an "all or nothing" method fully resolving the dispute in line with the rule which has neither weight nor dimension and is valid because it is the law. However, where a rule does not apply and therefore a principle must apply, a principle is not as conclusive as a rule. This is due to the fact that where a case has to be resolved by the application of a principle, several competing and contradictory valid principles may be applied, as a result of which the judge must weigh the principles against each other and apply the one which the judge chooses as being the best 'fit' for a certain case based on the full weight and dimension of the various principles.

Phase II

In the second phase (i.e. in the 1970's), Dworkin reformulated and elaborated his original *'rules and principle*' attack on positivism in his *'rights thesis*' but he excluded the arguments distinguishing rules from principles on grounds of weight and validity as well as his attack on Hart's rule of recognition. In his formulated theory based on the 'rights thesis' in which he discussed arguments of principle, he indicates that these arguments of principles are propositions of political morality, affirming the existence of rights of citizens in a system of law which can also be described as a "seamless web of principles."[15] He explains that if an issue already has not been covered by a rule, the judge in the case cannot exercise a Hartian mode of discretion and create new law, but must give effect to what is implicit in the society's moral fabric which is developed in the society within which the law and the legal system operate. It follows, therefore, that the judge, like the super-human judge Hercules (that Dworkin creates), must take into account the "totality of laws (so legal sources have to be looked at), institutions, moral standards, and goals of

[14] J.G.Riddall, "Jurisprudence" Lexis Nexis U. K, Butterworths, 2nd ed 1999
[15] *Ibid*

society"[16] and interpret all this in their best political moral light to achieve the appropriate 'fit' which will settle the question with the single right answer. This holistic approach to law is a further insistence by Dworkin that a judge cannot have a strong discretion[17] which seems to be the most consistent concept throughout the evolution of the theory and is partly carried over to the third phase as well.

Raz criticized this theory as Dworkin distinguishes between source and non-source laws in which he accords a separate/private place to legal sources which can be identified by Hart's rule of recognition as Dworkin did not offer any rule of his own. Raz points out that Dworkin's theory, while refuting positivism is basing some (and arguably some of the most crucial) of its features on positivism which is contradictory.

Despite the above-mentioned critiques to Dworkin's theory, Dworkin at this point had managed to add to his ever growing literature on the "one right answer."[18] In this part of the discussion, Dworkin postulated the concept of the super-judge Hercules; and the limits of judicial discretion were further discussed in the light of this conceptual judge.

As established above, Dworkin's argument depends on the fact that where a dispute arises and needs to be adjudicated, a judge has a series of tools by which he or she can adjudicate among which are the principles for the 'hard cases.' Dworkin clarifies that there are various ways of resolving a dispute; there is also the right answer in each case with regards to the question: *who has the right to win?* To answer this question, the judge will have to search through the moral fabric and decide how to apply the law in the best way possible. It is in this part of his theory where Dworkin explains the hypothetical judge's (Hercules') role in his theory. Hercules, as a super-judge with great abilities of analysis, deduction and adjudication would be able to justify the use of principles in 'hard cases' by constructing the best theory of law possible. Such analysis will indicate that the law is a seamless web of legal rules, legal principles and other legal standards and using this best theory the judge would render a correct decision and justify it.[19] For Dworkin, it follows therefore that even in 'hard cases' judges do not have quasi-legislative discretion,[20] rather they may have a weak form of discretion

[16] *Ibid*, p. 95
[17] Supra note 3
[18] *Ibid*
[19] *Supra* note 14
[20] *Ibid*

which allows them to decide how and which rules or principles to apply[21] but only if it is the right answer (as far as it can be justified).

He illustrates this somewhat hypothetical discussion on how to resolve hard cases in the case of Riggs v Palmer (1899).[22] In this case, the question that arose was whether a murderer could inherit from his victim in a legal system where the testamentary succession clearly indicated that a beneficiary named in a will would always be entitled to inherit. In the absence of other rules, the court in the United States decided to apply the legal principle that no one should benefit from their wrongful actions and denied the murderer the inheritance. For Dworkin, what this case demonstrated was that where an existing rule was clearly going to result in the wrong answer, the court used a principle to reach at the right answer which had the same level of legal validity as if the rule was used instead.

Phase III

In the third phase of Dworkin's long and illustrious career, Hercules' holism is considered further under the general idea of 'constructive interpretation'. Here Dworkin claims that all law is interpretive.[23] In this phase, Dworkin first attempts to give lesser importance to source-based law. Secondly Dworkin attempts to clarify and organize his ideas with some departure from the second phase. It is at the third phase that Dworkin develops a coherent theory explaining what judges do, (which is not filling "gaps"[24] through the exercise of discretion), but by undertaking a process of 'interpretation'[25] in hard cases (as easy cases do not truly need interpretation-looking at the statute will be enough as it applies without problems).

To do this, Dworkin sets out three stages; Firstly, the judge (or lawyer) has to *know the data* (pre-interpretive stage), secondly the judge must *evaluate it* and advance it in its best possible light (interpretive stage) and then thirdly, legal questions can be *settled* as there will be one right answer or the best answer which fits as discussed above. The pre-interpretive stage therefore can constrain discretion, as the judge will have to take into account texts and other relevant materials such as earlier cases. So, Dworkin draws on an analogy of the chain novel to explain this incremental historical constraint on later judges (although the first judge has no such constraint). Even though

[21] J.W. Harris, "Legal Philosophies" Lexis Nexis, Butterworths, 2nd ed. 2003
[22] *Supra* note 3, p. 338
[23] *Supra* note 21
[24] This is a positivist view and the word gap is most commonly used by Raz while Hart uses the word penumbra
[25] This is the aesthetic hypothesis; -*supra* note 3, p. 386

there is some constraint, the judge retains the ability to evaluate and interpret the law in a manner which he/she feels fits with the previous judgments while balancing it against 'coherence' or the relevant moral substantive standards of the society such as social goals as well as principles of justice[26] to come up with the single right answer or the best answer.

However, most aspects of Dworkin's efforts at this stage have been criticised by Raz, Fish, Finnis and Marmor. Fish criticises Dworkin's literary theory for two reasons. The first is that Dworkin, by excluding the first judge/novelist from the constraint, seems to be suggesting that the first judge is free to decide however he likes whereas Fish shows that they are all constrained. By making the first judge free to judge as he likes (as a judge does in the legal realist tradition/theory) and the latter ones constrained by self-evident history[27] (strict constructionism- a positivist exercise), Dworkin seems to be committed to both of the views he tries to criticise simultaneously. The second part of Fish's critique indicates that even though Dworkin argues against the positivist theory concerning simple cases by pointing out the existence of controversial simple cases (such as in the case of the will in *Riggs v Palmer*[28] in his earlier theory), he tries to use the distinction between simple and hard cases in the 'chain novel' theory and so, his whole theory becomes dependant on a positivist analysis of what is an easy case or a hard one.

Another criticism of Dworkin's work emerges from Marmor. His critique explains the inadequacy of Dworkin's proposal that a judge has to balance the 'fit' and moral/political value to find the right answer as the two stages of the interpretive test are not independent enough from each other to provide the friction that Dworkin needs for the theory to work. This dependence occurs as 'fit' itself is shaped by dimensions of personal morality.[29]

This concept that the right answer would emerge from the balance between 'fit' and 'coherence' has also been criticised by Finnis, who points out that the values that are being compared and balanced are incommensurable. Thus a single right answer cannot be determined scientifically on the basis of the comparison between the two values as this would mean that judges would have to choose which value was more important to them and this is a form of discretion.[30] A further criticism by Finnis is that, while some aspects of legal practice are interpretive, not all aspects of legal practice are. For example,

[26] *Supra* note 3, p. 393
[27] *Ibid*, p. 397
[28] *Ibid*, p. 338
[29] *Ibid*, p. 404
[30] *Ibid*, p. 405

legislation which is a significant part of legal practise cannot really be seen merely as an interpretive action.[31]

Finally, Raz criticises Dworkin's ideas about 'coherence' but points out that Dworkin has made concessions in view of the rule of recognition as well as with regard to the unique right answer which ultimately always leads to the conclusion that judges have discretion. Raz criticises the 'coherence' concept as it requires the judges to consider all the sources of law as well as make a judgment that is in line with the morality of the system. In so called 'evil' systems such as South Africa during apartheid, where the injustice was pervasive in the source law, as well as the general ideology of the system, the idea of coherence would mean that the courts would have to make judgments which were also unjust. On the other hand, Raz finds that Dworkin has made a concession to a Hartian rule of recognition in his idea of 'fit' due to the fact that so called legal sources make the law and to identify these, a rule of recognition is necessary.[32] Ultimately, however, Raz points out that Dworkin's most consistent claim about courts not having discretion "has been whittled down"[33] in the chain-novel metaphor as judges not only interpret the past sources but also have a creative role in deciding the cases.

Conclusion

In conclusion, over the years, Dworkin's initial critique of positivism has been modified (almost beyond recognition) and has changed a great deal. However, the greatest change has occurred due to his adoption of the "interpretive" theory of law as this phase of the theory has proved to be completely different from the first two phases in that Dworkin has inadvertently accepted a great deal of positivism in his critique of positivism, thus (in part) defying the purpose of this critique. However, the theories he has formulated are no less important in the study of jurisprudence even if they have ultimately not been as helpful to Dworkin in criticising positivism as one would expect. This is so because his approach involves a more mixed approach to legal theory. Neither major school of Jurisprudence (Natural Law and Positivism) is completely correct. Nor are these schools completely incorrect, and in effect, it is possible to try to reject some parts of the theories while blending other parts to have a more holistic approach in jurisprudence itself. ■

[31] *Ibid*, p. 418
[32] *Ibid*, p. 425
[33] *Ibid*, p. 423

ፍርዶች / Cases

ትኩረት- *የንብረት ሕግ (Focus: Law of Property)*

ማስታወሻ- የተከራካሪዎች የአባት ስም አልተገለፀም። (Patronymics of parties are omitted)

Cassation File No. 27506
Federal Supreme Court Cassation Division
Hamle 19, 1999 E.C

Petitioner Ato Samuel … *et al*
Respondent Ato Bizuneh …

> Can a defendant invoke his ownership of the premises in response to a legal action against deprivation or interference of possession? (Articles 1149/3 and 1140 of the Civil Code)

The possessory action of the plaintiffs (Ato Samuel *et al*) was based on the lease they have over nationalized houses that were administered by Kebele. In the absence of the plaintiffs, the defendant (Ato Bizuneh) occupied the houses after he obtained a certificate of heir to his deceased aunt who was the previous owner of the houses. Jijiga Zonal High Court decided under Art 1149/3 of the Civil Code that the houses were being administered by the Keble and were given by lease to the plaintiffs and held that the defendant should stop disturbing their possession. On appeal, the Somali Regional State Supreme Court reversed the decision of the High Court in favour of the defendant stating the Kebele's confirmation that the property does not fall under a statutory nationalization. The cassation petition to the Federal Supreme Court Cassation Division was brought from this decision.

Decision

1. The possessory action of the plaintiffs pertains to restoration of the house and cessation of interference (Art. 1149/3) which violates their possession (Art. 1140) of lease. The issue is thus whether there is interference against or deprivation of possession.
2. The respondent cannot invoke ownership title on the houses, and his claim cannot be raised as a defence. The remedy of eviction must rather be claimed through a separate petitiory action.
3. The decision of the High Court is affirmed and the decision of the Regional State Supreme Court is reversed.

Issues for reflection

Should the issue be "whether there is a right that justifies the Respondent's conduct" (Art. 1149/3 of the Civil Code) instead of "whether or not there is interference against or deprivation of possession? What is the difference between the issues? Would the outcome vary?

Cassation File No. 30461
Federal Supreme Court Cassation Division
Hidar 3, 2000 E.C.

Petitioner Ethiopian Roads Authority

Respondent Ato Issa …

> Whether the Ethiopian Roads Authority is entitled to take sand without payment of price from a person who has dug and collected the sand from a parcel of land on which he has been given extraction permit and possessory title deed? (Proclamation No. 80/89 E.C.; Provisions of FDRE Constitution and Regional Constitutions which provide that natural resources are state property)

The respondent started the legal action at the Illubabor Zone High Court claiming for payment of the price of sand taken from him by the petitioner. The High Court and the Regional Supreme Court decided in favour of the respondent because he has a permit to extract sand from a parcel of land over which he has possessory title while the petitioner, on the other hand, has not shown a better claim over the plot of land from which the sand was taken. This cassation petition was brought from this last decision.

Decision

1. The petitioner is entitled by law to take sand from land found anywhere by paying compensation for property found on the land. However the Proclamation does not state that compensation should be paid for stone or sand and these being natural resources are state property and the petitioner has no obligation to pay for the sand taken from the respondent.
2. The decisions of the two lower courts are reversed.

Issues for reflection

a) Is there a difference between sand as intrinsic element of land (which the Ethiopian Roads Authority is entitled to extract) and sand as moveable property after its extraction from land?

b) When can sand be considered as having been extracted? Does it have to be physically separated from the site from which it is extracted, such as having it transported from the site?

c) Does the entitlement of the Ethiopian Roads Authority to gather sand and quarries extend to all land, irrespective of possession by another person? If so, does this render possessory title superfluous?

Cassation File No. 26130; Federal Supreme Court Cassation Division
Yekatiti 4, 2000 E.C

Petitioner Ato G/egziabger …
Respondent W/t Selamawit …

> Whether land which was in the possession of one of the spouses before marriage becomes their common possession and be divided between them (after dissolution of marriage) if there is construction made on the land after marriage. (Art 40/3 of the FDRE Constitution, Article 85 of the Tigray Regional State Family Code, Proclamation No 47/67E.C)

The case began at the Mekele Zone High Court by W/t Selamawit's claim for the return of houses presently held by the respondent. She claimed that she is entitled to inherit the houses which belonged to her late mother. The respondent claimed that he owns half of the contested property because houses built during the period of marriage constitute common property.

The High Court accepted the respondent's plea and decided that five houses under his possession were built after his marriage to Selamawit's mother and should be divided between him and the heir but the four houses found on the same land were built before the marriage and belong to the plaintiff only. The court also added that the land over which the houses were built is state property and should be divided equally between the heir and the respondent or be sold at auction if the land cannot be divided. One judge wrote a dissenting opinion stating that Ato Gebregziabher can only claim a share in the houses built during the marriage and not on the land that was under the deceased's possession before marriage. The Tigray Regional Supreme Court affirmed the dissenting judgment. The Cassation Division of the Regional State Supreme Court also found no basic error of law. The present petition was brought to this court from this last decision.

Decision

1. The judgments of the Tigray Regional State Supreme Court and the Cassation Division are reversed.
2. The decision of the Mekelle Zone Court is affirmed. Land is publicly owned and not private property. The houses built during the marriage were constructed on this land and the petitioner is entitled to have an equal share on the land

Issues for reflection

a) Does possession of land have pecuniary value?
b) The possessor of land is entitled to *usus* and *fructus; and* Ethiopian land law confers possessory rights beyond *usus* and *fructus* because it allows a certain level of *abusus*. Are these rights overlooked in the decision?

የሰበር መዝገብ ቁጥር 27506

የፌ.ጠ.ፍ/ቤት ሰበር ሰሚ ችሎት
ሐምሌ 19 ቀን 1999 ዓ.ም

አመልካች እነ ሳሙኤል ...
ተጠሪ አቶ ብዙነህ ...

አንድ ሰው ተከራይቶ ወደያዘው ቤት ሌላ ሰው በመግባቱ ሁከት ይወገድልኝ ብሎ ክስ ሲያቀርብ ተከሳሹ የቤቱ ባለንብረት መሆኑን በመከላከያነት ማቅረብ ይችል እንደሆነ፤ (የፍትሐብሔር ሕግ .ቁ.1149/3 ፣1140)

ክርክር የተነሳባቸው ቤቶች በመንግሥት ከተወረሱ በኋላ ከሳሾች እነ አቶ ሳሙኤል ቤቱን ከቀበሌው ተከራይተው ሲኖሩ እነርሱ በሌሉበት ተከሳሽ አቶ ብዙነህ ቤቶቹ ውስጥ ስለገባ ከሳሾች ሁከት ይወገድልን በማለት ክስ አቀረቡ፡፡ ተከሳሽ የቀድሞ የቤቱ ባለቤት የነበሩት አክስቱ ወራሽ መሆኑንና ቤቱ የውርስ ንብረት መሆኑን አረጋግጦ ስለነበረ ይህን በመከላከያነት በማቅረብ ሁከት አልፈጠርኩም በማለት ተከራክሯል፡፡ የጅጅጋ ዞን ከፍተኛ ፍ/ቤት በከሳሾች ላይ ተከሳሽ የፈጠረው ሁከት ሊወገድ ይገባል በማለት ወሰነ፡፡ ይግባኝ የቀረበለት የሶማሊ ክልል ጠ/ፍ/ቤት ቤቶቹ በአዋጅ ያልተወረሱ በመሆኑና አቶ ብዙነህ የንብረቱ ወራሽ ስለሆነ ሁከት አልፈጠረም በማለት ወሰነ፡፡ ይህ የሰበር አቤቱታ የቀረበው ከዚህ ውሳኔ ነው፡፡

<u>ውሳኔ</u>

1. ከሳሾች የጀመሩት ክስ ሁከት ይወገድልን በማለት ነው፡፡ በቤቶቹ ላይ የተከራይነት ይዞታ እንዳላቸው በማስረዳት (የፍ//ሕግ .ቁ. 1140) ያቀረቡት የሁከት ይወገድልን ክስ (የፍ/ ሕግ .ቁ. 1149/3) በመሆኑ ጭብጡ ሁከት መፈጠር አለመፈጠሩ ነው፡፡
2. በተከሳሽ በኩል የቤቶቹ ባለቤት ነኝ የሚል ክርክር በማቅረብ ክሱን መከላከል አይችልም፡፡ የቤቶቹ ባለቤት ነኝ ካለ ማስለቀቅ ያለበት በሌላ ክስ ነው፡፡
3. የከፍተኛው ፍርድ ቤት ውሳኔ ፀንቷል፡፡ የክልሉ ጠቅላይ ፍ/ቤት ውሳኔ ተሽሯል፡፡

* *

ዳኞች፦ *መንበረፀሐይ ታደሰ፣ ፍስሐ ወርቅነህ፣ አድዱልቃድር መሐመድ፣ አብዱራሂም አህመድ፣ ታፈሰ ይርጋ*

...

መዝገቡ ተመርምሮ ቀጥሎ የተመለከተው ፍርድ ተሰጥቷል፡፡

<u>ፍ ር ድ</u>

ይህ የሰበር አቤቱታ ሊቀረብ የቻለው አመልካቾች ተጠሪ በይዞታችን ላይ የፈጠረው ሁከት ይወገድልን የሚል አቤቱታ ለጅጅጋ ዞን ከፍተኛ ፍ/ቤት አቅርበው ፍ/ቤቱም ግራ ቀኙን አከራክሮ ተጠሪ በአመልካቾች ላይ የፈጠረው ሁከት ሊወገድ ይገባል በማለት ውሣኔ ሰጥቶ ጉዳዩን በይግባኝ የተመለከተው የሶማሌ ክልል ጠቅላይ ፍ/ቤት የከፍተኛ ፍ/ቤቱን ውሣኔ በመሻር ሁከት የለም በማለት ውሣኔ በመስጠቱ አመልካቾች መሠረታዊ የሕግ ስህተት ተፈጽሟል በማለት ቅሬታ በማቅረባቸው ነው፡፡

ጉዳዩ ለሰበር ችሎት እንዲቀርብ በተሰጠው ትእዛዝ ተጠሪ የአመልካቾች አቤቱታ ደርሷቸው መልስ የሰጡ ሲሆን አመልካቾችም የመልስ መልስ በመስጠት አቤቱታቸውን አጠናክረው ተከራክረዋል፡፡

የጉዳዩ አመጣጥም ባጭሩ ሲታይ አመልካቾች በጅጅጋ ዞን ከፍተኛ ፍ/ቤት ባቀረቡት ክስ በጅጅጋ ከተማ ቀበሌ 06 የሚገኝና የምንኖርበት ቤት በአዋጅ ቁጥር 47/67 ተወርሶ ቀበሌው የሚያስተዳድረውና ላለፉት 20 ዓመታት በተከራይነት ኖረንበታል፡፡ ይሁን እንጂ ተከሣሽ ይሄው ቤት የአውራሼ የሚች ወ/ሮ ተዋበች ዘርፉ ነው በማለት፣ እኛ በሌለንበት ይህንኑ ከቀበሌው አስተዳደር በኪራይ የያዝነውን ቤት እየተገለገለበት ስለሆነ የተፈጠረው ሁከት ይወገድልን በማለት ጠይቀዋል፡፡

ተጠሪም በበኩሉ በሰጠው መልስ ለክሱ መነሻ ምክንያት የሆነው ቤት ከአክስቱ በውርስ የተላለፈለት ንብረት መሆኑን በመግለጽ አቤቱታው ውድቅ ሊደረግ ይገባል በማለት ተከራክሯል፡፡

የግራ ቀኙ ክርክር በዚህ መልኩ የቀረበለትም የዞኑ ከፍተኛ ፍ/ቤት ለክርክሩ ምክንያት የሆኑት ቤቶች የጅጅጋ ከተማ አስተዳደር መሆናቸውን ከሣሾችም በእነዚሁ ቤቶች በሕጋዊ መንገድ እየኖሩ እንደሆነ ከቀረበው ማስረጃ ማረጋገጥ የተቻለ ስለሆነ በተከሣሽ በኩል የተፈጠረው ሁከት በፍ/ብ/ሕ/ቁጥር 1149(3) መሠረት እንዲወገድ በማለት ውሣኔ ሰጥቷል፡፡

ክርክሩን በይግባኝ የተመለከተውም የሶማሌ ክልል ጠቅላይ ፍ/ቤት ግራ ቀኙን አከራክሮ፣ ለክርክሩ ምክንያት የሆኑት ቤቶች በአዋጅ ያልተወረሱ ስለመሆናቸው የሚመለከተው የቀበሌ አስተዳደር ያረጋገጠ ከመሆኑም በላይ ይግባኝ ባይ (ተጠሪ) የቤቱ ባለንብረት የነበሩት ግለሰብ ወራሽ መሆናቸው ባቀረቡት ማስረጃ ስለተረጋገጠ፣ የዞኑ ከፍተኛ ፍ/ቤት በተጠሪ በኩል የተፈጠረው ሁከት ሊወገድ ይገባል በማለት የሰጠው ውሣኔ ከጭብጡ ያፈነገጠ ነው በማለት ሽሯል፡፡

ይህ ሰበር ሰሚ ችሎትም አቤቱታው ለሰበር ቀርቦ መታየት አለበት በማለት ትዕዛዝ የሰጠው ለክርክሩ ምክንያት የሆነውን ቤት የቀበሌው አስተዳደር እያከራየ ገቢ ይሰበስብ ነበር ከተባለ በአዋጅ አልተወረሰም በሚል የተጠሪ የውርስ ሀብት ነው የመባሉን አግባብነት ለማጣራት [ነው]፤ በዚሁ አካያም አቤቱታው እንደሚከተለው ተመርምሯል፡፡

አመልካቾች በጅጅጋ ዞን ከፍተኛ ፍ/ቤት በተጠሪ ላይ ክስ የመሠረቱት ከጅጅጋ ከተማ ቀበሌ አስተዳደር በተከራይነት የምንኖርበትን ቤት ተጠሪ ወራሽ ነኝ በማለት ያለአግባብ ይዘው የሚገኙ ስለሆነ የተፈጠረው ሁከት ይወገድልን በማለት ነው፡፡

ሁከት ይወገድልኝ የሚል አቤቱታ የሚያቀርበው ወገን በንብረቱ ላይ የይዞታ መብት እንዳለውና በእርግጥም የሚያዝበት መሆኑን ማረጋገጥ እንደሚገባው ከፍ/ብ/ሕ/ቁ/1140 ድንጋጌ መገንዘብ ይቻላል፡፡

በተያዘው ጉዳይ አመልካቾች ሁከት ተፈጠሮብናል የሚሉበትን ቤት በኪራይ ውል መነሻነት ይዘው እንደሚገኙና የይዞታ መብት እንዳላቸው በጅጅጋ ዞን ከፍተኛ ፍ/ቤት ክርክር ሲደረግ በማስረጃ አረጋግጠዋል፡፡

የአመልካቾች አቤቱታ ሁከት ይወገድልን የሚል ከሆነ ክርክሩ የይዞታ መብትን /possessory action/ የሚመለከት በመሆኑ በጭብጥ ተይዞ ዕልባት ሊሰጠው የሚገባው ነጥብ ሁከት ተፈጥሯል ወይስ አልተፈጠረም የሚለው ነው፡፡

ይሁንና ተጠሪ በዞኑ ከፍተኛ ፍ/ቤት ያቀረቡት ክርክር ለክሱ ምክንያት የሆነው ቤት በውርስ የተላለፈልኝ የግል ቤቴ ስለሆነ የአመልካቾች አቤቱታ ውድቅ ሊደረግ ይገባል በማለት እንጂ ሁከት አልፈጠርኩም በማለት አይደለም፡፡

ተጠሪ በባለቤትነት ረገድ የሚያነሱት ክርክር ሁከት ተፈጥሯል ወይስ አልተፈጠረም ተብሎ ለሚያዘው ጭብጥ ተገቢነት የሌለውና እራሱን የቻለ ባለቤትነትን የመፋለም ክስ /petitory action/ በሚመለከተው ላይ አቅርበው ከሚታይ በስተቀር፣ ሁከት እንዲወገድ በቀረበ ክስ የባለቤትነት ክርክር ማንሳት አግባብነት አይኖረውም፡፡ ስለሆነም የሶማሌ ክልል ጠቅላይ ፍ/ቤት በተጠሪ በኩል ባለቤትነትን የመፋለም ክስ ባልቀረበበትና አመልካቾች ሁከት

ይወገድልን በማለት ባቀረቡት ክስ ተጠሪ የቤቱ ባለቤት ናቸው በማለት ውሣኔ መስጠቱ መሠረታዊ የሕግ ስህተት ሆኖ ተገኝቷል፡፡

ው ሣ ኔ

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2. ግራ ቀኙ ወጭና ኪሣራ ይቻቻሉ፡፡

…

የሰበር መዝገብ ቁጥር 30461

የፌ.ጠ/ፍ/ቤት ሰበር ሰሚ ችሎት
ጎዳር 3 ቀን 2000 ዓ.ም.

አመልካች የኢት መንገዶች ባለሥልጣን
ተጠሪ አቶ ኢሳ …

> የኢት መንገዶች ባለሥልጣን በተቋቋመበት አዋጅ አሸዋና ድንጋይ ከየትም ቦታ በነፃ መውሰድ እንደሚችል ስለተደነገገ እንዲሁም አሸዋ በተፈጥሮ ሀብትነት የመንግሥት ስለሆነ ፈቃድና ካርታ በተሰጠው ቦታ ላይ አሸዋ ካወጣ ሰው የባለሥልጣኑ መሥሪያ ቤት አለምንም የዋጋ ክፍያ አሸዋ ለመውሰድ ስለመቻል አለመቻሉ፤ (አዋጅ ቁ 80/89 ፣ በኢ.ፌ.ዲ.ሪ እና በክልሎች ሕገ መንግሥት የተፈጥሮ ሀብት የመንግሥት መሆኑን የሚደነግጉ አንቀጾች)

ተጠሪ በኢሉባቦር ዞን ከፍተኛ ፍ/ቤት በጀመሩት ክስ የንግድ ፈቃድ እና የቦታ ካርታ ተሰጥቷቸው አሸዋ አውጥተው እየነገዱ ሳለ፣ ተከሳሽ መ/ቤት ቦታው ላይ ገብቶ አሸዋ ስለወሰደባቸው የአሸዋው ዋጋ እንዲከፈላቸው ጠየቁ፤ ከፍተኛው ፍ/ቤትና የክልሉ ጠ/ፍ/ቤት ተከሳሹ በቦታው ላይ መብት እንዳለው አላረጋገጠም፣ ከሳሽ ግን የንግድ ፈቃድና ካርታ አላቸው በማለት ለከሳሽ ወሰኑ፡፡ ይህ የሰበር አቤቱታ የቀረበው በዚህ ውሳኔ ላይ ነው፡፡

ውሳኔ

1. አመልካች በተቋቋመበት አዋጅ መሠረት መንገድ ለመሥራት መሬትና ድንጋይ በነፃ እንደሚጠቀምና ቦታው ላይ ለሚገኙ ንብረቶች ካሳ እንደሚከፍል የተመለከተ ቢሆንም፣ ለድንጋይም ሆነ ለአሸዋ ገንዘብ መክፈል እንዳለበት በአዋጁ ላይ ስላልተመለከተ፣ በእነዚህም የተፈጥሮ ሀብት ላይ መንግሥት የባለቤትነት መብት ስላለው አሸዋውን የወሰደው የመንግስት መሥሪያ ቤት አሸዋውን ላወጣው ተጠሪ የዋጋ ክፍያ የመክፈል ግዴታ የለበትም፡፡
2. የሥር ፍ/ቤቶች ውሳኔዎች ተሽረዋል፡፡

* *

ዳኞች፡- *መንበረፀሐይ ታደሰ፣ ፍስሐ ወርቅነህ፣ ሐጎስ ወልዱ፣ ሂሩት መለሰ፣ ታፈሰ ይርጋ*
...

መዝገቡን መርምረን ቀጥሎ የተመለከተውን ፍርድ ሠጥተናል፡፡

ፍ ር ድ

ይህ ሰበር አቤቱታ ሊቀርብ የቻለው ተጠሪ በአመልካችና በሥር 2ኛ ተከሳሽ ላይ በኢሉባቦር ዞን ከፍተኛ ፍ/ቤት፣ አሸዋ አውጥቼ ለመነገድ ከዞኑ ንግድ ኢንዱስትሪና ቱሪዝም መምሪያ ፈቃድ እንደዚሁም ከዞኑ የሥራና ከተማ ልማት መምሪያ በመሐንዲስ ቦታው ተለክቶ ካርታ የተሰጠኝ ሲሆን ተከሳሾች ወደ ይዞታዬ ገብተው አሸዋዬን እንዳይወስዱ ብከለክላቸውም ፈቃደኛ ባለመሆን ከመጋቢት 7 ቀን 1996 እስከ መጋቢት 12 ቀን 1996 ዓ.ም. ድረስ በአራት መኪና አሸዋዬን ተመላልሰው የወሰዱብኝ ስለሆነ ጠቅላላ ዋጋውን ብር 30.000 (ሰላሳ ሺህ) ክሱ ካስከተለው ወጭና ኪሳራ ጋር እንዲከፍሉ ይወሰንልኝ የሚል ክስ በማቅረባቸው ነው፡፡ ፍ/ቤቱም ግራ ቀኙን አከራክሮ ከሳሽ ለክሱ ምክንያት በሆነው ቦታ ላይ የንግድ ፈቃድና ካርታ የተሰጠ ስለመሆኑ የተረጋገጠ ከመሆኑም በላይ 1ኛ ተከሳሽ /አመልካች/ አሸዋ የሚወጣበት ቦታ የእኛ ነው ከማለት በስተቀር ያቀረበው ማስረጃ ስለሌለና 2ኛ ተከሳሽም አሸዋውን መጫኑን ስላልካደ ኃላፊ ናቸው ብሎ በክሱ የተጠየቀውን ገንዘብ እንዲከፍሉ በመወሰኑና ጉዳዩን በይግባኝ የተመለከተውም የኦሮሚያ ጠቅላይ ፍ/ቤት በበኩሉ ግራ ቀኙን አከራክሮ የዞኑን ከፍተኛ ፍ/ቤት ውሳኔ በማጽናቱ አመልካች [የኢት መንገዶች ባለሥልጣን] መሠረታዊ የሕግ ስህተት ተፈጽሟል በማለት ቅሬታ በማቅረቡ ጉዳዩ ለሰበር እንዲቀርብ ታዟል፡፡

ይህ ሰበር ችሎትም በአመልካች በኩል የቀረበውን ቅሬታ መርምሮ አመልካች ክስ በቀረበበት ጉዳይ ኃላፊ ነው ተብሎ በክስ የተጠየቀውን ገንዘብ ለተጠሪ እንዲከፍል መወሰኑ ከአዋጅ ቁጥር 80/89 አኳያ የሰበር አቤቱታው ሊጣራ የሚገባ ሆኖ በማግኘቱ ተጠሪን በመጥራት ግራ ቀኙን አከራክሯል፡፡

ምላሽ ማግኘት የሚገባውም የክርክሩ ነጥብ አመልካች ለተጠሪ ክስ የቀረበበትን ገንዘብ ለመክፈል ይገደዳል ወይ የሚለው በመሆኑ ከሕጉ አኳያ እንደሚከተለው ተመርምሯል፡፡

የሥር ፍ/ቤቶች ለውሳኔያቸው መሠረት ያደረጉት ለክርክሩ መነሻ ምክንያት በሆነው የአሸዋ ማምረቻ ቦታ ላይ ለተጠሪ ከሚመለከተው መንግሥታዊ አካል የንግድ ፈቃድና ካርታ የተሰጠ ስለሆነና አመልካች በዚሁ የአሸዋ ማምረቻ ቦታ ባለመብት መሆኑን የሚያረጋግጥ ማስረጃ ያላቀረበ ስለሆነ ከተጠሪ ይዞታ ለተወሰደው አሸዋ በክስ የተጠየቀውን ገንዘብ ለመክፈል ይገደዳል በማለት ነው፡፡

በሌላ በኩልም የአመልካች መ/ቤትን እንደገና ለማቋቋም በወጣው አዋጅ ቁጥር 80/89 አንቀጽ 6/18 መሠረት ለአውራጎዳናዎች ግንባታና ጥገና እንደዚሁም ለመኖሪያ ለመሣሪያ ማሳረፊያና ለሌሎች አገልግሎቶች የሚያስፈልገውን መሬትና ድንጋይ ነክ ሀብቶች ያለክፍያ በነጻ እንደሚጠቀምና በሚጠቀምበት መሬት ላይ ለሚገኙ ንብረቶች በሕግ መሠረት ካሳ እንደሚከፍል ተመልክቷል፡፡ የአመልካች መ/ቤትም የተቋቋመው አውራጎዳናዎችን ለማልማትና ለማስተዳደር እንደዚሁም በመንገዶች ሥራ ወጥነትን ለማረጋገጥና የመንገድ አውታር በተቀናጀ መልኩ የሚያድግበትን አመቺ ሁኔታ መፍጠር እንደሆነ በዚሁ አዋጅ በአንቀጽ 5 ላይ ተመልክቷል፡፡

አመልካች የተቋቋመበትን ዓላማ ለማሳካት መሬትና ድንጋይ ነክ ሀብቶች በነፃ መጠቀም እንደሚችል በተጠቀሰው አዋጅ የተፈቀደለት እንደመሆኑ መጠን፣ ይህንኑ አዋጅ በመጥቀስ በኢሉባቦር ዞን ከፍተኛ ፍ/ቤት ክርክር ያቀረበ ቢሆንም በዝምታ የታለፈ ሲሆን፣ በኦሮሚያ ጠ/ፍ/ቤት በይግባኝ ክርክር ሲደረግ ፍ/ቤቱ በውሳኔው ላይ እንዳሰፈረው በይ/ባይ የተጠቀሰው ይሄው ሕግ አሸዋና ድንጋይ ሊጠቀም የሚችል መሆኑን የሚገልጽ እንጂ በይዞታነት ለሌላ

ሰው በተሰጠ የአሸዋ ማምረቻ መጠቀም እንደሚችል ስለማይገልጽ ሕጉ ለጉዳዩ አግባብነት የለውም በማለት ሳይቀበለው ቀርቷል፡፡

ይሁንና የአመልካች መ/ቤት የተቋቋመበት አጠቃላይ ዓላማ ለሀገርና ለጠቅላላው ሕዝብ ጥቅም መሠረት ልማትን በመላ ሀገሪቱ ለማስፋፋት እንደመሆኑ መጠን መሬትና ድንጋይ ነክ ሀብቶችን በነፃ መጠቀም እንደሚችል በሕግ ተፈቅዶለታል፡፡

አመልካች መሬትና ድንጋይ ነክ የሆኑ ሀብቶችን በነፃ ሲጠቀም በመሬቱ ላይ የሰፈረ ንብረት ካለ ለዚሁ ንብረት ካሳ እንደሚከፍል በተጠቀሰው አዋጅ ቁ. 80/89 6(18) ላይ ከመመልከቱ በስተቀር ለድንጋዩም ሆነ ለአሸዋው ገንዘብ መክፈል እንዳለበት አልተመለከተም፡፡

ከዚህም መገንዘብ የሚቻለው መሬትም ሆነ ድንጋይ ነክ ሀብት የተፈጥሮ ሀብት እንደመሆኑ መጠን የተፈጥሮ ሀብት ባለቤትነት ደግሞ መንግሥትና ሕዝብ እንደሆኑ በኢ.ፌ.ዲ.ሪ.ም ሆነ በክልል ሕገ መንግስታት በግልጽ የተንጸባረቀ ስለሆነ በተፈጥሮ ሀብት አጠቃቀም ረገድ መንግስትና ሕዝብ ባለቤት ከመሆናቸው አኳያ በነጻ የመጠቀም መብት ያላቸው መሆኑን ነው፡፡

ስለሆነም ተጠሪ ለክርክሩ ምክንያት የሆነው አሸዋ የሚገኝበት ቦታ የንግድ ፈቃድና ካርታ ከሚመለከተው መንግሥታዊ አካል የተሰጠው ቢሆንም፣ አሸዋ የተፈጥሮ ሀብት ከመሆኑ አኳያ በዚህ የተፈጥሮ ሀብት የባለቤትነት መብት የማይኖረው ከመሆኑም በላይ በክሱም የጠየቀው አሸዋውን ለመሰብሰብ የወጣ ወጭ ሳይሆን የአሸዋውን ዋጋ ስለሆነ ይህም የሕግ መሠረት ስለሌለው የኢሉባቦር ዞን ከፍተኛ ፍ/ቤትም ሆነ የኦሮሚያ ጠ/ፍ/ቤት የአሸዋውን ዋጋ አመልካች ለተጠሪ ሊከፍል ይገባል በማለት የሰጡት ውሳኔ የሕግ ስህተት ያለበት ሆኖ ተገኝቷል፡፡

<u>ው ሳ ኔ</u>

1. የኢሉባቦር ዞን ከፍተኛ ፍ/ቤት በመ.ቁ. 01451 በሚያዝያ 6 ቀን 1998 ዓ.ም የሰጠው ውሳኔ እንደዚሁም በይግባኝ የተመለከተው የኦሮሚያ ጠ/ፍ/ቤት በመ.ቁ. 42157 በመጋቢት 20 ቀን 1999 ዓ.ም የሰጠው ውሳኔ መሠረታዊ የሕግ ስህተት ስላለበት በፍ.ብ.ሕ.ሥ.ሥ.ቁ 348/1/መሠት ተሽሯል፡፡ ይፃፍ፡፡
2. አመልካች መሬትና ድንጋይ ነክ ሀብቶችን በነፃ ለመጠቀም በአዋጅ ቁጥር 80/89 አንቀጽ 6/18/ ላየ የተፈቀደለት ስለሆነ ለመንገድ ሥራ ለተጠቀመበት አሸዋ ለተጠሪ ካሳ ሊከፍል አይገባም ተብሎ ተወስኗል፡፡
3. ግራ ቀኙ ወጭና ኪሳራ ይቻቻሉ፡፡

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* * *

የሰበር መዝገብ ቁጥር 26130

የፌዴራል ጠ/ፍ/ቤት ሰበር ሰሚ ችሎት
የካቲት 4 ቀን 2000 ዓ.ም

አመልካች አቶ ገ/እግዚአብሔር ...

ተጠሪ ወ/ት ሰላማዊት ...

ከጋብቻ በፊት የሚሰት ወይም የባል ይዞታ በነበረ መሬት ላይ በጋብቻ ወቅት ቤት መሠራቱ በቤት ባለንብረትነት ላይ ስለሚኖረው ውጤትና ቤቱ የተሠራበት ቦታ አንደጋራ ይዞታ ተቆጥሮ ጋብቻ ሲፈርስ ለሁለቱ ወገኖች እኩል የሚካፈል ስለመሆን አለመሆኑ፡

(በአዋጅ ቁ. 33/91 የወጣው የትግራይ ክልል የቤተሰብ ሕግ አንቀፅ 85፣ መሬት የመንግሥትና የሕዝብ ንብረት እንደሆነ የሚደነግጉት የኢ.ፌ.ዲ.ሪ ሕገ መንግስት አንቀፅ 40/3 እና የከተማ ቦታን የመንግሥት ለማድረግ የወጣው አዋጅ ቁ. 47/67)፡፡

ተጠሪ የእናታቸው ወራሽ በመሆናቸው በሟች እናታቸው ስም የተመዘገበውን ቤት ተከሳሽ የያዙት ስለሆነ እንዲያስረክቧቸው ክስ አቀረቡ፤ ተከሳሽ ከተጠሪ እናት ጋር በትዳር ላይ አብረው የሠሩት በመሆኑ ለከሳሽ እና ለሌሎች ወራሾች የሚገባው የንብረቱ ግማሽ ብቻ ነው በማለት መልስ ሰጡ፡፡ ክሱ የቀረበለት የመቀሌ ዞን ከ/ፍ/ቤት አምስት ቤቶች ከጋብቻ በኋላ የተሠሩ ስለሆነ በተከሳሽና በወራሾች መካከል እንዲካፈሉ ሌሎች አራት ቤቶች ደግሞ ከጋብቻ በፊት የተሠሩ ስለሆነ ተከሳሽን ሳይጨምር ወራሾች ብቻ እንዲካፈሉ ወሰነ፡፡ የቦታ ይዞታን በተመለከተ የተጠሪ እናት ከጋብቻ በፊት ቤት የሠሩበት ቦታ ላይ የግል መብት ስለሌላቸውና ቦታው የመንግሥት ስለሆነ ወራሾች ከተከሳሽ ጋር እኩል መካፈል ከቻሉ እንዲካፈሉ ካልተቻለ ንብረቱ ተሽጦ ገንዘቡን እኩል እንዲካፈሉ ሲል ወሰነ፡፡

በአነስተኛ ድምፅ አንድ ዳኛ፣ ተከሳሽ መብት የሚኖራቸው በዚህ ቦታ ላይ ከጋብቻ በኋላ ለተሠሩት አምስት ቤቶች ግማሹን በተመለከተ ስለሆነ የዚህን ቤት ግምት በስተቀር ከጋብቻ በፊት የከሳሽ እናት ባረጋገጡት ቦታና ቤት ላይ መብት ሊኖራቸው አይገባም በማለት የቦታውን ክፍፍል ተቃወሙ፡፡

ይግባኝ የቀረበለት የትግራይ ክልል ጠ/ፍ/ቤት አነስተኛውን ድምፅ በመደገፍ ውሳኔ ሰጠ፡፡ አመልካች ለትግራይ ክልል ጠ/ፍ/ቤት ሰበር ሰሚ ችሎት አቤቱታ ቢያቀርቡም ተቀባይነት አላገኘም፡፡ የሰበር አቤቱታ የቀረበው ይህ ውሳኔ መሠረታዊ የሕግ ስህተት አለው በማለት ነው፡፡

ውሳኔ

1. የትግራይ ክልል ጠ/ፍ/ቤት ሰበር ችሎት እና የክልሉ ጠ/ፍ/ቤት ውሳኔዎች መሠረታዊ የሕግ ስህተት የተፈፀመባቸው ስለሆነ ተሽረዋል፡፡
2. የመቀሌ ዞን ማዕከላዊ ፍ/ቤት የሰጠው ውሳኔ በአግባቡ ስለሆነ ፀንቶአል፡፡ በዚህም መሠረት መሬት የመንግሥትና የሕዝብ ንብረት ስለሆነ በግል ሊያዝ ስለማይችል አመልካች ከጋብቻ በኋላ የሠሯቸው ቤቶች በዚህ ቦታ ላይ ስለሆነ በተጠሪ እናት ተይዞ የነበረውን ቦታ የመካፈል መብት አላቸው፡፡

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ዳኞች፡ *መንበረፀሐይ ታደሰ፣ ዓብዱልቃድር መሐመድ፣ ሐጎስ ወልዱ፣ ሂሩት መለሠ፣ ታፈሰ ይርጋ*

...

መዝገቡ ተመርምሮ ቀጥሎ የተመለከተው ፍርድ ተሰጥቷል፡፡

ፍ ር ድ

ይህ ክርክር የተጀመረው በትግራይ ክልል በመቀሌ ዞን ከፍተኛ ፍ/ቤት ሲሆን የአሁን ተጠሪ በአመልካች ላይ ባቀረቡት ክስ፣ የሚች እናቴ ወ/ሮ ድንቅነሽ ... ወራሽ ስሆን በአውራሽ ስም የተመዘገበውንና በመቀሌ ከተማ የሚገኘውን 10 ክፍል ቤት እኔ በማላውቀው ሁኔታ ተከሣሽ ይዞ በማከራየት ላይ ስለሚገኝ የ13 ወር የቤት ኪራይ በጠቅላላው ብር 35,000 /ሠላሳ አምስት ሺህ/ በመክፈል ቤቴን እንዲያስረክበኝ ይወሰንልኝ በማለት ጠይቀዋል፡፡

ተካሣሽም ቀርበው ለክሱ በሰጡት መልስ ከሳሽ የሚች ወ/ሮ ድንቅነሽ ... ልጅ መሆኗን እንደማይክዱ፣ ነገር ግን ከሚች ጋር በ1977 ዓ.ም ተጋበተን አብረን ስንኖር ልጆች የወለድን ከመሆኑም በላይ ክስ የቀረበበትንም ቤት አብረን ሠርተናል፡፡ የሚያከራክረው ቤትና ቦታ ግማሹ የራሴ ሲሆን ግማሹ ደግሞ የሚች ወ/ሮ ድንቅነሽ ... ስለሆነ ከሣሽ ከሌሎች ወራሾች ጋር በመሆን ድርሻዋን ብትካፈል አልቃወምም ብለው የቤት ኪራይን በተመለከተ ቤቱ በወር ብር 2000 /ሁለት ሺህ/ ይከራይ እንደነበረ አምነው ነገር ግን ከሰኔ 29 ቀን 1995 ዓ.ም. እስከ ጎዳር 1997 ዓ.ም ድረስ ያለውን ሚች በሕይወት እያለች በጋራ የተጠቀምንበት ሲሆን ቀሪውንም ከከሳሽ ጋር በጋራ ስለተጠቀምንበት ክሱ ያለአግባብ ስለቀረበ ሊሰረዝ ይገባል በማለት ተከራክረዋል፡፡

የግራ ቀኙ ክርክር በዚህ መልኩ የቀረበለትም የዞኑ ከፍተኛ ፍ/ቤት የግራ ቀኙን ማስረጃ ሰምቶ ክስ ከቀረበበት ቤት መካከል 5 ክፍል ቤት የከሳሽ እናትና ተከሣሽ በ1977 ዓ.ም. ከተጋቡ በኋላ በ1994 ዓ.ም. የተሰራ መሆኑ ስለተረጋገጠ ግማሹ የተከሳሽ ሆኖ ግማሹ ደግሞ ከሳሽን ጨምሮ ወራሾች እንዲካፈሉት ቀሪው 4 ክፍል ቤት ደግሞ ከመጋባታቸው በፊት መሠራቱ በማስረጃ ስለተረጋገጠ ከሣሽና ሌሎች የሚች ወራሾች እንዲከፋፈሉት በማለት ውሣኔ ሠጥቷል፡፡

እንደዚሁም ቤቱ ያረፈበትን የቦታ ይዞታ በተመለከተ የቦታው ስፋት በማዘጋጃ ቤት ደንብ መሠረት ለሁለት ለማካፈል የሚቻል ከሆነ ግማሹን ከሳሽና ሌሎች ወራሾች እንዲወሰዱ ቀሪውን ግማሽ ደግሞ ተከሣሽ እንዲወሰዱ፤ የማዘጋጃ ቤት ደንብ ቦታውን ለሁለት ለማካፈል የማይቻል ከሆነም ቤቱና ቦታው ተሸጦ ከላይ በተመለከተው ዓይነት ወራሾችና ተከሣሽ እንዲከፋፈሉ በማለት በአብላጫ ድምፅ ውሣኔ ሠጥቷል፡፡

የአነስተኛው ድምፅ ደግሞ ለክርክሩ ምክንያት የሆነው ቤት የተሠራበት ቦታ የከሳሽ እናት ወ/ሮ ድንቅነሽ ... ተከሣሽን ከማግባታቸው በፊት የነበራቸው ይዞታ ስለሆነ ተከሳሽ መብት የሚኖራቸው በዚህ ቦታ ላይ ከጋብቻ በኋላ ለተሠራው ቤት ግማሹን በተመለከተ ስለሆነ የዚህን ቤት ግምት ይዞ እንዲሄድ ከሚወሰን በስተቀር ከጋብቻ በፊት የከሳሽ እናት ባረጋገጡት ቦታና ቤት ላይ መብት ሊኖረው አይገባም የሚል ነው፡፡

ጉዳዩን በይግባኝ የተመለከተውም የትግራይ ክልል ጠቅላይ ፍ/ቤት በበኩሉ ግራ ቀኙን አከራክሮ በአብላጫ ድምፁ የተሰጠውን የከፍተኛ ፍ/ቤት ውሣኔ በመሻር የአነስተኛውን ድምጽ አጽንቷል፡፡

አመልካች በዚሁ ውሣኔ ቅሬታ አድሮባቸው የሰበር አቤቱታ ለክልሉ ጠቅላይ ፍ/ቤት ሰበር ችሎት ቢያቀርቡም መሠረታዊ የሕግ ስህተት አልተፈጸመም በማለት ችሎቱ አቤቱታውን ሳይቀበለው ቀርቷል፡፡

ይህ [የፌዴራል ጠቅላይ ፍ/ቤት] ሰበር ሰሚ ችሎትም የቀረበለትን የሰበር አቤቱታ መርምሮ ለክርክሩ ምክንያት የሆነውን ቤትና የቦታ ይዞታ ክፍፍል አስመልክቶ በትግራይ

ክልል ጠ/ፍ/ቤት የተሰጠው ውሣኔ አግባብነት ተጣርቶ ሊወሰን የሚገባው መሆኑን በማመኑ ተጠሪን በመጥራት ግራ ቀኙን አከራክሯል፡፡

በአጠቃላይ የክርክሩ ይዘት ከላይ የተመለከተው ሲሆን የሰበር አቤቱታውም እንደሚከተለው ተመርምሯል፡፡

ለክርክሩ ምክንያት የሆነው ቤት የተሠራበትን ቦታ የተጠሪ እናት ወ/ሮ ድንቅነሽ ... ከአመልካች ጋር ከመጋባታቸው በፊት ይዘውት እንደነበር በዚሁ ቦታም ላይ አመልካችን ከማግባታቸው በፊት 5 ክፍል ቤት ሠርተው እንደነበር ቀሪው 4 ክፍል ቤት ደግሞ ከአመልካች ጋር ከተጋቡ በኋላ እንደተሰራ በዞኑ ከፍተኛ ፍ/ቤት ክርክር ሲደረግ በማስረጃ ተረጋግጧል፡፡

በሌላ በኩልም በፌዴራሉ የቤተሰብ ሕግም ሆነ በአዋጅ ቁጥር 33/91 በታወጀው የትግራይ ክልል የቤተሰብ ሕግ አንቀጽ 85 መሠረት ከጋብቻ በፊት የነበረ የባልና ሚስት ንብረት የግል ንብረት እንደሚሆን የተመለከተ ቢሆንም የከተማ ቦታን የመንግሥት ንብረት ለማድረግ በወጣው አዋጅ ቁጥር 47/67 መሠረት የከተማ ቦታ በግል ባለቤትነት ሊያዝ እንደማይችል ከመደንገጉም በላይ በኢ.ፌ.ዲ.ሪ ሕገመንግሥት አንቀጽ 40/3 ላይ መሬት የመንግሥትና የሕዝብ ንብረት እንደሆነ ስለተደነገገ፣ [እንዲሁም] ግለሰቦች በመሬት ላይ የይዞታ መብት እንጂ የባለቤትነት መብት ሊኖራቸው ስለማይችል የተጠሪ እናት ቤቱ በተሠራበት ቦታ ላይ አመልካችን ከማግባታቸው በፊት የነበራቸው የይዞታ መብትም ቢሆን ከተጠሪ ጋር ከተጋቡ በኋላ በነበራቸው የቦታ ይዞታ ላይ ተጨማሪ ቤት እንዲሠራ በፈቀዱት መሠረት አራት ክፍል ተጨማሪ ቤት በጋራ ስለመሥራታቸው የተረጋገጠ በመሆኑ ጋብቻው በሞት ምክንያት ሲፈርስ አመልካች ከሚደርሳቸው ቤት በተጨማሪ በቦታው ላይ የይዞታ መብትም [ይገባቸዋል]፡፡ በዚሁ መሠረትም የዞኑ ከፍተኛ ፍ/ቤት ቦታውን ወራሾችና አመልካች በማዘጋጃ ቤት ደንብ መሠረት እኩል ለመካፈል የሚችሉ ከሆነ እኩል እንዲካፈሉት፣ እኩል ለማካፈል ካልተቻለም ተሸጦ ገንዘቡን በውሣኔው መሠረት እንዲካፈሉ በማለት የሰጠው ውሣኔ በአግባቡ ሆኖ ሳለ፣ የክልሉ ጠቅላይ ፍ/ቤት ይህንን ውሣኔ በመሻር በጋብቻ ጊዜ የተሠራውን ቤት የግማሹን የዋጋ ግምት አመልካች ሊወስድ ይገባል በማለት የሰጠው ውሣኔ በአግባቡ ካለመሆኑም በላይ የክልሉ ጠ/ፍ/ቤት ሰበር ችሎትም ይህንኑ ስህተት ሳያርም መቅረቱ የሕግ ስህተት ሆኖ ተገኝቷል፡፡

ው ሣ ኔ

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3. ግራ ቀኙ ወጭና ኪሣራ ይቻቻሉ፡፡

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MIZAN LAW REVIEW

ST. MARY'S UNIVERSITY COLLEGE

FACULTY OF LAW

Cultural Problems in Research and Publications

Source: *Reform Document on Legal Education and Training in Ethiopia (June 2006) § 2.4.1/A*

1. Lack of research, reading, and writing culture
   - Complacence with our work merely as teachers.
   - No sense of urgency about the need to engage in research and turn up research products.
   - No '*publish or perish*' attitude.
   - No attempt to work beyond the positive laws.
2. Lack of Institutional Commitment
   - In terms of budget, time, and resource allocation for R&P
   - In terms of reduction of teaching load or granting (Research Leave).
3. Lack of team spirit for Research and Publications
   a) Among staff members;
   b) Between staff and students;
   c) Lack of collaboration among institutions.
4. Lack of innovation in diversification of publications, and problems regarding spheres of focus in research.
5. Raising the stakes too high in assessing the quality of publishable manuscripts (despite) shortage of (such) manuscripts.
6. Lack of tradition of salvaging "distressed" manuscripts through sympathetic editing without compromising quality.
7. Weak consumption of research products in the legal professional community and in government institutions, and poor state of constructive feedback.
8. Inadequate attention to relevance of research to the real life or actual problems of the society.

Vision of law schools

Law schools shall have vision towards elevating the standard and quality of legal education to the level of leading law schools in other countries, and towards preparing graduates who will have optimum impact in Ethiopia's development, democracy, good governance and social justice.

Mission of law schools

Law schools shall promote the intellectual and social conditions of Ethiopia by providing equitably accessible quality legal education and training programs through teaching, research and service to prepare competent and responsible members of the legal profession who actively contribute towards rule of law, democracy, human rights, good governance, social justice, equality, tolerance and development.

Source: **Ethiopian Legal Education and Training Reform Document (June 2006)**

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