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Articles:

Conceptual Foundations of Property Rights: Rethinking *De Facto* Rural Open Access to Common-Pool Resources in Ethiopia

Human Rights under the Ethiopian Constitution: An Overview

Legal Pluralism, Sharia Courts and Constitutional Issues in Ethiopia

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Notes Corner
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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.

CONCEPTUAL FOUNDATIONS OF PROPERTY RIGHTS:

RETHINKING *DE FACTO* RURAL OPEN ACCESS TO COMMON-POOL RESOURCES IN ETHIOPIA

Elias N. Stebek ♣

Abstract

This article, *inter alia*, attempts to highlight some major concepts and theories on property and the rationales and elements of property rights. It also briefly deals with the distinction between property rights on the stock of resources and its flows, and indicates the downsides of open access in the *efficient* utilization and *sustainability* of common-pool resources. Where *de jure* public property becomes *de facto* open access, certain common-pool resources in the rural areas of Ethiopia (such as forests) are exposed to encroachment, unlawful logging and overgrazing. The article attempts to show that it is usually impossible to effectively exclude persons from the use and overconsumption of common-pool resources in Ethiopia in the absence of well-defined and effectively implemented public property regime, or unless the property rights of indigenous communities and collectives such as peasant associations are duly recognized and clearly defined so that the right holders can have vested interest in the preservation, protection and development of these resources.

Key words:

Property rights, rural open-access, common property, public property, common-pool resources, Ethiopia.

Introduction

According to Article 40(3) of the Constitution of the Federal Democratic Republic of Ethiopia, "the right to ownership of rural and urban land, as well as natural resources is exclusively vested in the State and in the peoples of Ethiopia" and "shall not be subject to sale or to other means of exchange." One of the fundamental issues that can be raised in relation to public property of rural land and natural resources is whether it has the impact of open access to a significant part of these resources. Addressing this issue is essential because publicly owned resources can be susceptible to *de facto* open access where the

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law either does not adequately recognize the collective land rights of communities (who traditionally claim customary exclusive rights) or peasant associations, or where it becomes unable to effectively control access or exclude withdrawals of resources (such as trees).

Sections 1 and 2 deal with the emergence of property and highlight some theories including Hobbesian, Lockean and Marxist conceptions of property. Section 3 briefly discusses the rationales, categories and key attributes of property rights. It highlights the range of entitlements to property rights in relation to access, withdrawal, management, exclusion and alienation. The section also briefly presents the elements of assurance, duration and breadth as attributes of property rights. Section 4 deals with the distinction between property rights on the stock of resources and its flows, and it briefly addresses the risk of overconsumption in common-pool resources with particular attention to the tragedy of the commons, the downsides of open access and the modes of ownership that are in tune with the efficient utilization and sustainability of different types of common-pool resources. And finally, Section 5 discusses the necessity of rethinking whether a significant part of publicly owned resources in rural Ethiopia have become open access.

1. Social Evolution and First Appropriation as Sources of Property

Finnis notes that title deeds were not attached to land and other focal instances of property[1] when these resources came to existence. The notion of property was attached to these resources in the course of socio-economic evolution. Pre-modern conceptions of property were predominantly communitarian and they were influenced by the custom and values that prevailed for many generations.

The notion of land ownership was unknown to earlier human societies of hunter-gatherers. In light of the sparse population and abundance of resources, "no individual could possibly care much for any particular spot of ground".[2] Hunters needed extensive areas for their means of subsistence which can now be considered as "large enough [for the subsistence of] many thousand agriculturalists".[3]

As hunter-gatherers gradually started domestication of animals, and eventually "became shepherds feeding herds which they had previously tamed"

[1] John Finnis (1980), "Natural Law and Natural Rights" at 187 n. 30. (in Gary Chartier, 2009, *Economic Justice and Natural Law* (Cambridge University Press), p. 32.
[2] Thomas Hodgskin (1832), *Natural and Artificial Right to Property Contrasted* (Republished by Augustus M. Kelley. Publishers, Clifton, 1973), p. 64
[3] *Ibid.*

they still needed "extensive territories, though not equal to those required by the hunters".[4] After the emergence of agriculture, however, "a comparatively small space sufficed to supply each one with the means of subsistence", and it is mainly after this period that people "fixed their habitations, and around them fixed landmarks, each one appropriating as much land" as was necessary to "supply his family with food."[5]

The acquisition of land in Europe until the downfall of the Roman Empire, for example, was limited to the needs of the family and the ability to cultivate until the Empire's northern conquerors introduced their pre-agricultural "habits of life" to land appropriation. Even if agriculture continued in the Roman Empire, the new rulers kept their habits of having herds of cattle and swine. As "each chief required a large space to supply himself and his family and followers with food," land was appropriated "not according to what quantity each man could dig by his hand, but rather according to the quantity his horse could gallop around".[6]

Various views are forwarded regarding why and how property rights in land emerged. The major views include the factor of efficiency (and transaction cost) and the principle of first appropriation.

1.1- Factors of efficiency and transaction cost in the genesis of property

Demsetz discusses the impact of commercial fur trade in the indigenous communities of North America and he states that exclusive property rights emerged owing to the adverse impact of overhunting under the setting of open access. Under such circumstances, there is the need for well-defined rights with regard to access, use, control, withdrawal and alienation along with the subsequent duties of protection and development of the resources.

Demsetz[7] states the absence of private ownership in land in various communities which hunted for food. In these communities, the same act of hunting by others (i.e. externalities) does not affect the needs of every member of a community to hunt for subsistence as long as the resources are abundant and other variables remain unchanged. Demsetz used the studies conducted in North American communities for his analysis. He observes that after the emergence of commercial fur, there was an increase in the value of furs which

[4] *Ibid*.
[5] *Ibid*, p. 65.
[6] *Ibid*, p. 71, for the quotes in the paragraph.
[7] Harold Demsetz (1967), "Toward a Theory of Property Rights", *The American Economic Review*, Vol. 57, No. 2, Papers and Proceedings of the Seventy-ninth Annual Meeting of the American Economic Association. (May, 1967), pp. 347-359.

led to a sharp increase in the scale of hunting. This caused the quest for private hunting territory. Allotted territories thus emerged and the fur trade encouraged "the husbanding of fur-bearing animals" and this "requires the ability to prevent poaching and this, in turn, suggests that socioeconomic changes in property in hunting land will take place."

Withdrawals from common pool resources mainly incur benefits and the cost involved is minimal. However, when a person resorts to excluding others from a given resource, guarding the resources, having fences where necessary, etc, involve cost. Demsetz argues that "property rights arise when it becomes economic for those affected by externalities to internalize benefits and costs." He defines communal property, private property and state property, and then states that the development of private property involves the community's recognition of "the right of the owner to exclude others from exercising the owner's private rights."

After discussing the problems inherent in community ownership regarding the prudent management and development of resources, Demsetz highlights the benefits and downsides of private ownership. Demsetz further shows the merits of share companies that can mobilize resources without raising transaction and policing cost in economies of scale which would have been the case in communal ownership. This is so because owners cannot participate in all decisions thereby making it necessary to delegate a small group to be in charge of management "in recognition of the high negotiating costs that [it] would otherwise obtain." The distinction that Demsetz makes between communal ownership and the rights of shareholders in a company is that in the latter case "[t]he shareholders own their shares, and the president of the corporation and possibly a few other top executives control the corporation."

Krier[8] builds up his analysis from Demsetz's views. Even if he criticizes Demsetz in some respects, he admits that in communal ownership "any commoner who exploits the resource gains all the benefits of doing so for himself, whereas the costs spill over onto everybody," and on the contrary, "individual rights, where each member of the community is entitled to a separate resource packet, to the exclusion of other members, concentrates costs and benefits and thus creates constructive incentives." Krier also appreciates Demsetz's contribution in demonstrating "how individual holdings reduce the transaction costs of the negotiation process by reducing the number of people who have to negotiate." He further states that Demsetz, "had sought only to

[8] James E. Krier (2009), "Evolutionary Theory and the Origin of Property Rights", *Cornell Law Review*, Vol. 95, pp. 139 – 159

suggest a positive theory that property rights develop in response to costs and benefits."

According to Bentham, the concept of property "consists in an established expectation" to draw "an advantage from the thing possessed" and secondly Bentham believed that "… this expectation, this persuasion, can only be the work of law." Krier does not agree with Bentham's second element of property rights because *de facto* property rights existed thousands of years before the existence of any formal law.

Krier raises the question whether the evolution of the concept of property emerged as an *intended design* or through the spontaneous unfolding of *unintended consequences*. He illustrates changes without design by using Adam Smith's notion of the '*invisible hand*' in the market place where every individual "intends only his own gain," yet is "led by an invisible hand to promote an end which was no part of his intention."

After having indicated that Demsetz mainly deals with the WHY aspect of the emergence and coalescence of property, Krier discusses HOW property emerged. He briefly highlights the views of Hobbes and Locke on the emergence of private property and supports Hume's views on the gradual emergence of private property which ultimately acquired formal enforcement "by a slow progression, and by our repeated experience of the inconveniences of transgressing it." He further contrasts Hume's view that private property is unnatural to human beings with the views of many biologists who argue that "deference to possession is the result of biological evolution." Krier states that possession "provides a clear indication of the status of any claimant." Moreover, he cites Sugden and Locke regarding the human tendency to respect the earlier expenditure of effort, some labour, by the possessor; and he also mentions "the biological evidence suggesting "that humans, like other animals, have some 'innate sense of possession and territory'."

Krier does not consider property rights as outcomes of an intended design; nor does he believe that they are entirely spontaneous and unintended. Krier indicates the shortcomings of the *intentional-design approach* (albeit its account for the creation and enforcement of property rights) because "it entails the difficult task of accounting for the origins and actions of the designer and implies a degree of human rationality that probably had not yet developed by the time the first primitive property rights emerged." He also states two limitations involved in the *unintended consequences approach*. First, there is the assumption of deference by members of the community owing to abundance of resources, and secondly this approach "cannot account for anything beyond very simple property rules because the asymmetries on which it depends must be crude in order to be effective."

Krier notes the match up in "the strengths and weaknesses of the two approaches" and he states that "[w]hat the first approach does well, the second does not; and what the second approach does well, the first does not." In effect, he suggests that the two approaches can be combined based on which he constructs a sketch of the development of property. He forwards the sketch in the development of property "in the context of a rough timeline of human evolution" with a long evolutionary development mainly as unintended and ultimately evolving towards legally enforceable rights which emerged along with the advent of the state, nation states and legal systems. Meanwhile, Krier underlines that as centuries rolled on, more and more population was competing for resources which could have hardly been facilitated by informal deference to possessions.

There have been various views regarding the underlying factors in the emergence of private property. Engels[9] discusses the evolution of the family, private property and the state. He states that private property came into being in the course of the labour inputs of human beings in taming animals, handicrafts and agriculture. He also discusses the phases undergone in the transformation of property rights and the resultant emergence of exchange, land ownership and enhanced production which led to the emergence and consolidation of classes, the state and a legal regime with strong enforcement schemes.

Merges[10] states three major theories of property, namely: the labor theory of property (John Locke *et al*), the transaction-cost approach (Demsetz *et al*), and institutional theories of property (Rose[11] *et al*). According to Merges, property rights have significant roles in contract formation and enforcement of contracts. He argues that that transactional role of property "is growing in importance, as the 'new economy' ushers in a more transaction-intensive industrial structure featuring greater numbers of smaller, more specialized firms."

1.2- The principle of first possession (Appropriation)

The Ethiopian Civil Code envisages four modes of acquiring ownership, namely *occupation*, *possession in good faith*, *accession* and *usucaption*.[12] The first two

[9] Frederick Engels (1884), *The Origin of the Family, Private Property and the State* (Chapter IX Barbarism and Civilization)

[10] Robert P. Merges (2005), "A Transactional View of Property Rights", *Berkley Technology Law Journal*, Vol. 20, pp. 1477-1489, 1519-1520

[11] Carol M Rose (1985), "Possession as the Origin of Property", *The University of Chicago Law Review*, Vol. 52, No. 1. (Winter, 1985), pp. 73-88.

[12] The provision on usucaption, i.e. Article 1168 is largely outdated because of public ownership of land since 1975, other than its probable relevance towards analogous application for certain possessory claims.

modes solely apply for movables while the latter applies to immovables. Accession, however, applies to both categories of property. Occupation, possession in good faith and usucaption are manifestations of the principle of possession or appropriation, whereas accession (Arts 1170-1182) raises the issue of ownership of a *stock and its flows*.

Acquisition of ownership by *occupation* may be preceded by the hitherto non-appropriation of a certain property (*res nullius*) or by the abandonment of property by its former owner (*res derelictae*). The Ethiopian Civil Code makes a distinction between '*things without master*' (Articles 1151-1153), and '*things found*' (1154-57). The former provisions imply *res nullius* while the latter apply to *res derelictae*. However, Article 1157 allows recovery of the object by owner thereby allowing acquisition only in the case of abandoned chattels.

The exceptions to the rules that enable the finder to acquire ownership rights are treasures[13] and antiques. While the treasures "become the property of the owner of the land"[14] who is required to provide a reward to the finder, special laws shall apply to archeological excavations and antiques.[15] These modes of acquisition of ownership show that the *principle of first possession* (also known as *the rule of first appropriation*) applies to things that are not formerly owned. In the case of *res derelictae*, as well, the same principle applies because the acquisition of ownership occurs as a result of abandonment of the right by the former owner.

---

[13] According to Article 1159 (3), "[t]hings of which nobody can be shown to be the owner shall be deemed to be treasures where it appears certain, at the time of their discovery, that they have been buried or hidden for not less than fifty years." The finder of such treasures "is entitled to a reward of one half of the value of the treasures" (Art. 1159/2) while the treasure becomes "the property of the owner of the land or [the] thing in which it was found" (Art. 1159/1). French law on acquisition of ownership of a treasure found is nearly identical with the stipulation under Article 1159 of the Ethiopian Civil Code. Article 716 of the French CC reads:

> Ownership of a treasure trove belongs to him who discovers it on his own tenement; where a treasure trove is discovered on another's tenement, one half of it belongs to him who discovered it, and the other half to the owner of the tenement.
>
> A treasure trove is any hidden or buried thing of which nobody can prove ownership and which is discovered by a mere chance.

[14] The land law regime is different from the one that existed during the promulgation of the Civil Code, and it is arguable whether the treasures found under a certain building belongs to the owner of an immovable, or to the state because land is currently under public ownership in Ethiopia.

[15] Civil Code, Art.1160.

The second category of ownership under the Civil Code is *bona fide purchasing*.[16] It is referred to as '*possession in good faith*' and it considers 'possession' as a crucial factor towards the acquisition of ownership. Unlike the former mode of acquiring ownership (i.e. occupation), the person who aspires to acquire ownership ought to take possession of the thing, and should also in good faith believe that the seller owns the thing. Moreover, the *bona fide* buyer ought to have entered into the contract for consideration (such as payment of price). One may thus say that *bona fide* purchasing does not constitute a paradigm example of acquisition of ownership through 'the principle of first possession.'

The typical modes of acquiring ownership through priority in possession (of things that are *res nullius* or *res derelictae*) envisage abundance of resources whereby members of a relatively sparse population will be able to (individually or in group) occupy, possess and own resource systems or their fruits. The rule of first possession thus seems to be feasible in legal regimes where the resources that are available for capture and possession are significantly wide or where state regulation of access to such resources seems difficult or unlikely.

> The rule of first appropriation ('first come, first served'; 'finders, keepers') is firmly rooted in Western legal culture and social practice. Also in state of nature situations, such as the allocation of parking places on the street and seats in a restaurant, people regard it as natural that the first occupant should be respected. Probably the possessive advantage explains a lot of this spontaneous attitude.
>
> Legal rules, endorsing first appropriation, are often considered as expressions of a democratic and egalitarian spirit. Everyone has an equal chance at the start, without regard to his class-status, race or religion. [17]

For example the *American Homestead Act* of 1862 "was applicable to the vast territories, west of the Mississippi-Missouri" and it "allowed families to claim 160 acres of land, a surface considered as sufficient to feed a large farmer's family." The Act required "the payment of ± 10 dollars and the uninterrupted occupation of the claimed land during five years" based on which "the claimants obtained a valid title."[18]

Bouckaert cites Gaius[19] and states that "[u]nder *Roman law*, first appropriation (occupation) was possible for goods which did not belong to anybody (*quae antea nullius erant*), such as wild animals, for goods taken from

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[16] Civil Code, Arts 1161-1167.

[17] Boudewijn Bouckaert (1999), "Original Assignment of Property Rights," Encyclopedia of Law and Economics, 1100, <http://encyclo.findlaw.com/1100book.pdf>, p. 3 (Accessed: 29 September 2010)

[18] *Ibid*

[19] Gaius 2, 66; see D. 41, 1,1,1-7; D. 41,7,1. Van Oven, 1948 [in Bouckaert, *Ibid*]

enemies (*quae ex hostibus capiuntur*), for abandoned goods (*res derelictae*)."[20] The French Code of 1804 does not give much emphasis to the rule of first appropriation although prescription, as one of the grounds of acquisition of ownership under French law, envisages possession for a certain period of time as stipulated in the law. According to Article 712 of the French Civil Code, ownership is, *inter alia*, "acquired by accession or incorporation, and by prescription."

2. Hobbesian, Lockean, Marxist and Hegelian Conceptions of Property Rights: An Overview

The perspectives that are forwarded above can further be substantiated by various theories on property rights. Such theories include the Hobbesian theory of the sovereign, Locke's labour theory of property, the Marxist negation to private property and the Hegelian notion of a person's rights over objects.

The Hobbesian, Lockean and Marxist conceptions of property, *inter alia*, represent a spectrum of positions regarding the role of the state in the assignment of and the respect for property rights. While the Hobbesian conception regards the state as the fountain of property rights, Locke considers individuals not as passive subjects but as citizens with inalienable rights including the right to property, subject to the conditions which he attaches to private property. The Marxist notion of property, on the other hand, negates Locke's position, and is meanwhile different from the Hobbesian conception because reassignment of rights in land, for example, targets at redistribution of land to tillers, collectives and state-farms and not to other landlords or proprietors.

2.1- Hobbesian conception of the absolute sovereign

Thomas Hobbes lived during the most turbulent years of European history, and needless-to-say, his views in *Leviathan* were influenced by the realities that prevailed during the English civil wars in 1642-46 and 1648-49. According to Hobbes,[21] human beings are naturally egoistic, quarrelsome and distrustful. He believed that human beings seek peace in the absence of which they resort to war, and are also willing to set aside their rights to the extent that others do the same. This, according to Hobbes, leads to the setting up of some civil power and the reduction of wills to a single will by giving part of the power of human beings under a given state to one man, or one assembly of men. In the realm of

[20] Bouckaert *(ibid*) indicates that "a rule of first appropriation concerning unowned things such as wild animals" is upheld by the common law and "as is illustrated by the famous case of *Pierson v. Post* (3 Cai. R., 175, N.Y. Supreme Court, 1805 -…)."

[21] Thomas Hobbes (1651), *Leviathan*.

property rights, the sovereign "determines the rules that tell every man what goods he may enjoy and what actions he may do."

The Hobbesian conception that considers citizens as "subjects" of the sovereign was manifested in the 1931 Ethiopian Constitution which considered all Ethiopians as the Emperor's subjects. Article 27 (under Part I of the Constitution) guarantees private property subject to provisions of the law. Article 74 (of Chapter 8) of the 1931 Constitution recognizes the private ownership over all land possessed by the Emperor and the Imperial family (and further property that they may purchase in the future) and it further guarantees the inheritance of their estate by descendants. Article 75 recognizes the rights of the nobility, governors and all Ethiopians to the ownership of their possessions and to the property they would buy after the promulgation of the Constitution. In short, the 1931 Constitution recognized the possession of the Imperial Family, the nobility, governors and Ethiopians at large and it guarantees the acquisition of ownership to the possessions that existed before the Constitution. The preamble and Article 1 (i) of the Imperial Order (issued on November 3rd 1955),[22] for example, indicate the power of the Emperor in the allocation of land.

2.2- Locke's labour theory of property

John Locke [23] lived through a period of European history which witnessed post-Westphalian decades of nation-state building and the emergence of constitutional monarchy that gradually developed after the Glorious Revolution of 1688-1689. His theory of the state was liberal and anti-authoritarian which

[22] The Imperial Order reads as follows:

"*Conquering Lion of the Tribe of Judah*
Haile Selassie I
Elect of God, Emperor of Ethiopia

Whereas, it has always been Our duty to promote the agriculture and commerce of Our people in order to advance their prosperity and well-being; and

Whereas, on the 23rd of Tekemt 1945 upon Our own motion We granted in full ownership of one-third of a gasha of land to those who were then in occupation of Maderia land; …

…

Now therefore, on this occasion of the Silver Jubilee of Our Coronation: We order as follows:

1. (i) We do hereby terminate all services such as monthly special constable duties which are rendered by those who are in occupation of Maderia land and We *Do Now Hereby Grant* as extension of Our grant of 23rd Tekemt 1945, in respect of the remaining two-thirds of Maderia land of the occupants thereof to enjoy full ownership of them as *rist* ."

[23] John Locke (1689), *Two Treatises of Government.*

opposed divine rule and defended private property. Labour, according to Locke, justifies private property and the consent of people determines the limits of government authority. He underlines that human beings are born free and equal. Locke states the scarcity of resources such as land as population increases and the inadequacy of moral and social schemes of punishing transgressors thereby necessitating a *social contract* towards the formation of a constitutional government with expressly defined rights and obligations.

Locke supports private property on the ground that a person has the right to everything that is necessary for self-preservation. Locke rejects the idea that persons are subjects of a sovereign, and argues against the view that only one universal monarch should have property. Moreover, Locke does not accept the divine right of kings. His premises indicate that everyone owns his own person and whenever one mixes up his/her labour with natural resources, others will have no right to it thereby rendering it private property. The first limitation to this relates to the *Lockean Proviso*, which requires that "*enough and as good*" ought to be left in common to others. And secondly, one cannot take what will not be used or things that will be wasted (spoiled).

However, one can argue that Locke's argument does not deal with the potential gap between the actual value of a thing and the amount of a person's labour inputs. Under Locke's *social contract*, people give up a certain portion of their liberty, accept civil society and will subject themselves to political power, while one of the core functions of government becomes the preservation of private property. Carole Rose[24] summarizes Locke's *labour theory of property* and *Consent theories of property* and then explains the possession/occupation theory which she critically analyzes. She criticizes the crucial role that the act of possession and occupancy are given in the acquisition of property.

Locke's view of private property evokes the dilemma involved between Locke's premise about the common heritage of resources and the individual appropriation of scarce resources. Hubin[25] briefly states the lines of argument in Locke's theory of property as discussed in *Two Treatises of Government*. In §25 Locke holds that the world initially belongs to everyone in common and this is justified "by appeal to natural law, which Locke believes knowable by reason, and to scripture." Section 26 of Locke's Treatise envisages means of appropriating "portions of the fruits of the Earth for private use without the

[24] Rose, *supra* note 11, pp. 73-88.

[25] Hubin, Donald C. (2003), *Locke's Theory of Property*, Lecture Sketch, <http://people.cohums.ohiostate.edu/hubin1/ho/Locke%20Theory%20of%20Property.pdf> (Accessed: 15 September 2010).

consent of all." However '*consent of all'* is required under§193 to use something held in common. This may lead to an absurd conclusion that it is "impossible to get the consent of all to the use of the fruits of the Earth" (§28) so long as a resource is held in common.

According to Locke's *Labour Theory of Acquisition,* the appropriation is justified if one mixes his/her labour on the fruits of the Earth (§27) "which were formerly unowned." Locke further states limits to acquire fruits of the Earth such as the condition that "[o]ne may acquire only as much as one can use without spoilage" (§31 & §37), and the "Sufficiency Limitation--also called *The Lockean Proviso* (§27 & §33)" which requires a person to "leave *enough and as good* in common for others."

Hubin indicates that these limitations are overcome with the introduction of money, because it "allows the practical possibility of wage labor;" and "[i]f you employ wage labor, then the work of your employees is *your* labor (§85). Moreover, "[t]he spoilage limitation is overcome because the introduction of money allows the practical possibility of any commodity being converted into a nonperishable commodity; such commodities can be hoarded at will (§50)." With regard to the sufficiency requirement Hubin notes the following:

> By allowing the practical possibility of wage labor, the introduction of money allows us to get around the sufficiency requirement. The justification for the sufficiency requirement is that each must be able to sustain his/her life through his/her productive efforts. With the introduction of wage labor, the existence of common resources is not necessary for this. Hence, we satisfy the underlying rationale for the sufficiency limitation.

Hubin indicates the dilemma in Locke's views: On the one hand, the literal interpretation of the Locke's views does not justify "most of the appropriations that have taken place in recent times" because "there has not been enough and as good left in common for others." He thus suggests reinterpretation of the *Lockean Proviso* because "it would appear that all Locke can justify is a *"Value Added Theory of Acquisition*." According to Hubin, such reinterpretation "may well justify some private ownership of natural resources, but it will probably not justify perpetual ownership of such resources (at least without labor being perpetually invested in it)."

2.3- Proudhon and Marx

Hubin contrasts Locke's views on private property with Proudhon's position in favour of possession rather than full private ownership. The rights related to property involve entitlements such as *use* rights, *exclusion* rights, a combination of both in the form of *usufructory* rights, and *full ownership* rights. Hubin shows that natural rights only justify the right to use, and he also notes that "[t]he argument concerning the "*tragedy of the commons*" and the *efficiency of private*

use of resources justify, at most, *exclusion rights*. The conclusion drawn by Hubin is the following:

> Proudhon is charging Locke with committing a fallacy called "false dichotomy". That is, according to Proudhon, Locke presents us with two systems, fully common property and full proprietary ownership, as if they are the only two alternatives when, in fact, there are others.

Proudhon's book "*What is Property: An Inquiry into the Principle and Right of Government*"[26] deals with the distinction between full proprietary rights (which Proudhon) rejects and the right to use. Pierre-Joseph Proudhon is known for his two famous phrases "*slavery is murder*" and "*property is theft*". He does not discard the notion of property altogether, but makes a distinction between *personal property* as applied to the possessions obtained from one's labour and what he, in the context of the scarcity of resources, regards as *private property* beyond one's needs.

Marx regards *private property* as "the product, the necessary result of *alienated* labour, of the external relation of the worker to nature and to himself". Marx[27] and Engels[28] argue that capitalism has brought about the polarization of classes into the bourgeoisie and the proletariat (as opposed to the aspirations of 1789 French Revolution towards *liberty*, *equality* and *fraternity*). They note that property relations (and other elements of the superstructure that includes laws) are determined by the forces of production that will inevitably be accompanied by production relations that change in conformity with changes in production forces.

Marx and Engels state that every stage of social development has its own *mode of production* which is characterized by two elements. The first element relates to *the means of production* which refers to "the material means of production, the hardware, tools, machines, buildings, workers, etc."), while the second element involves the *relations of production*, i.e. the "property relations under which a society produces, manufactures, and exchanges products." According to Marx's *Das Capital*, capitalism brings about *social production* which becomes contradictory with *private appropriation;* and this contradiction

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[26] Pierr-Joseph Proudhon (1840), "*What is Property: An Inquiry into the Principle and Right of Government*," Chapter II- Property considered as a Natural Right. — Occupation and Civil Law as Efficient Bases of Property. Definitions.

[27] Karl Marx, *Economic and Philosophical Manuscripts*, First Manuscript, Translation by T. B. Bottomore, [in E. Fromin, *Marx's Concept of Man* (New York, Frederick Utigar Publishing Co. 1961)].

[28] Karl Marx and Frederick Engels (1848), *The Communist Manifesto* (Proletarians and Communists).

can only be resolved through *social appropriation* which necessitates the abolition of private property of the means of production.

Marxism has clearly influenced the property rights regime under the Proclamation to Provide for the Public Ownership of Rural Lands (Proclamation No. 31/ 1975) and the proclamation that nationalized urban land and extra urban houses (Proclamation No 47 of 1975). The notion of public ownership embodied in these proclamations was also embodied in the 1987 PDRE (People's Democratic Republic of Ethiopia) Constitution and various laws. Article 1(3) of the 1987 PDRE Constitution expressly states that Ethiopia shall march from a National Democratic Revolution to Socialism, and Article 6 declares that the Ethiopian Workers Party pursues Marxism-Leninism and shall be the ruling party. Articles 9 to 18 of the PDRE Constitution indicate the economic system, and Articles 11 and 12 state that central planning and socialist ownership of means of production will be pursued which includes ownership by the state, cooperatives and private ownership.

Marxist approaches to property rights also seem to have a significant influence on Article 40 of the 1995 FDRE (Federal Democratic Republic of Ethiopia) Constitution, and in particular sub-Article 3 which provides that "[t]he right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia." The provision further states that "Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange." Sub-Articles 4 & 5 guarantee the right of peasants and pastoralists.

Meanwhile, sub-Article1of Article 40 of the FDRE Constitution[29] guarantees private property. The influence of John Locke's labour theory of value is apparent in sub-Article 2 which defines private property as:

> "any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common."

Locke's labour theory of value is also reflected in Article 40, sub-Article 7 of the Constitution which defines the rights of individuals in immovable property.

The issue that arises at this juncture is whether a certain legal regime can be equally Marxist and Lockean at the same time. Although a spectrum of

[29] Sub-Article 1 reads "Every Ethiopian citizen has the right to the ownership of private property. Unless prescribed otherwise by law on account of public interest, this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise."

synthesis in this regard can be observed in the property law regimes of various countries, the Marxist influence in Article 40 of the FDRE Constitution seems to be predominant even if Lockean conceptions are reflected in the provision. Moreover, the Hobbesian approaches to property can also be manifested in various property regimes depending upon the magnitude of unlimited power of the state to assign and reassign property rights.

2.4- Property and personhood: Hegel and Radin

Radin[30] relates property with *personhood* and she gives examples of objects to which a person can feel attached. She believes that "people possess certain objects they feel are almost part of themselves" and that such objects "are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world." Radin states that the type of the objects we feel attached to can vary among different persons and indicates "a wedding ring, a portrait, an heirloom, or a house" as common examples. Evans[31] summarizes Radin's views as follows:

> The article concludes with three summarizing propositions. (1) Some conventional property rights should be preserved as personal. (2) Personal property is *prima facie* protected against interference from government and fungible property interests. This is strongest where the personal property is necessary to become a fully developed person. (3) Fungible property should *prima facie* yield to personhood interests not embodied in property.

Evans raises the question whether a person is entitled to own more and more property "which can then become bound up in [his/her] person." The question raised by Evans also relates to how different would "the end result of the personhood perspective" be "from that envisioned by Marx, where personal property exists but to a large extent must give way to other interests?"

This personhood perspective to property traces its roots to Hegel's conception of human beings as the soul of nature. According to Hegel, "[a] person has the right to direct his will upon any object, as his real and positive end" and "the object thus becomes his".[32] He argues that as the object "has no

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[30] Margaret Jane Radin (1982), "Property and Personhood", 34 *Stan. L. Rev*. 957 (1982).

[31] Evans, Keith (2010), *Reading Introduction:* Margaret Jane Radin, "Property and Personhood", February 26, 2010. <http://faculty.law.ubc.ca/harris/documents/propertytheory/student%20comment/Evans%20intro%20Radin.pdf> (Accessed: 20 September 2010).

[32] Hegel, G.W.F. (Berlin, 1840), *Philosophy of Right,* Translated by S.W Dyde (Kitchener: Batoche Books), 2001, §44, p. 57.

end in itself, it receives its meaning and soul" from the will of persons, and "Mankind has the absolute right to appropriate all that is a thing."[33]

Marx criticizes this view on the ground that Hegel's position leads to the assumption that "every human being must be a landowner, in order to become a real individual" and that private ownership which is a "definite social relation of man as an individual to nature" has become "an absolute right of man to appropriate all things." Marx further notes:

> …[t] the individual cannot maintain himself as a landowner by his mere 'will' against the will of another individual, who likewise wants to become a real individual by virtue of the same strip of land. It definitely requires something other than goodwill. Furthermore, it is absolutely impossible to determine where the 'individual' draws the line for resisting his 'will' – whether the will requires for its realization a whole country, or whether it requires a whole group of countries by whose appropriation 'the supremacy of my will over the thing can be manifested.' Here Hegel comes to a complete impasse. …[34]

Property rights are *rights in rem* that must be respected by all persons that are subjects of a given legal system. On the other hand, *right in personam*, such as the right that a person has in relation to the performance of a contractual obligation, applies to a particular person or a group of persons. Hegel's views seem to have given more emphasis to the relationship between the subject of rights (i.e. the owner) and the object of ownership (i.e. the thing or object owned) rather than the relationship between the person who owns an object and all persons who are duty-bearers to respect the right of the owner.

Hohfeld considers each *right in rem* (right over a thing) as the "multitude of more or less identical individual rights, each of which is held by the right in rem-holder against one of every large and individual group of persons, essentially all subjects of a legal system."[35] In other words, Hohfeld describes "a *right in rem* as a multitude of *rights in personam*".[36] Hohfeld's analysis gives a significant insight into the causal relationship between *right in rem* and *right in personam*. Unlike Hegel's assumption, therefore, the absence of will on the part of the objects that can be owned or possessed (such as land) does not prove the absence of will on the part of other persons that have competing interests

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[33] *Ibid.*

[34] Marx Karl (1894), *Capital*: *Critique of Political Economy* Vol III (1894) Progress Publishers (1974) pp. 615- 616 [The quotes in the paragraph are from Footnote 26 in pp. 615-616]

[35] J. E. Penner (1997, Reprinted 2007), The Idea of Property Law (New York: Oxford University Press), p. 23. [Penner refers to W. N. Hohfeld (1923), Fundamental Legal Conceptions (New Haven, Conn.: Yale University Press), p. 72].

[36] Penner, *Ibid*, p. 27

over the same object. Hegel should have thus considered the issue of competing wills among persons in the course of the private appropriation of natural resources such as land.

3. Rationales, Categories and Key Attributes of Property Rights

3.1-The rationales of property

Chartier states seven rationales which represent values that ought to be considered in property systems. These values are "autonomy, compensation, generosity, productivity, reliability, stewardship, and identity."[37]

3.1.1- Autonomy

Human beings are social animals (in their roles as members of a social group), and at the same time autonomous individuals because we all have a distinct existence (in time and space) and the notion of identity, individual thought processes, desire, interest and values. The latter feelings of the self, identity and autonomy are interwoven with the social and cosmic foundations of our being that evoke the feelings of fraternity (at various levels) and cosmic unity with the natural environment.

Chartier regards autonomy as the freedom of individuals "to determine the contours of their own lives and make major life choices without coercive intrusion." Autonomy does not of course envisage absolute freedom to do whatever one 'desires' because autonomy and freedom envisage what Chartier refers to as "practical reasonableness" within the context of the Golden Rule of reciprocal respect to the freedom and rights of others.

> The rights created by a fair property system serve the appropriate purpose of giving each "owner freedom to expend his own creativity, inventiveness, and undeflected care and attention upon the goods in question, to give him security in enjoying them or investing or developing them, and to afford him the opportunity of exchanging them for some alternative item(s) of property seeming to him more suitable to his life-plan."[FN 10] Property rights matter because they equip people to control their own lives. [38]

The rationale of autonomy thus establishes "a presumption against interfering with people's property to the extent that doing so would significantly reduce autonomy"[39] but should meanwhile be regulated to avoid the risk of its adverse effects on the autonomy of other persons.

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[37] Gary Chartier (2009), *Economic Justice and Natural Law* (Cambridge University Press), p. 35.

[38] *Ibid*. The footnote in the quoted text cites Finnis, *supra* note 1. at 172.

[39] *Ibid.*

3.1.2- Compensation, generosity and productivity

Compensation in the form of money or real property in return to goods or services provided is the second rationale for property. This is in conformity with the Lockean concept of labour as a rationale for property. The third rationale for property, stated by Chartier, is generosity which usually presupposes the material ability to be generous. He cites Aristotle who noted that "there is the greatest pleasure in doing a kindness or service to friends or guests or companions, which can only be rendered when a man has private property".[40]

The fourth rationale raised by Chartier is productivity[41], because the propriety of a property regime can depend on its impact on productivity or efficiency. Effective use of resources not only increases productivity which benefits individuals who own the property, but is also beneficial to the community at large.

3.1.3- Reliability, stewardship and identity

A property regime is expected to have consistency and predictability. This is because it ought to "enable people to rely on their reasonable expectation that just property rules will continue in force" and "that decisions made about individual claims in light of such rules" and "just property titles will be respected."[42]

The notion of stewardship in property is the golden median between the *anthropocentric* conception in property rights (which regards the human species as the master of nature and its resources) and the opposite *eco-centric* conception which seeks natural preservation for its sake. While the former

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[40] Aristotle, *Politics* (Benjamin Jowett trans., 1905), at II.5

[41] "The productivity rationale warrants property rights to the extent that they foster the creation of wealth in a community. Given the negative impact on productivity associated with greater uncertainty on the part of property-owners regarding their holdings, the productivity rationale may lend support to a presumption in favor of respecting existing holdings. But it might also help, for instance, to justify the reassignment of fallow land from owners of large agricultural estates to peasants to the extent that the peasants were likely to be more productive than absentee landlords." [Chartier, *supra* note 37, pp. 37-38]

[42] *Ibid*, p. 38

" … [I]f frequent reassignment or extinction were a live possibility, people would be less likely to invest in the enhancement and efficient use of their property. And constant reassignment or extinction of property rights is likely to reduce people's autonomy and their ability to plan and complete personal projects. Thus, the reliability rationale justifies protecting present possessory interests, all other things being equal."[Chartier, p. 38]

conception confers upon property owners the widest discretion in the utilization of their 'property,' the latter view argues that ecosystems, wildlife and the natural environment in general deserve recognition, legal personality and preservation as *intrinsically* mandatory ends and not in view of their *instrumental* role in human well-being.

Stewardship is the middle path between these extremes. Property regimes are expected to "facilitate stewardship – taking good care of property, cultivating and developing it responsibly, and preventing it from falling into disrepair" because "[i]f no one in particular is responsible for something, experience suggests that it will likely not be taken care of well". [43]

And finally, Chartier considers 'identity' as the seventh rationale for property. He makes a distinction between 'identity constitutive attachments" to certain types of property such as a person's attachment to a wedding ring or a farm in which an heir has grown up. He contrasts such property with fungible property to which a person does not have attachment as in the case of money in one's bank account.

The rationales highlighted here-above and the consideration of 'practical reasonableness' can be used as a "broad range of standards regarding acquisition, retention, abandonment, forfeiture, deprivation, and voluntary transfer of property."[44] Nevertheless there cannot be rigid standards which can invariably apply irrespective of the particular objective and subjective realities.

3.2- Definition and categories of property rights

Property rights involve legally recognized and enforced entitlements to a spectrum of actions in the use and control of a given resource or object. To this end, the property law regime defines "actions that individuals can take in relation to other individuals regarding some 'thing.' "[45] Hohfeld[46] cites the following from Eaton v. B. C. & M. R. R. Co:

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[43] *Ibid*, at 38-39

> "The stewardship rationale warrants property rights to the extent that they ensure that things are cared for at a satisfactory level. Thus, it will sometimes provide support for the reassignment of title to someone likely to care more effectively for a particular piece of property than the putative owner. But it will also support a stable system of property rights, and therefore count against some reassignments, because people are most likely to care for property when they are able to retain it or to dispose of it at their discretion." Chartier, p. 39].

[44] *Ibid*, at 43.

[45] Elinor Ostrom (1999), "Private and Common Property Rights," *Encyclopedia of Law and Economics*, 2000, p. 339.

> In a strict legal sense, land is not 'property', but the subject of property. The term 'property', although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it'. 'It denotes a right over a determinate thing'. 'Property is the right of any person to possess, use, enjoy, and dispose of a thing'.

As stipulated under the Ethiopian Civil Code,[47] ownership includes the right to *use* (*usus),* exploit the fruits of the thing owned (*fructus)* and the right to transfer and dispose of *(abusus*). "Property rights entail *rights* with respect to benefit streams of value, and *duties* of others to respect those rights."[48] It is to be noted, however, that property rights are not absolute because duties such as good neighbourly behaviour,[49] social and environmental compliance standards, etc. embody restrictions in use and disposal.

Nor are property rights monolithic and uniform in content and scope because the "[r]ights of access, withdrawal, management, exclusion and alienation can be separately assigned to different individuals" or they can be "viewed as a cumulative scale moving from the minimal right of access through possessing full ownership rights" which "may be held by single individuals or by collectivities".[50] For example, "Some attributes of common-pool resources are conducive to the use of communal proprietorship or ownership and others are conducive to individual rights to withdrawal, management, exclusion and alienation".[51]

Most economists define private property as equivalent to alienation and they consider "property-rights systems that do not contain the right of alienation" as ill-defined.[52] These economists presume that such ill-defined property rights cause inefficiency "since property-rights holders cannot trade their interest in an improved resource system for other resources, nor can someone who has a more efficient use of a resource system purchase that system in whole or in part."[53]

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[46] Wesley Newcomb Hohfeld (1913), "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", *The Yale Law Journal*, Vol. 23, No. 1 (Nov., 1913), p. 22.

[47] Civil Code of Ethiopia (1960), Art. 1205.

[48] <www.capri.cgiar.org/training/08Feb05_PRTheory-EM.ppt> (8 February, 2005, Slide 1, CGIAR Systemwide Program on Collective Action …), Accessed: October 7, 2010.

[49] See for example the Ethiopian Civil Code, Articles 1225 and 1226.

[50] Elinor Ostrom (1999), *supra* note 45, p. 332

[51] *Ibid*.

[52] *Ibid*, p. 339

[53] Harold Demsetz (1967), 'Toward a Theory of Property Rights', **57** *American Economic Review*, 347-359 [in Ostrom, *ibid*]

Consequently, it is assumed that property-rights systems that include the right to alienation will be transferred to their highest valued use. Ostrom states that economists such as "Larson and Bromley[54] challenge this commonly held view and show that much more information must be known about the specific values of a large number of parameters before judgements can be made concerning the efficiency of a particular type of property right."[55]

Schlager and Ostrom (1992)[56] define five property rights that show the range of entitlements in tiers of capacities as owners, proprietors, claimants, authorized users and authorized entrants.

Access: The right to enter a defined physical [area and enjoy nonsubtractive benefits (for example, hike, canoe, sit in the sun).][57]

Withdrawal: The right to obtain resource units or products of a resource system (for example, catch fish, [appropriate] water).[58]

Management: The right to regulate internal use patterns and transform the resource by making improvements.

Exclusion: The right to determine who will have access rights and withdrawal rights, and how those rights may be transferred.

Alienation: The right to sell or lease management and exclusion rights (Schlager and Ostrom, 1992).

Ostrom and Schlager (1996) use the following table[59] to show the bundles of rights that are exercised by each category of property rights:

[54] Bruce A. Larson & Daniel W. Bromley (1990), 'Property Rights, Externalities, and Resource Degradation: Locating the Tragedy', **33** *Journal of Development Economics*, 235-262. [In Ostorm, *supra* note 45].

[55] Ostrom, *supra* note 45, p. 339.

[56] Edella Schlager & Elinor Ostrom (1992), 'Property Rights Regimes and Natural Resources: A Conceptual Analysis', *Land Economics*, Vol. 68, No. 3 (Aug., 1992) 250, 251.

[57] The parenthesis shows the version as it appeared in Ostorm, *supra* note 45 p. 339

[58] Slightly edited in Ostrom, *ibid*. The original version in Schlager and Ostrom (1992) reads "The right to obtain the "products" of a resource (e.g., catch fish, appropriate water, etc.)."

[59] Elinor Ostrom and Edella Schlager (1996), 'The Formation of Property Rights', in Hanna, Susan, Folke, Carl, and Mäler, Karl-Göran (eds), *Rights to Nature*, Washington, DC, Island Press, p.133 [in Ostrom, *supra*, note 45 p. 340].

Bundles of Rights Associated with Positions

	Owner	Proprietor	Claimant	Authorized User	Auth. Entrant
Access	X	X	X	X	X
Withdrawal	X	X	X	X	
Management	X	X	X	X	
Exclusion	X	X			
Alienation	X				

Based on the definitions that Ostrom (1999) gives to the classes of property rights,[60] she criticizes the classification of the property rights regime into government, private and common property because of the complexity of the rights. She states that such classifications rather reflect "the status and organization of the holder of a particular right than the bundle of property rights held."[61] The property rights of access, withdrawal, management, exclusion and alienation can be held individually or by a group of persons. For example,

[60] Ostrom (1999), *supra* note 45, pp. 339-342

The following excerpts from Ostrom gives definitions and examples for five classes of property rights:

- 'Authorized entrants' include most recreational users of national parks .., but do not have a right to harvest forest products. Those who have both entry and withdrawal use-right units are 'authorized users'. …
- 'Claimants' possess the operational rights of access and withdrawal plus a collective-choice right of managing a resource that includes decisions concerning the construction and maintenance of facilities and the authority to devise limits on withdrawal rights. …
- 'Proprietors' hold the same rights as claimants with the addition of the right to determine who may access and harvest from a resource. Most of the property systems that are called 'common property' regimes involve participants who are proprietors and have four of the above rights, but do not possess the right to sell their management and exclusion rights even though they most frequently have the right to bequeath it to members of their family and to earn income from the resource. …
- 'Owners' possess the right of alienation - the right to transfer a good in any way the owner wishes that does not harm the physical attributes or uses of other owners - in addition to the bundle of rights held by a proprietor. An individual, a private corporation, a government, or a communal group may possess full ownership rights to any kind of good including a common-pool resource (Montias, 1976; Dahl and Lindblom, 1963). …

[61] Ostrom (1999), *supra* note 45, p. 342

"irrigation systems in Nepal, the Philippines and Spain" that are managed by farmers "have established transferable shares to the systems", and thus, "[a]ccess, withdrawal, voting and maintenance responsibilities are allocated by the amount of shares owned" [62]

Ostrom states that communal groups have established some means of governing themselves in relationship to a resource[63] and she argues that the fact that a certain property right is collective or communal does not necessarily lead to the conclusion that it is not well-defined because, *inter alia*, full members of communal groups have the "right to sell their access, use, exclusion and management rights to others, subject in many systems to the approval of the other members of the group."[64] Ostrom's conception of communal property includes the rights of shareholders in corporate firms, and she argues that the modern corporation (or share company established through public subscription) should not be "thought of as the epitome of private property" but rather falls under one of the "mixed systems of communal and individual property rights."[65]

3.3- Attributes of property rights

From the perspective of the right holder, the key attributes of property rights are "*assurance, duration* and *breadth*."[66]

a) *Assurance* refers to "the probability of enjoying the same right in a future period."
b) *Duration* denotes the "length of time or period" of a given property right.
c) *Breadth* refers to the scope of the bundles of rights in a given property.

Assurance refers to the security recognized and protected. The property right holder is assured that s/he or anyone to whom the property is transferred through sale, inheritance, donation, endowment, etc. enjoys the same rights 'without restriction'. The *duration* of such assurance depends upon the mode of ownership. In private property, the duration is unlimited while lease holding and other forms of restricted *rights in rem* have time limits which ought to balance the interests of *property owners* with other public policy considerations against the perpetual ownership of certain resources. Lease holdings assure use rights of an immovable for a limited duration which is usually long enough to motivate investments.

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[62] *Ibid*. Ostrom cites: Maass and Anderson, 1986; E. Martin, 1986; Martin and Yoder, 1983a, 1983b, 1983c; Siy, 1982.
[63] Elinor Ostrom (1990), *Governing the Commons: The Evolution of Institutions for Collective Action*, New York, Cambridge University Press.
[64] Ostrom (1999), *supra* note 45, pp. 343-343.
[65] *Ibid*, p. 352.
[66] *Supra*, note 48.

The scope of a property right refers to the spectrum of rights that a person is entitled to enjoy. The scope or breadth of a given right is determined by:

a) *Transferability of the right*: This is determined by laws and policies that range from those that allow unlimited right of transfer including sale to the ones that prohibit transfer. The degrees of permissibility of transfer may range from transfer of use right with the corresponding right to share the fruits (known as sharecropping), and may include transfers through renting, inheritance, sale with some restriction, or unlimited rights of transfer including sale.[67] *The right to alienation and disposal* is the highest tier in the transferability of property rights and it allows the owner to do whatever one pleases with property, including sale and other forms of disposal.

b) *Entitlement to exclude others*: The exclusive entitlement to property rights can entitle the owner with the right to totally exclude others from using and exploiting property. On the contrary, open access entitles others to freely use and exploit property. The middle ground between these two extremes involves restricting "access to members of a defined group" or restricting access on "certain conditions."[68] Allowing access to a defined group gives specific rights to the members of the group and excludes everyone outside the group, while providing access on certain conditions renders access contingent upon the conditions that are necessary for the sustainability of common-pool resources.

c) *Rights of withdrawal:* The scope of the right to *use* and *manage* property might involve a hierarchy of benefits of withdrawal. The right to access such as access to parks does not include withdrawals or collection. The first stage in the exercise of the right for collection is known as "*non-destructive collection*[69] which marks "the first step" in the hierarchy of withdrawal rights. This can apply to community owned or state owned lands in which members of a community can be allowed to gather fallen woods, use bee-hives, collect wild fruits, etc. without destroying or affecting the integrity of resources such as forests. The second level in withdrawal rights can be allowing "seasonal cultivation and grazing"[70] on lands that are vulnerable but yet utilizable with a certain level of protection and care. The third tier can be allowing exploitation of property with determined "withdrawal levels" based on the sustainability and renewability of resources.

d) *The right to transform and enhance property*: A given property right might articulate the right to transform or enhance property. A case in point is the

[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*

> right over a certain property with a non-profit motive of enhancing ecosystems, such as planting trees. An endowment that has an objective of protecting biodiversity or conducting forestation projects for instance, can allow property rights over a vast green belt surrounding a city, and this right may mainly involve the right to transform and enhance the ecosystem.

Harris[71] supports private property without, however, "approving or condemning public, common or communitarian property." Similarly, Heitger[72] holds that "secure private property rights and the rule of law are important determinants of economic growth." However, the regime of property rights involves issues that are far more complex than the private /common property discourse. Current academic discourse[73] suggests that concerns of ecosystem sustainability necessitate new theories of property rights.

Resources such as watersheds, for example, involve a complex combination of competing claims and interests. These claims may include the "use or control of the diverse resource stocks, flows and filters that comprise watersheds." There can be "individuals and groups that exert those claims" which will bring about "statutory and non-statutory entities that support those claims." There can be different "institutions that protect those claims" and it is inevitable that there will be "interactions among different types of resources."[74]

4. The Risk of Overconsumption in Common-pool Resources

4.1- Property rights on the stock of resources –versus- one time flow from resources

Lueck defends the principle of the first possession against critics who consider the principle as inefficient which renders resources susceptible to dissipation due to the race in possession and overexploitation. He shows that "possession

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[71] J.W. Harris (1995), "Private and non-private property: what is the difference?" *Law Quarterly Review* [L.Q.R. 1995, 111(Jul)] pp. 421-444.

[72] Bernhard Heitger (2004), "Property Rights and the Wealth of Nations: A Cross-Country Study", *Cato Journal*, Vol. 23, No. 3 (Winter 2004), pp. 381- 402.

[73] *See* for example: Carl J. Circo (2009), "Does Sustainability Require a New Theory of Property Rights?" *Kansas Law Review*, Vol. 58, pp. 91-159; Emily Sherwin (2006), "Three Reasons Why Even Good Property Rights Cause Moral Anxiety", *William and Mary Law Review*, Vol. 48, pp. 1927-1951; Jerry L. Anderson (1989), "Takings and Expectations: Towards a Broader Vision of Property Rights", *Kansas Law Review*, Vol. 37, pp. 529-562.

[74] *Supr*a note 48.

may extend either to the entire stock of a resource or to simply a onetime flow from that stock."[75]

> For example, possession could grant ownership of a pasture in perpetuity, or it could simply grant ownership of the grass currently being grazed by one's livestock. Perpetual ownership means ownership of the stock, while a shorter term of ownership means ownership of some flows. Granting rights to stocks also confers ownership to the future stream of flows, so the formal economic model is inter-temporal. Granting rights to flows, however, means ownership is a onetime event.[76]

According to Lueck, the rule of first possession may lead to enforceable possessions of resource stocks followed by a race to claim assets and property rights. On the other hand, if the rule applies to enforceable possession of resource flows, the rule takes the form of 'the rule of capture' which entitles the possessor a certain part of the flow and claims of access for yet other captures from the flow.[77] Lueck admits that in a race with Homogenous Claimants the rule of first possession "can dissipate value when there is unconstrained competition among many potential claimants".[78] This is because potential claimants within the group of homogenous competitors strive to "gain ownership by establishing possession just before their competitors".[79]

Lueck then contrasts the rule of first possession with the commonly recommended alternative of offering assets for auction in which the state offers it to the highest bidder. Under such circumstances Lueck admits that the winner of the auction pays the highest price and usually begins production in due time "thus maximizing the value of the asset" but, he *inter alia*, states that this begs the question as to how the state acquires property rights.[80] Lueck underlines that the rule of capture which is one of the derivatives of the rule of possession indeed leads to open access and dissipation.[81]

Where the resources are 'plenteous' the rule of capture "may not produce severe dissipation" and under certain circumstances, "waste can be reduced simply by restricting access to the stock" that "creates a new ownership regime-

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[75] Dean Lueck (1995), "The Rule of First Possession and the Design of the Law", *Journal of Law and Economics*, Vol. 38, No. 2, (Oct. 1995), p. 430.

[76] *Ibid*, pp. 396, 397.

[77] Figure 1, *ibid*, p. 397.

[78] Yoram Barzel, "Optimal Timing of Innovations", 50 *Rev. Econ. & Stat*. 348 (1968); Dale T. Mortensen, "Property Rights and Efficiency in Mating, Racing, and Related Games", 72 *Am. Econ. Rev*. 968 (1982), [in Lueck, *ibid*, p. 399].

[79] Lueck, *ibid*.

[80] *Ibid*, p. 403.

[81] *Ibid*, p. 404.

common property-which is an intermediate case between open access and private ownership."[82] Under such circumstances "[c]ommon property may arise out of explicit private contracting"[83] which leads to "joint effort to exclude outsiders".[84] It may also "arise out of custom" as in the case of common pastures and forests; or may "have legal (for instance, riparian water rights) or regulatory (for example, hunting and fishing rules) origins that have implicit contractual origins."[85] This, according to Lueck, leads to well-defined rights which ultimately bring about restrictions in open access and resource dissipation.

Lueck concludes that "[w]hen first possession has the potential for a race, the law tends to mitigate dissipation by assigning possession when claimant heterogeneity is greatest". However, when first possession relates to the capture of flows from stock, open access can lead to dissipation, and "the law tends to limit access and restrict the transfer of access rights to limit open access exploitation."[86]

4.2- The '*tragedy of the commons*' versus the '*conscience dilemma*'

The concept of the '*tragedy of the commons'* was "first advanced in 1833 by mathematician William Forster Lloyd"[87] regarding the tendency to neglect and abuse resources accessible to all. There is also the corresponding dilemma related to the tragedy in the *laissez faire* quest for private ownership and gain which puts the conscience in a dilemma between integrity and lower standards of conscience to prosper at the expense of others. While the "tragedy *of the commons*" leads to neglect of common possessions,[88] "*the conscience dilemma*"

[82] *Ibid*, p. 405.
[83] *Ibid.*
[84] *Ibid*, p. 406.
[85] *Ibid*, pp. 405, 406.
[86] *Ibid* p. 409.
[87] Michael W. Masters (2001), "Ecology, Ethics, and Immigration: The writings of biologist Garrett Hardin", *The Social Contract*, Fall 2001, p. 6.
[88] The following excerpt (*Ibid*), illustrates the concept of the '*tragedy of the commons*':

> "The … thesis [of] the tragedy of the commons begins with a pasture, held in common by a band of herdsmen. All are free to use the commons to graze their animals. Use of the pasture costs each herdsman nothing, but his livestock are valuable. Therefore each herdsman, acting out of self-interest, will be tempted to exploit the commons by grazing more livestock on the land. But the commons can only support so many animals. This limit is called the carrying capacity. Exceeding the pasture's carrying capacity leads to depleted grass stocks, soil erosion, malnourished animals — and, quite possibly, conflict among herdsmen.

on the other hand, tends to lead to unconscientious greed in *laissez faire* market systems owing to the prospects of 'prosperity' through unconscientious profiteering and endless quest for steadily increasing wealth.

According to Masters, the *conscience dilemma* occurs because a "laissez faire market system ruled by conscience alone rewards for a lack of conscience" and ultimately "the 'good guys' see the 'bad guys' prosper, their envy is energized and one after another good guys become bad guys." [89] This is particularly manifest during the transition from collectivist and communitarian value systems and settings to *laissez faire* markets and atomistic individualism.

Parisi *et al* have substantiated the concept of the '*tragedy of the commons*' with another concept which they refer to as the '*tragedy of the anticommons*'. In contrast to the tragedy of the commons which is vulnerable to overuse by the "failure to monitor and constrain each other's use, the '*tragedy of the anticommons'* is said to exist "when multiple owners hold rights to exclude others from a scarce resource and no one exercises an effective privilege of use" as a result of which "the resource might be prone to underuse: a problem known as the *tragedy of the anticommons*.'[90] These problems, as the authors noted "are the effects of a lack of conformity between use and exclusion rights, with a

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Unchecked, this process will lead to exhaustion of the commons. When this happens, everyone suffers, even those who — out of a sense of responsibility or conscience — refrain from overusing the commons. ...

Fortunately, restraint is possible even in the presence of human greed. If the pasture has an owner, he has a vested interest in preserving it for the future. If he fails to limit use to the pasture's natural carrying capacity it will be ruined, and he will suffer great loss. The tragedy of the commons is a persuasive argument for private property ownership. In a crowded world privatism may help provide a stable social and economic life."

[89] The following (*Ibid*, pp. 6-7) describes the '*conscience dilemma*' that has its downsides and which seems to be the antithesis of the '*tragedy of the commons*':

"While private property ownership may mitigate the tragedy of the commons, conscience will not. Since conscience is one of the most compelling demands of both secular humanism and [religious] dogma, this will strike many as heretical. However, Professor Hardin summons forth the rather startling conclusion that under certain circumstances, conscience may eliminate itself from a population:

'.. A laissez faire market system ruled by conscience alone rewards for a lack of conscience… The second stage in the dissolution of a conscience-ruled system takes place because of envy. As the 'good guys' see the 'bad guys' prosper, their envy is energized and one after another good guys become bad guys.'

[90] Francesco Parisi, *et al*, "Symmetry and Assymetry in Property: Commons and Anticommons" <http://www.vwl.uniwuerzburg.de/fileadmin/12010300/Publikationen/Symmetry.pdf> (Accessed: 30 September 2010).

consequential misalignment of the private and social incentives of multiple owners in the use of a common resource."

4.3- Common property –versus- open access

Most economists believe that private property is conducive to economic development "due to the incentives associated with diverse kinds of property relationships" while loose connection of work with benefits tends to lead to free riding which ultimately leads to low economic productivity.[91] Ostrom cites various studies and summarizes three sources of inefficiency that are stated by many economists in relation with common property. The *first* source is "*rent dissipation*, because no one owns the products of a resource until they are captured, and everyone engages in an unproductive race to capture these products before others do." The *second* source of inefficiency is "*the high transaction and enforcement costs* expected if communal owners were to try to devise rules to reduce the externalities of their mutual overuse." And the *third* aspect of the inefficiency relates to "*low productivity*, because no one has an incentive to work hard in order to increase their private returns."[92]

Ostrom criticizes such conclusions and she argues that this misunderstanding "has been clouded by a troika of confusions" with regard to "the differences between (1) common property and open-access regimes, (2) common-pool resources and common property regimes, and (3) a resource system and the flow of resource units."[93] She argues that common property and open-access regimes should not be confused. According to Ostrom, the downsides of open-access in resources that are susceptible to dissipation should not be confused with common property which can exclude others and regulate access and use by property right holders. In property regimes that are *open access*, "no one has the legal right to exclude anyone from using a resource" while *common property* allows *"*the members of a clearly demarked group … to exclude nonmembers of that group from using a resource."[94] Yet, she admits that there will be lack of incentive to conserve the sustainable use of common-pool resources "or to invest in improvements" if they are accessible to everyone. She further notes that "the lack of rules regarding authorized use" of open-access resources "will lead to misuse and overconsumption."[95]

This adverse impact of open-access results not only from 'lack of rules regarding authorized use', but can also be caused by the non-enforcement or

[91] Ostrom (1999), *supra* note 45, p. 334.
[92] *Ibid*, p. 335.
[93] *Ibid*.
[94] *Ibid.*
[95] *Ibid*, p. 336.

inadequate enforcement of such rules. This raises the issue whether natural resources that are legally declared as government-owned are in fact open-access regimes as long as there is no effective control against the withdrawal of the resources by persons who have no right to do so.[96]

4.4- Ostrom's views on common-pool resources conducive to different modes of property rights

Common-pool resources are resource systems while the term '*common property*' refers to the property regime. "Common-pool resources[97] may be

[96] Ostrom (*Ibid*, p. 337) observes the following:
"As concern for the protection of natural resources mounted during the 1960s, many developing countries nationalized all land and water resources that had not yet been recorded as private property. The institutional arrangements that local users had devised to limit entry and use lost their legal standing, but the national governments lacked monetary resources and personnel to monitor the use of these resources effectively. Thus, resources that had been under a *de facto* common property regime enforced by local users were converted to a *de jure* government-property regime, but reverted to a *de facto* open-access regime. When resources that were previously controlled by local participants have been nationalized, state control has usually proved to be less effective and efficient than control by those directly affected, if not disastrous in its consequences (Curtis, 1991; Hilton, 1992; Panayotou and Ashton, 1992; Ascher, 1995). The harmful effects of nationalizing forests that had earlier been governed by local user-groups have been well documented for Thailand (Feeny, 1988), Niger (Thomson, 1977; Thomson, Feeny and Oakerson, 1992), Nepal (Arnold and Campbell, 1986; Messerschmidt, 1986), and India (Gadgil and Iyer, 1989; Jodha, 1990, 1996). …"

[97] "… All common-pool resources share two attributes of importance for economic activities: (1) it is costly to exclude individuals from using the good either through physical barriers or legal instruments and (2) the benefits consumed by one individual subtract from the benefits available to others (Ostrom and Ostrom, 1977b; E. Ostrom, Gardner, and Walker, 1994). …

Common-pool resources share with public goods the difficulty of developing physical or institutional means of excluding beneficiaries. Unless means are devised to keep nonauthorized users from benefiting, the strong temptation to free ride on the efforts of others will lead to a suboptimal investment in improving the resource, monitoring use, and sanctioning rule-breaking behavior. Second, the products or resource units from common-pool resources share with private goods the attribute that one person's consumption subtracts from the quantity available to others. Thus, common-pool resources are subject to problems of congestion, overuse and potential destruction unless harvesting or use limits are devised and enforced. …

… Examples exist of both successful and unsuccessful efforts to govern and manage common-pool resources by governments, communal groups, cooperatives, voluntary associations, and private individuals or firms (Bromley et al., 1992; K.

owned by national, regional, or local governments; by communal groups; by private individuals or corporations; or be used as open access resources by whoever can gain access."[98] Another relevant concept in relation with common-pool resources is what is known as '*resource stock'* which refers to the resources such as rivers, underground water, etc. that cannot be subject to private appropriation while the *units* that are taken out of the stock are part of the flow.[99]

Under the setting of scarcity, common-pool resources are susceptible to conflict "over who has the rights to invest in improvements and reap the results of their efforts", and this "can lead individuals to want to enclose land through fencing or institutional means to protect their investments." [100] However, there are situations where a group of persons opts to use common resources by excluding others from having access to the resource, rather than enclosing individual parcels. Ostrom cites Netting's [101] observations that the practices of Swiss peasants for many centuries shows that "the same individuals fully

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Singh, 1994; K. Singh and Ballabh, 1996). Thus, as discussed below, there is no automatic association of common-pool resources with common property regimes - *or, with any other particular type of property regime.* Further, common property arrangements are essentially share contracts (Lueck, 1994; Eggertsson, 1990, 1992, 1993a, 1993b) and, as such, face similar problems of potential opportunistic behavior and moral hazard problems." (Ostrom: 1999, *Supra* note 45, pp. pp. 337-338).

[98] *Ibid*. p.338.

[99] The following explanation by Ostrom (*Ibid*, p. 338) about common-pool resources further elaborates what is meant by resource system, resource stock and the units in resource stock:

"Common-pool resources are composed of resource systems and a flow of resource units or benefits from these systems (Blomquist and Ostrom, 1985). The resource system (or alternatively, the stock or the facility) is what generates a flow of resource units or benefits over time (Lueck, 1995). Examples of typical common-pool resource systems include lakes, rivers, irrigation systems, groundwater basins, forests, fishery stocks and grazing areas. … The resource units or benefits from a common-pool resource include water, timber, medicinal plants, fish, fodder, central processing units, and connection time. Devising property regimes that effectively allow sustainable use of a common-pool resource requires rules that limit access to the resource system and other rules that limit the amount, timing, and technology used to withdraw diverse resource units from the resource system."

[100] *Ibid*, p. 343.

[101] Robert McC. Netting (1976), 'What Alpine Peasants Have in Common: Observations on Communal Tenure in a Swiss Village', **4** *Human Ecology*, 135-146. [in Ostrom] &
R. M. Netting, (1981), *Balancing on an Alp: Ecological Change and Continuity in a Swiss Mountain Community*, New York, Cambridge University Press. [in Ostrom].

divided their agricultural land into separate family-owned parcels" while their "grazing lands located on the Alpine hillsides were organized into communal property systems." [102]

> …Netting identified five attributes that he considered to be most conducive to the development of communal property rights:
> 1. low value of production per unit of area;
> 2. high variance in the availability of resource units on any one parcel;
> 3. low returns from intensification of investment;
> 4. substantial economies of scale by utilizing a large area; and
> 5. substantial economies of scale in building infrastructures to utilize the large area. [103]

Similarly, "Agrawal (1996) has shown that communal forestry institutions in India that are moderate in size are more likely to reduce overharvesting than are smaller groups because they tend to utilize a higher level of guarding than smaller groups."[104] For Example, if producers "aggressively pump from a common oil pool, all tend to be harmed by the overproduction and are willing late in the process to recognize their joint interests."[105] However, this assumes homogeneity in "the knowledge and acceptance of local common property regimes" in the absence of which individual members tend to optimize their benefits to the detriment of joint interests.

Certain common-pool resources are, such as however, conducive to individual property rights. Such rights in private goods like industrial and agricultural commodities "generate incentives that lead to higher levels of productivity than other forms of property arrangements."[106] Ostrom believes that "[a]gricultural land in densely settled regions is usually best allocated by a system of individual property rights"[107] which mainly includes formal title to land and other modalities that secure tenure.

Ostrom cites the studies of Feder *et al*. (1988)[108] and Feder and Feeny (1991)[109] and states that such secure titles "provided better access to credit and

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[102] Ostrom: 1999, *Supra* note 45, p. 344.
[103] *Ibid.*
[104] *Ibid*, p. 348.
[105] *Ibid.*
[106] *Ibid*, p. 349.
[107] *Ibid.*
[108] Gershon Feder, T. Onchan, Y. Chalamwong and C. Hangladoran (1988), *Land Policies and Form Productivity in Thailand*, Baltimore, MD, Johns Hopkins University Press [in Ostrom, *ibid*].
[109] Gershon Feder and David Feeny (1991), 'Land Tenure and Property Rights: Theory and Implications for Development Policy', 5 *World Bank Economic Review*, 135-153 [in Ostrom, *ibid*].

led to greater investments in improved land productivity" in Thailand.[110] On the other hand, the studies made by Skaperdas & Syropoulos (1995)[111] and (Umbeck, 1981a,[112] 1981b[113]), indicate that "[i]nsecure property rights may lead potential users to arm and engage in violent conflict so as to gain control over land through force or by negotiation to avoid force"[114] thereby leading to various types of economic losses. With regard to mobile resource units such as water and fish, private rights can only be ownership of withdrawal rights because water rights, for example "are normally associated with the allocation of a particular quantity of water per unit of time or the allocation of a right to take water for a particular period of time or at a particular location." [115]

5. The Need to Control Rural Open Access in Ethiopia: *De jure* pubic property and de *facto* open access

5.1- Ownership of rural land

Article 40(4) of the FDRE Constitution recognizes the right of peasants to get land without payment and their rights against eviction from their possession, and it envisages specific legislation towards the implementation of the provision. Likewise, Article 40(5) guarantees the rights of pastoralists for free land for grazing and cultivation and the right against displacement. Farming and grazing lands are thus allocated to rural farmers and pastoralists.

In addition to the consideration of *equitable allocation* of land to citizens, Ethiopian property law regime is also concerned about the *sustainable use* of rural land and resources. To this end, the fifth paragraph of the preamble of Proclamation No. 456/2005[116] reads:

> … [I]t has become necessary to put in place legal conditions which are conducive to enhance and strengthen the land use rights of farmers to encourage them take the necessary conservation measures in areas where mixed farming of crop and

[110] Ostrom, *supra* note 45, p. 349.

[111] Skaperdas, Stergios and Syropoulos, Constantinos (1995), 'Competing for Claims to Property', Working paper, University of California, Irvine, Department of Economics [in Ostrom, *ibid*].

[112] Umbeck, John R. (1981), *A Theory of Property Rights: With Application to the California Gold Rush*, Ames, IA, Iowa State University Press {in Ostrom, *ibid*].

[113] Umbeck, John R. (1981), 'Might Makes Rights: A Theory of the Formation and Initial Distribution of Property Rights', 20 *Economic Inquiry*, 38-59 (in Ostrom, *ibid*].

[114] Ostrom, *supra* note 45, p. 349.

[115] *Ibid*, p. 350.

[116] The Federal Democratic Republic of Ethiopia Rural Land Administration and Use Proclamation, No. 456/2005.

> animal production is prevalent and where there is threat of soil erosion and forest degradation.

As observed in the preceding sections, the conservation and sustainable use of resources require well-defined property rights (such as the common property rights of communities, property rights of individuals, enforceable public ownership, etc.). Moreover, the right to access and the mode of access to state-owned property ought to be well-defined particularly where resources are scarce. Well-defined property rights do not necessarily require private ownership because beneficiaries of common property can also regulate the sustainable use of resource stocks and units of flow from resources as highlighted in Section 4. A case in point is the Kobo traditional community forest allotment system in which every member of the community has a Kobo in Sheka Zone of Southern Nations Nationalities and Peoples (SNNP) Regional State. Each household can use its Kobo for bee-hives and to gather fallen trees for fuelwood. Cutting trees is traditionally considered as a taboo and such community practices clearly show that traditional property rights such as the Kobo have schemes of access, use rights, non-destructive collection and effective exclusion of others thereby regulating open access and safeguarding resources from dissipation.

Property rights are regarded as well-defined where the entitlements of access, withdrawal, management, exclusion and alienation are clearly and effectively articulated. This can take the form of recognition of indigenous or customary laws (such as the good practices of the Kobo regime stated above), conferring rights on entities that have the prime non-profit purpose of environment protection and forest preservation, and the practical protection of resources that are regarded as public. In rural communities where such well-defined property regimes are lacking, or where they are not effectively implemented, the problems of deforestation, overgrazing, squatting, and the resultant resource dissipation are indeed widespread. Likewise, indigenous customary laws that are conducive to the sustainable use and protection of natural resources against dissipation are being sidelined by rendering the possession of title deeds as a *sine qua non* condition for property rights which, in effect, fails to recognize the rights of indigenous communities to use and protect common-pool resources.

The French Civil Code, for example, confers property rights for communities who live on the land that has no master. Article 713 of the French Civil Code (as amended by Act No. 2004-809 of 13 August 2004) provides that "[t]he property which has no master belongs to the *commune* on whose territory it is situated", and the provision allows transfer of ownership to the Public Domain "where the *commune* waives the exercise of its rights." The current version of the French Civil Code thus gives priority in the presumption of property to communities in whose territory the property is found. Needless-to-say, effective

control and preservation of natural resources can be more effective if it is performed by communities that can exclude others and regulate access to common pool resources rather than a merely *de jure* state ownership unaccompanied by effective regulation of access.

The French Civil Code envisages open access to "things which belong to nobody and whose usage is common to all."[117] However, the second sentence of the same provision states that "Public order statutes regulate the manner of enjoying them." The French Civil Code, further stipulates that the "right to hunt and fish" shall be "regulated by specific statutes."[118]

According to Proclamation No. 456/2005,[119] government owns all rural land[120] and there can only be an entitlement to use rights referred to in the Proclamation as '*holding rights*'. In this regard the Proclamation deals with three forms of holding rights: namely individual, communal and state holding rights. The Proclamation further deals with certification, land registration and other pertinent issues.

In terms of ownership, however, the Proclamation recognizes only one form of ownership, i.e. ownership of land by the *government*. This seems to be inconsistent with Article 40(3) of the FDRE Constitution which vests ownership of rural and urban land, as well as of all natural resources (not in the government, but) in "the State and in the peoples of Ethiopia." This constitutional provision further declares that "Land is the common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange."

5.2- Holding rights on rural land

The Rural Land Use Proclamation (Proc. No. 456/2005) confers *holding rights* to peasant farmers, semi-pastoralists or pastoralists and the right consists of using "rural land for the purpose of agriculture and natural resource development" and leasing and transfer to family members or other lawful heirs. The holding right also entails "the right to acquire property produced on [the] land by [his/her] labour or capital and sale, exchange and bequeath same."[121] It

[117] French Civil Code, Art. 714.
[118] French Civil Code, Art. 715.
[119] Rural Land Administration and Land Use Proclamation No. 456/2005.
[120] Proclamation No. 456/2005, Art. 5(3).
[121] Proclamation No. 456/2005, Art. 2(4).

must be noted that the term 'holding' in the Proclamation has a wider meaning in contrast to the definition of 'holder' under the Civil Code.[122]

Under the Rural Land Use Proclamation, holding right is a *use right* which can be bequeathed in accordance with the law and it also includes acquisition of property of the products of one's labour or capital in the course of using the land. The holder of the land has full ownership rights over the products from the land and can thus alienate them through sale, exchange and other forms such as successions without the restrictions that are set forth in relation to the holding rights over the land. Moreover, there are other forms of individual holding recognized under Article 5(4) of the Proclamation "subject to giving priority to peasant farmers, semi-pastoralists and pastoralists." They are:

a) the right of private investors engaged in agricultural activities,[123] and
b) the right of Governmental and non-governmental organizations 'to use rural land in line with their development objectives."[124]

It is debatable whether the Proclamation recognizes *communal holding*. Article 2(12) defines communal holding as "rural land which is given by the government to local residents for common grazing, forestry and other social services." Unlike Article 714 of the French Civil Code, which was cited earlier, communities are not presumed to have property rights (no matter how long they had been using the land) until the government expressly recognizes the community's holding rights. Article 5(3) of the Proclamation provides that "Government being the owner of land, communal rural land holdings can be changed to private holdings as may be necessary." This shows that the recognition given to communal rural holdings can at any time (when deemed necessary) be withdrawn in favour of private holdings. This raises the issue whether communal holding has a merely partial recognition on a temporary basis.

Nevertheless, there are good practices in the legislation of various regional states that recognize common property of communities. For example, Article 3 of the Forest Proclamation of Oromia[125] recognizes community forests. Communal possession is also recognized under Article 16 of the SNNPR Rural Land Use Proclamation.[126] In addition to such recognition, however, issues

[122] *See* for example Articles 1141 and 1147 of the Ethiopian Civil Code (1960) which define holding as possessing the object on behalf of another person who may be an owner or possessor.
[123] *Ibid*, Art. 5(4)(a).
[124] *Ibid*, Art. 5(4)(b).
[125] Proclamation No. 72/2003 (*Megeleta Oromia*, 15/1993).
[126] SNNP Regional State Rural Land Administration and Utilization Proclamation (Proclamation No. 53/2003) Debub Negarit Gazeta, 8th Year No. 2.

related with the benefits accrued to the community, the scope of access, the community's means of regulating withdrawal and the scope of the right to transfer ought to be addressed because they are among the factors that determine the extent to which such community rights can safeguard common-pool resources from dissipation. This necessitates regulatory schemes which not only provide concrete benefits to the community, but that can at the same time provide for restrictions that facilitate the sustainable use, conservation and development of resources.

The third mode of holding is '*state holding*' which, according to Article 2(13) of Proclamation No. 456/2005, refers to "rural land demarcated and those lands to be demarcated in the future as federal or regional states holding; and includes forest lands, wildlife, protected areas, state farms, mining lands, lakes, rivers and other rural lands." This provision evokes the issue whether any resource that is not held by individuals or communities can be regarded as 'state holding', or whether the latter needs specific demarcation, certification and land registration.

Interpretation in favour of the latter option may seem to be inconsistent with the right of the State in land ownership because *use-right holding* is the subset of ownership, and in the absence of another use-right holder, the owner automatically becomes the holder, and not a mere bare owner. Yet, one may argue that the State owns all land, but '*holding*' is specific and relates to property rights such as use right and control, which may be exercised by an owner or by a person to whom these rights are assigned by the owner. Even if we pursue this line of interpretation, demarcation of the state's holding in accordance with Article 2(13) is merely *declaratory* (to let the public know about the holding of the State which is the owner of the resources) and not *constitutive* (i.e. an act which confers new holding right to the State).

5.3- Unprotected public ownership and *defacto* open access

As highlighted in the preceding sections, land in Ethiopia is publicly owned, and there can be three forms of use-right holdings on land, i.e. individual, community and state holding. The issue that can arise is whether whatever is not effectively *held* by individuals, communities and the State is *defacto* open access, even if it is state-owned. This question presupposes a distinction between what is *held* (i.e., demarcated and effectively controlled) by the State and what is owned by the State but not held by any of the three entities (including the State) that are enumerated under Proclamation No. 456/2005.

The second issue of concern is whether we can offer a wider interpretation to Article 2(13) of Proclamation No. 456/2005 and interpret '*state holding*' as all resources not held by individuals and communities. This interpretation seems to be viable because the words "rural land demarcated" refer to the ones that have

already been demarcated as state forests, wild life parks, etc… and the phrase "those lands to be demarcated in the future" applies to all other resources outside the holdings of individuals and communities.

This warrants the interpretation that the State becomes the bare owner where the use rights of land are held by individuals and communities. With regard to the resources that come under *state holding*, however, the State is not only a use-right holder[127] but the possessor and the owner. This domain (which is state-owned but not effectively protected) is susceptible to *defacto* open access. There is thus the need for rethinking whether the State (both at federal and regional levels) is in the course of effectively and efficiently practicing the five attributes of ownership highlighted under Section 3.2, i.e. access, withdrawal, management, exclusion and alienation. Apparently, the lack or inadequacy of efficient and effective control in these attributes or property rights leads to *de facto* open access and resource dissipation.

China's experience shows that collective ownership is more effective than state ownership of common-pool resources (such as forests) unless the latter is effectively implemented. China's priority to collective ownership (and the current trend towards *Household Responsibility Systems*) illustrates the options that are available towards effective tenures under public ownership. It is to be noted that collective ownership is the principle and state ownership an exception under the Constitution of the Peoples Republic of China which clearly goes beyond the recognition of collective use rights, and rather recognizes collective ownership of rural land (subject to the restrictions imposed in relation with alienation):

> Land in the rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with the law; house sites and private plots of cropland and hilly land are also owned by collectives. The state may in the public interest take over land for its use in accordance with the law. No organization or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways. All organizations and individuals who use land must make rational use of the land.[128]

There can indeed be schemes that can be used in addressing the problem of *de facto* open access in Ethiopia. Such schemes can, *inter alia*, include the following:

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[127] As stated in *supra* note 122, The term 'holder' is used in its restrictive sense under the Civil Code (eg. Arts 1141 and 1147). However, Proclamation No. 456/2005 uses the term *holding* in its wider interpretation as use-right holding.

[128] Art. 10, Constitution of the People's Republic of China.

a) One of the policy options is a stronger recognition of indigenous community rights[129] or collective rights of communities such as peasant associations that would exclude others who are not members of the community and in effect control open access. This can facilitate collective forest tenure over a defined area with periodic withdrawal and harvesting rights in such a manner that afforestation can be encouraged, and reforestation becomes commensurate with harvest. Such schemes require well-defined benefits to communities so that members can benefit from the preservation and development of forest lands, wild life, and other natural resources. Subject to the need to control the risk of unproductive fragmentation, collective forest tenures can, for example, devolve towards *Household Responsibility Systems* which have indeed become effective in China.
b) The second scheme (which can coexist with other forms of tenure) is effective state ownership through clear demarcation and articulation of the scope of access. This involves strengthening control through rangers employed from the rural areas in which the forests, wild life, etc. are found, putting inventory schemes in place and designing effective mechanisms which would make the rangers accountable for unguarded resources and wildlife;
c) Thirdly, private foresters can play a positive role without, however, violating the interest of communities, nor without resorting to the privatization of already existing forests.

In all these forms of tenure, periodic harvesting need to be effectively monitored as envisaged under Article 7 of Proclamation No. 542/2007.[130] The issue of regulating forest harvesting is relevant not only in relation with private and community holding, but should also apply to state holdings. A case in point is the risk involved in undefined procedures of alienation and the inclination of certain public administrative institutions to harvest trees (without prior or immediate reforestation) in search of revenue without due regard to the precautions embodied under Arts 8 to 11 of Proclamation No. 542/2007 and other regional proclamations. Prudence thus requires that harvesting timelines and procedures be regulated by public agencies such as the Environmental Protection Authority and not public administrative entities that have a conflict of interest owing to their pursuits to generate revenue for their budget and projects.

[129] See for example the discussion on community land holding rights in: E. N. Stebek (2008), "Dwindling Ethiopian Forests: The Carrot and Stick Dilemma", *Mizan Law Review*, Vol. 2, No. 2, pp. 267-271.

[130] Proclamation No. 542/2007, "A Proclamation to Provide for the Development and Conservation and Utilization of Forests."

Concluding Remarks

Exclusion is relatively easy in the implementation of various property rights such as the protection and use of an individual's possessions. Such exclusion and control is not necessary where public goods are abundant and not susceptible to depletion. While *pure public goods* such as air are regarded as largely non-substractable and accessible without the risk of depletion, *common pool resources* are significantly substractable and prone to overconsumption and depletion. As certain public goods such as forests become scarce (and depletable) competing interests unaccompanied by adequate regulation, control and exclusion render the sustainability of these resources difficult or highly costly.

The demarcation between *pure public goods* and *common pool resources* is indeed getting blurred as public goods such as water are growing scarce in some parts of the world. Nevertheless, resources such as forests (under the current Ethiopian realities) seem to predominantly fall under the domain of common pool resources that are vulnerable to overuse and dissipation.

Lack of adequate institutional framework and effective implementation coupled with competing interests in withdrawals from common pool resources enhance the pace at which these resources are depleted. This leads to overconsumption and dissipation of common-pool resources rather than their sustainable utility because the *common good* becomes accessible to all or to many without effective schemes of protection and preservation. This is because, public ownership without the effective control of the *usus* and *fructus* aspects of ownership merely means access to all thereby leading to the tragedy of resource non-sustainability.

There is thus the need for rethinking the Ethiopian legal regime on rural land use in light of the necessity to control open access to resources such as forests through well-defined common property rights of communities, rights of private foresters, rights of non-profit foresters, and well-defined state property regimes which expressly regulate or prohibit access with effective control and enforcement schemes thereof. Short of such schemes, the *business as usual* option inevitably worsens the dissipation of common-pool resources because the inadequacy of a "common property regime enforced by local users" and the conversion of "*de jure* government-property regime" onto "a *de facto* open-access regime" can eventually lead to the conversion of many green mountains to sand dunes and rocky landscapes. ■

HUMAN RIGHTS UNDER THE ETHIOPIAN CONSTITUTION: A DESCRIPTIVE OVERVIEW

Adem Kassie Abebe ♣

Abstract

This article summarizes human rights under the Ethiopian Constitution (mainly surrounding Chapter 3 of Constitution and related constitutional provisions on human and democratic rights), and forwards some insights. It, *inter alia*, covers various aspects of the application and interpretation of human rights provisions, limitation and derogation from protected rights, the amendment procedure and constitutional adjudicatory jurisdiction. The relevance attached to international and regional human rights instruments and their status in the Ethiopian hierarchy of laws is noted. Although there are some references to factual situations, the article primarily considers the constitutional landscape. The article thus attempts to cover a wider spectrum of issues, and its purpose is not to discuss each issue in detail, but to forward an overview and offer some insights.

Key words:

Human rights, The Ethiopian Constitution, Ethiopia, constitutional adjudication, constitutional amendment, constitutional remedies.

Introduction

Ethiopia had three written constitutions (in 1931, 1955 and 1987) before the 1995 FDRE Constitution. The 1931 Constitution[1] does not have significant relevance for the human rights discourse as it was primarily designed to reaffirm and fortify the absolute power of Emperor Haile Selassie I.[2] The state was generally not understood to owe duties to its subjects.[3] The 1955 Constitution[4]

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[1] Constitution of Ethiopia, (adopted in July 1931). The absence of written constitutions before 1931 does not however mean that there were no (unwritten) constitutions.

[2] For more discussion see, Fasil Nahum (1997), *A Constitution for a Nation of Nations: The Ethiopian Prospect* (Red Sea Press) at 21 (See generally Chapter 2).

[3] T Regassa (2009) "Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia", 3(2) *Mizan Law Review* 287, at 297*; see also* CN Paul & C Clapham (1972), *Ethiopian Constitutional Development: A Sourcebook*, Addis Abeba University Press)

was adopted in response to the inadequacy of the 1931 Constitution to accommodate the more complex legal and political scenario at domestic and international levels. Although this Constitution recognized a handful of rights, their relevance was vastly compromised due to the absolute power of the Emperor, and the absence of an organ empowered to interpret and apply the Constitution.[5] Besides, most of the rights were entangled with claw-back clauses.[6]

The military junta (which called itself the Dergue, which literally means Committee) took power after dethroning Emperor Haile Selassie I in 1974, and it adopted a Constitution in 1987 after 13 years of constitutional lacuna. The 1987 Constitution[7] highly accentuates economic, social and cultural rights due mainly to the socialist tendency of the regime. It was nonetheless a regime beset by fear and there was no fertile ground to foster the recognition and exercise of human rights.[8]

The current Ethiopian Constitution entered into force on 21 August 1995.[9] In a stark break from its predecessors, the FDRE Constitution establishes an ethnic based federal state consisting of regional states delineated on the basis of settlement patterns, language, identity, and consent of the people concerned.[10] The Constitution also represents a major breakthrough in terms of human rights. It was crafted to respond to the underlying causes that triggered the widespread

[4] Revised Constitution of the Empire of Ethiopia, Proclamation No. 149 of 1955.

[5] See generally G Krzeczunowicz (1984), 'Hierarchy of laws' 1(1) *Journal of Ethiopian Law*, 11

[6] T Regassa, *supra* note 3 above, at 298.

[7] Constitution of the People's Democratic Republic of Ethiopia, adopted 22 February 1987.

[8] In addition to the four Constitutions alluded to, Ethiopia also had the 1991 Transitional Period Charter of Ethiopia which organized the Transitional Government between 22 July 1991 and 21 August 1995. This Charter recognized 'freedom, equal rights and self-determination of all the peoples' as its governing principles.

[9] There is no indication that the Constitution or any of its elements were inspired by constitutions in other parts of the world. Nonetheless, the human rights provisions of the Constitution must have been highly influenced by the development internationally.

[10] See FDRE Constitution arts 1, 46 and 47. Currently, there are nine regional states and two city states under federal administration, Addis Abeba and Dire Dawa. Each level of government, Federal and Regional, has its own legislative, executive and judicial structures. The judicial structure is composed of first instance, high court and supreme courts at the federal level and in each regional state.

conflict and the ultimate downfall of the Dergue military junta in 1991. It addresses the volatile issues of ethnicity and self-determination.[11]

It is with this mindset that the drafters of the Constitution articulated the common objective of "building a political community founded on the rule of law and capable of ensuring a lasting peace guaranteeing a democratic order".[12] Unlike its predecessor which vehemently promoted a unitary system, the current Constitution emphasizes, tolerates and even encourages diversity and attempts to address it through an ethnic-based federal system. The relevance accorded to human rights is reflected from the outset by the preamble of the FDRE Constitution which emphatically affirms "the full respect for individual and people's fundamental rights" as a condition precedent and foundational principles for the success of this sparkling ambition.[13]

The article presents an overview of the peculiar features and application of the Ethiopian Constitution regarding human rights and briefly discusses issues of interpretation. Moreover, the rights guaranteed by the Constitution are highlighted followed by a brief discussion on restrictions, derogation during emergencies, amendment, adjudication and constitutional remedies.

1. Peculiar features and application of the Constitution (regarding human rights and freedoms)

The Constitution devotes more than one third of its content to provisions on fundamental human and people's rights.[14] Moreover, there are provisions that deal with national policy principles and objectives which either establish important guarantees or have direct relevance to the interpretation of fundamental rights. The Constitution imposes a responsibility and duty to the respect and enforcement of fundamental rights and freedoms at all levels of the federal and state legislative, executive and judicial bodies.[15]

The Constitution further elevates the horizon of human rights through reference to international and regional human rights instruments as thresholds

[11] See the preamble which starts, 'We the nations, nationalities and peoples of Ethiopia'. The Constitution serves as an expression of sovereignty which resides in nations, nationalities and peoples of Ethiopia (FDRE Constitution Art. 8).

[12] FDRE Constitution, preamble, para 1.

[13] FDRE Constitution, preamble, para 2 & 5.

[14] See FDRE Constitution, Chapter 3, Arts. 13 – 44.

[15] See FDRE Constitution, Art. 13(1) – this reinforces the supremacy of the Constitution and the general responsibility and duty the Constitution imposes on "all citizens, organs of state, political organizations, other associations as well as their officials" to obey and ensure its observance (Arts 9(1) and (2)).

for the interpretation of its human rights provisions.[16] Another prominent feature is the implicit recognition of the independence, interrelatedness and indivisibility of all generations of human rights by incorporating them on equal footing without any difference in consequence.[17]

In terms of substantive guarantees, the Ethiopian Constitution is the only one in Africa to recognize the right to self-determination of "nations, nationalities and peoples".[18] This right extends up to creating regional states within the federal state and can even extend up to secession under the conditions stated in the Constitution. However, the exercise of the right to secession has not so far been seriously considered by any of the regions although a demand for secession has been espoused by some rebel groups.[19]

The Constitution also establishes separate procedures for the amendment of the human rights and fundamental freedoms.[20] To avoid any possible regression and safeguard the gains, a more stringent and rigorous procedure is required to amend the provisions relating to the fundamental rights and freedoms than the remaining parts of the Constitution. [21] The Constitution fortifies these features through the supremacy clause under Article 9(1).

Application relates to who is bound to comply with the obligations that rights create. It helps to determine who may stand to be guilty of violating human rights. At a macro level, constitutions generally regulate the relationship between the state and its subjects, and amongst the state institutions themselves (vertical application). At a micro level, fundamental rights and freedoms delimit

[16] See FDRE Constitution, Art. 13(2).

[17] This is in conformity with the 1993 Vienna World Conference on Human Rights (para 5), and the African Charter on Human and Peoples' Rights which affirms indivisibility of all kinds of rights in the preamble (adopted 27 June 1981, Preamble Para 6). For a detailed discussion see H Steiner & P Aliston, *International Human Rights in Context: Law Politics, and Morals* (2nd ed, 2000, Oxford University Press). The three generation of rights are first generation civil and political rights, second generation economic, social and cultural rights, and third generation group rights.

[18] See also C Heyns and W Kagoungo (2006), 'Constitutional human rights law in Africa' (22) *South African Journal of Human Rights 673, at* 678. See FDRE Constitution, Art. 39(1).

[19] The Oromo Liberation Front and the Ogaden National Liberation Front are examples in this regard. There is better tolerance for internal self-determination: for instance, the Silte exercised their right to internal self-determination.

[20] For the procedures of amendment see FDRE Constitution, Arts. 105(1) and (2).

[21] For a detailed discussion of the safeguards and procedure of amendment see item (G) below.

relationships between and among subjects themselves (horizontal application).[22] Most constitutions often anticipate and predominantly consider and regulate the vertical application of rights. Some progressive constitutions however also have desirously acknowledged horizontal application of human rights.[23]

In the Ethiopian Constitution, the Chapter that deals with human rights only explicitly recognizes their vertical application.[24] The absence of mention of other entities in the same Chapter that deal with human and fundamental rights has led some to conclude that the Constitution is one of a handful of African constitutions that contain application clauses but do not recognize horizontal application of rights.[25]

A holistic and purposive view at the Constitution, however, reveals that even individuals and juristic persons are bound by the bill of rights. This is because the Constitution enjoins, though not exclusively concerning the bill of rights, "all citizens, organs of state, political organizations, other associations as well as

[22] For a discussion of the vertical and horizontal application of rights and the theoretical and philosophical concepts that underlie horizontal application see generally DM Chirwa 'In search of philosophical justifications and suitable models for the horizontal application of human rights' 2008 8/2 *African Human Rights Law Journal 294*; and JJ Paust 'Human rights responsibilities of private corporations' (2002) 35 *Vanderbilt Journal of Transnational Law* 801

[23] The Constitution of the Republic of South Africa (Act No 108 of 1996) provides an interesting example. Section 8(2) provides 'A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. This is a very broad and obscure standard which obviously necessitates a case by case and individualized consideration of each situation on its own facts - it is hardly possible to develop a general all-encompassing standard. The Constitutional Court of South Africa in one case referred to the 'intensity of the right', which itself is unclear and barely elaborative, as a determining factor - Case of *Khumalo v Holomisa* 2002 (5) SA 401(CC). See also South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) 'Business and Human Rights: The responsibilities of corporations for the protection and promotion of human rights' (2008). For a discussion of the application of the bill of rights in the South African Constitution see I Currie & Johan de Waal *The bill of rights handbook* (5th ed, 2005, Juta Publication) 30-78.

[24] See FDRE Constitution, Art. 13(1) which imposes a duty to respect and enforce only on 'All federal and state legislative, executive and judicial bodies'.

[25] The other two are Burundi and Cape Verde. A total of 13 constitutions of African countries contain application provisions. See Heyns & Kagoungo "Constitutional Human Rights Law in Africa" *supra* note 18 above.

their officials" to obey and ensure its observance.[26] This clearly exacts compliance and imposes a duty on the listed persons and entities to obey and observe, *inter alia*, the fundamental human rights and freedoms stipulated under the Constitution.

2. Interpretation of Human Rights and Fundamental Freedoms

Interpretation refers to the ascertaining or determination of the meaning of a legal provision.[27] Contemporary constitutions generally provide that their bill of rights should be interpreted generously and holistically.[28] The Ethiopian Constitution does not include a general interpretation clause whose application permeates all of its provisions. It does however contain a laudable interpretation clause regarding the chapter dealing with human rights and fundamental freedoms.[29] Article 13(2) requires that the bill of rights "shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights (UDHR), International Covenants on Human Rights[30] and international

[26] See FDRE Constitution, Article 9(2). Note that the list does not include Non-Ethiopians as well as juristic persons established under the laws of other states. Considering the effects of globalization and the ever increasing presence of foreigners and the increasing role of foreign companies in the Ethiopian economy, an amendment may be necessary.

[27] The power of interpreting the Constitution lies with the House of Federation, a political organ with semi-legislative power consisting of representatives of nations, nationalities and peoples of Ethiopia. Each nation, nationality and people has at least one representative and one more for each one million of its population. See arts 61-66 of the FDRE Constitution.

[28] See for instance Section 39 of the Constitution of South Africa. This provision further requires that the promotion of values that underlie open and democratic societies should guide the interpretation of the bill of rights. The Constitutional Court of South Africa has consistently reiterated this on several occasions; see for instance *S v Makwanyane* 1995 (3) SA 391 (CC), and *S v Mhlungu* 1995 (3) SA 391 (CC). More importantly, Art. 4 of the International Covenant on Civil and Political Rights (ICCPR, adopted 16 December 1966 and entered into force 23 March 1976) and Art. 5 of the International Covenant on Economic, Social and Cultural Rights (ICESCR, Adopted by the UN General Assembly on 16 December 1966 and entered into force 3 January 1976) note that the provisions therein should not be interpreted to undermine other provisions or in a way that limits rights more than anticipated and permitted.

[29] See FDRE Constitution, Art. 13(2).

[30] Apparently, this seems to refer to the 1966 Covenants (ICCPR and ICESCR) which, together with the Universal Declaration of Human Rights (UDHR, adopted 10 December 1948) form the International Bill of Rights. The FDRE Constitution does not however succinctly determine the status of ratified international instruments in the Ethiopian hierarchy of laws. For more discussion on this, see I. Idris 'The place of

instruments adopted by Ethiopia".[31] It should be noted that the relevant instruments need not have been ratified by Ethiopia. However, the reference is limited to adopted instruments and does not include customary international law *per se*.[32]

The status of international instruments in general (and human rights instruments in particular) in the Constitution is not definite and is subject to academic debate. Article 9(1) of the Ethiopian Constitution declares the supremacy of the Constitution. Hence, a literal reading of this provision clearly indicates that international instruments, which, under Article 9(4), are made an integral part of the laws of the land upon ratification, are subordinate to the Constitution. Since human rights treaties are also part of a special kind of international agreements, they should be understood to be subordinate to the Constitution. However, the inclusion of the interpretation clause (Article 13/2 in relation to the fundamental rights chapter) has led some scholars to conclude that international human rights instruments adopted (and not just ratified) have a status higher than, or at least equal to, Chapter 3 of Constitution itself.[33]

International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia Constitution' (2000) 20 *Journal of Ethiopian Law 113;* and SA Yeshaneh 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (2008) 8/2 *African Human Rights Law Journal 273.*

[31] 'International instruments' should be understood to include regional and sub-regional instruments as well. If the words 'international instruments' were not meant to include regional instruments, the reference to 'International Covenants on Human Rights' would have sufficed. The Constitution could have explicitly mentioned the African Charter on Human and Peoples' Rights especially as the African Charter (Article 21) is the only human rights instrument that unequivocally establishes the right to self-determination of peoples, which underpins the very foundation of the Ethiopian Constitution. For the application of this interpretation clause see *Dr Negaso Gidada v the House of Peoples' Representatives and the House of Federation*, Federal High Court, Appeal, Addis Ababa, Judgment 4 January 2006 which applied the UDHR (even though the Supreme Court rejected the ruling of this Court); and *Miss Tsedale Demissie v Mr Kifle Demissie*, Federal Supreme Court Cassation Division, File 23632, Judgment 6 November 2007 which applied Convention on the Rights of the Child (adopted 20 November 1989).

[32] Similarly, Art 9(4) of the FDRE Constitution, which makes ratified instruments part of the law of the land, does not mention customary international law. Note that Article 9 is the interpretation provision whereas Article 13(1) is the incorporation provision.

[33] Ibrahim Idris (2000) 'The place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia Constitution', 20 *Journal of Ethiopian Law* 113.

Nevertheless, the Constitution only requires reference to the '*principles*' – such as principles of universality, indivisibility and interdependency of all human rights, the duty to respect, to protect, to fulfill, and the principle that limitations of rights are the exceptions etc, rather than the *provisions* of international instruments which outline the specific rights to guide the interpretation of the provisions in the fundamental rights chapter. It also broadly refers to hard as well as soft instruments. Most importantly, conformity is required only when there is the need for interpretation which excludes cases where clear differences exist between the Constitution and international instruments as well as cases of clear constitutional provisions which merely require application of the Constitution. As such, even international human rights instruments have a status subordinate to the Constitution.

The requirement that interpretations should conform to international instruments, however, only applies to human rights provisions included in Chapter 3 of the Constitution.[34] There are other provisions outside this Chapter that are directly or indirectly relevant to human rights. Chapter 10 that deals with the National Policy Principles and Objectives, for instance, contains essential provisions germane to human rights particularly to socio-economic and environmental rights.[35] Even more directly relevant is the provision that deals with derogation of rights.[36] Interpreting the derogation clause probably needs more guidance based on international and regional instruments and jurisprudence. However, since the provision dealing with the substantive and procedural requirements for derogation of rights in emergency exists outside Chapter 3, the interpretation of the derogation provision does not have to be in conformity with international standards.[37] However, the interpretation provision should be understood purposively to oblige guidance and conformity in interpreting all provisions that have direct or indirect bearing on the fundamental rights and freedoms enshrined in the Constitution.

The Constitution does not say anything about the relevance of foreign law and jurisprudence. However, Proclamation No. 251/2001 which was enacted to consolidate the House of Federation (HoF), i.e., the organ which has the power to interpret the Constitution, authorizes the HoF to identify, develop and

[34] See Art. 13(2) of FDRE Constitution 'the fundamental rights and freedoms specified in *this Chapter'* (emphasis added*).*

[35] See FDRE Constitution, Arts. 88-92 dealing with political, economic, social and environmental objectives, and principles of foreign policy.

[36] See FDRE Constitution, Art 93.

[37] There are however several rights which are non-derogable under international human rights law but are derogable under the Ethiopian Constitution - for instance, the right to life. For further discussion on derogation of rights, see item (f) below.

implement principles of constitutional interpretation as it deems appropriate.[38] The legislation enacted to establish the Council of Constitutional Inquiry[39] reiterates the same authorization.[40] This allows the HoF to look into foreign law and comparative jurisprudence in consolidating its own principles of interpretation.[41] Yet, as Ethiopia is a civil law country highly influenced by civil law traditions, the instance of reference to foreign law and jurisprudence is likely to be rare.

Another relevant provision for purposes of interpretation is the presumption of the constitutionality of legislation.[42] This implies that the onus of proving the unconstitutionality of any law or practice lies with the person or entity challenging the constitutionality of the action or omission. Finally, Article 106 of the Constitution provides that the Amharic version is authoritative.

3. Protected Rights

The Ethiopian Constitution incorporates several human rights. The recognition ranges from traditional civil and political rights to socio-economic and group or solidarity rights. This is further reinforced by the National Policy Principles and Objectives. The rights are generally guaranteed for everyone with some exceptions.[43]

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[38] Consolidation of the House of Federation and Definition of its Powers and Responsibilities Proclamation No. 251/2001, Art. 7(1).

[39] The Council of Constitutional Inquiry is a constitutional body established to assist the House of Federation in interpreting the Constitution. It is composed of eleven members including the President and Vice President of the Federal Supreme Court, six other legal experts with proven competence and high moral standing appointed by the President of the Republic upon recommendation of the House of Peoples' Representatives, and three others nominated by the House of Federation from among its members. See FDRE Constitution, Arts. 82-84.

[40] Council of Constitutional Inquiry Proclamation No.250/2001 Art. 20 (1)

[41] Indeed, the Council relied heavily on the US law and jurisprudence on issues of bail to reject a complaint that argued that the determination as to which crimes in relation to which bail might not be available, or available only to a limited extent may not be made by the House of Peoples' Representatives (HoPR) under the Ethiopian Constitution – see The case concerning the constitutionality of the law that excluded bail in corruption offences, Council of Constitutional Inquiry.

[42] See Art. 9(1) of Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation No. 251/2001.

[43] Art. 33 (the right to nationality), Art. 38 (the right to vote and be voted for), Art 39 (the right to self-determination), Art. 40 (the right to property), and Art. 41(economic, social and cultural rights), Art. 43 (the right to development to the totality of the peoples of Ethiopia, and to nationals) all establish rights only to

3.1- Civil and political rights

The Constitution embodies several civil and political rights most of which are adopted from the provisions of the UDHR.[44] The list includes the right to life (which forbids deprivation of life except as punishment for a serious offence determined by law),[45] to security of the person, to liberty (which prohibits arbitrary arrest and deprivation of liberty), protection against cruel, inhuman, or degrading treatment or punishment including the banning of slavery and trafficking in human beings for whatever reason, and forced or compulsory labor.[46] The Constitution further guarantees the right to equality and equal protection of the law (Article 25); the right to privacy which may only be limited if "compelling circumstances" exist in accordance with law (Article 26). The freedom of religion, belief and opinion (Article 27); freedom of thought and expression including access to information of public interest;[47] the right of assembly, demonstration and petition;[48] the right to association for any cause or purpose (Article 31); freedom of movement including the right to reside anywhere within the national territory as well as the right to leave and return to Ethiopia (Article 32); the right to nationality, to change it at one's will, and not to lose it for the mere reason of marriage to a foreign national are also recognized.[49]

Individuals and groups have the right to access to justice to obtain a decision or judgment over any justiciable matter in a court of law or other competent

Ethiopians. Hence, foreigners cannot as a right claim the benefits flowing from these rights.

[44] In fact, the UDHR is the only human rights instrument that the Constitution expressly mentions. See art 13(2). The Constitution, though not by name, also refers to other instruments adopted by Ethiopia.

[45] This obviously allows the imposition of the death penalty. It does not however define what a 'serious crime' means. It is apparently left to the discretion of the legislator to determine in relation to which crimes death sentence may be imposed. For instance, the new Anti-terrorism Proclamation No 652/2009 requires the imposition of the death penalty (see Art. 3).

[46] See FDRE Constitution, Arts. 14 – 18.

[47] FDRE Constitution, Art. 29. A new legislation to give effect to this provision has been enacted, see The Mass Media and Freedom of Information Proclamation No 590/2008.

[48] FDRE Constitution, Art. 30. A legislation has been enacted to give effect to this right, see Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political Meeting No 3/1991

[49] FDRE Constitution, Art. 33. An implementing legislation has been adopted. See the Ethiopian Nationality Proclamation No. 378/2003 for further detail. The constitutional provision does not however guarantee the right not to be forcefully expelled.

body with judicial power.[50] The right to vote and be elected is guaranteed to all Ethiopians of age (Article 38); similarly, the right to property is embodied under Article 40.

Moreover, the Constitution includes guarantees pertinent to the criminal justice system. The right of arrested persons[51] to remain silent; to be promptly informed, in a language she/he understands, of the reasons for their arrest; to be brought before a judge in 48 hours, and *habeaus corpus*. It also excludes confession or admission obtained through coercion;[52] and establishes the right to bail.[53] Accused persons have the right to a public trial in an ordinary court within a reasonable time; to be informed with the particulars of the charge; the privilege against self-incrimination and the presumption of innocence until proven guilty; access to and the right to challenge evidence presented against them and to adduce evidence on their behalf; the right to be represented by legal counsel of their choice; and if they cannot afford to pay for such counsel and if miscarriage of justice would result, to be provided with one at the expenses of the state[54]; and the right to appeal to a competent court.[55]

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[50] FDRE Constitution, Art. 37. The Constitution does not provide criteria for determining, nor a definition of, justiciability of a matter. It is therefore arguable whether, for instance, the policy principles of the Constitution are justiciable. Some suggest that what is justiciable is more or less well recognized. See Fasil Nahum "A Constitution for a Nation of Nations", *supra* note 2 above, at 150. This, however, ignores the difference in domestic approaches on what constitutes justiciable disputes.

[51] For the rights of accused persons, see FDRE Constitution, Article 20. Note that the difference between arrested and accused persons only relates to the pressing of charge. Once a charge is pressed, an arrested person becomes an accused person. Accused persons may however not always be arrested as they might exercise and be granted their right to bail.

[52] Note that evidence obtained through other illegal methods, or involving procedural irregularities - such as failure to inform the arrested person of his right to remain silent, not involving coercion is not required to be discarded under the Constitution.

[53] See FDRE Constitution, Art19. The constitutional provision on bail is not sufficiently clear on whether the law will prescribe the general standards, to be applied by the court in each case involving individual determination, or whether the law prescribes the specific cases as to when bail may be legitimately denied (for instance depending solely on the sentence of the crime with which the suspect is charged). The Criminal Procedure Code adopts standards. See the Criminal Procedure Code of Ethiopia Proclamation No 185/1961, Arts 63(1) and 67.

[54] The phrase 'miscarriage of justice' has generally been determined based on the possible punishment the charge may entail.

[55] This provision may be invoked to challenge the constitutionality of the Federal Courts Establishment Proclamation No 25/1996 (Art 8(1)) which gives the Federal Supreme Court first instance jurisdiction to try criminal cases involving high government

Persons in custody have the right to treatment that respects their human dignity. They also have the right not to be held incommunicado and hence to be visited by their spouses or partners, close relatives, friends, religious councilors, medical doctors or their legal counsel.[56] The retroactive application of criminal laws is also prohibited and hence unconstitutional.[57] It is however controversial whether this guarantee applies to both substantive and procedural criminal laws alike.[58] The Constitution prohibits double jeopardy in the form of re-trial or punishment for an offence upon which a final conviction or acquittal has been entered as per criminal law and procedure.[59] This clearly means that double jeopardy does not apply to cases where there were irregularities in the application of the relevant criminal law or procedure.

Marital, personal and family rights with equal rights for both sexes while entering or during marriage, or at the time of divorce;[60] the rights of women to

officials. Since the Supreme Court is the highest judicial body, there is no possibility of appeal from its orders or judgments. The only possible avenue is the Cassation Division of the Supreme Court which only considers questions of law, and not questions of fact which may be considered on appeal.

[56] FDRE Constitution, Art. 21. This provision also means that arrested persons may not be (or at least do not have the right to be) visited by others who are not listed in the provision such as foreign diplomats or the media.

[57] FDRE Constitution, Art. 22. This relates to criminal laws which either create a new crime, or impose more severe penalties for existing crimes. Exceptionally, retroactive application of criminal laws is permitted if it benefits the accused, for instance, by decriminalizing a previously criminal act or by reducing the penalty for such act.

[58] Substantive criminal law refers to those laws that create new crimes, or aggravate the punishment for existing crimes; procedural criminal law relates to other criminal laws that do not create crimes but are detrimental to the accused such as those that retroactively exclude bail. In the first case, retroactivity is prohibited. But would a law that retroactively excludes bail be unconstitutional?

[59] FDRE Constitution, Art. 23.

[60] FDRE Constitution, Art. 34. The Constitution, however, allows for the establishment of religious or customary courts such as Sharia Courts (FDRE Constitution, Art. 34(5) and 78(5)). This authorizes the adjudication of disputes of a family and personal nature in accordance of religious or customary laws, with the consent of the parties. Obviously the application of Islamic law, for instance, might lead to unequal treatment between men and women in marriage or during divorce. This obviously contradicts the equality guarantee under Arts. 25 and 34(1), and Article 35(7) which guarantees equal treatment in the inheritance of property. The House of Federation had missed a golden opportunity to rule whether decisions of customary and religious courts are appealable to regular courts when it rejected an appropriate case for want of standing – The case was submitted to the Council of Constitutional Inquiry by the Islamic Affairs Supreme Council in *Tikimit* 1992 (October 1999) and decided by the Council of Constitutional Inquiry on 25 January 2000.

equality, protection from harmful customary and religious practices, right to maternity leave, right to acquire property, equal employment opportunities, and access to family planning education and information are also protected. This is further supplemented by the right to affirmative action.[61] The rights of children to name and nationality, and to be free from corporal punishment or cruel and inhuman treatment in schools and other institutions responsible for the care of children is also stipulated; the best interest of the child is the primary guiding principle; juvenile offenders must be detained separately from adults;[62] children born in and out of wedlock enjoy equal rights.[63]

3.2- Economic, social and cultural rights (ESC Rights)

The Ethiopian Constitution incorporates various ESC rights. Every Ethiopian has the right to freely engage in economic activities; to choose his/her means of livelihood, occupation and profession; and equal access to publicly funded services. It further requires the state to allocate ever-increasing resources to provide social services; provide funds for the rehabilitation of persons with disabilities, the aged and children without parents or guardian subject to

[61] FDRE Constitution, Art. 35. The Constitution (Article 7) moreover declares that provisions set out in the masculine gender also apply to the feminine gender. There is no similar counter right to family planning education and information to men. Regarding affirmative action, the Constitution does not make it clear whether and when it may stop.

[62] Note however that there is only one Juvenile Rehabilitation Centre situated in Addis Abeba. Hence, juveniles are in practice detained with adults in other parts of the country.

[63] FDRE Constitution, Art 36. The Constitution does not ban corporal punishment in a family setup. Moreover, even the principle of the best interest of the child does not expressly refer to decisions taken by the family – it only binds 'public and private welfare institutions, courts of law, administrative authorities or legislative bodies'. This interpretation is supported by the Federal Revised Family Code Proclamation No 213/2000 which authorizes courts to intervene in decisions of the parents concerning children only when the parents fail to privately settle the disagreement (Art. 266(2)). However, the Cassation Division of the Federal Supreme Court has ruled that the provisions of the Federal Revised Family Code may only be applied to the extent in compliance with the best interest of the child – see *Miss Tsedale Demissie v Mr Kifle Demissie*, Federal Supreme Court Cassation Division, File 23632, Judgment 6 November 2007. The principle of detention as a last resort and to the minimum possible regarding child offenders is also not guaranteed (compare Art 37(b) of the Convention on the Rights of the Child, and Rule 5 of the Beijing Rules, U.N.Doc.A/40/53/1985). We should therefore employ the interpretation provision (FDRE Constitution, Article 13(2)) to refer to international and regional human rights instruments to fill these yawning gaps in the Constitution.

available means;[64] and to pursue policies aimed at expanding job opportunities for the poor through undertaking programmes and public works projects. It also imposes a duty on the state to protect and preserve historic and cultural legacies, and to contribute to the promotion of arts and sports.

The Constitution also guarantees several labour rights. These rights include the right to association including the right to form trade unions for collective bargaining purposes; the right to strike; equal pay for equal work; paid leaves; reasonable limits to working hours; and a healthy and safe work environment.[65]

The ESC rights under the Ethiopian Constitution have some variation from the UDHR and ICESCR. One major difference from most civil and political rights in the Constitution is that ESC rights are guaranteed only for the benefit of Ethiopians.[66] Moreover, the provisions create government obligations, rather than individual or collective rights, in a manner similar to the state policy principles and objectives. The general and duty-based formulation makes it difficult to determine whether these rights are justiciable.[67] Since the Constitution does not indicate their non-justiciability, it can be argued that these rights are in fact justiciable, at least in the House of Federation.[68] Justiciability will also depend on the level of activism exercised by the members of the Council of Constitutional Inquiry and the House of Federation itself. In any case, the socio-economic rights provisions of the Constitution should be

[64] Note that ever increasing resources does not mean maximum available resources.

[65] FDRE Constitution, Art. 42. Note that the Constitution does not recognize the right of employers or employers' associations to lockout. However, the Labour Proclamation No 377/ 2003 Art. 157(2) recognizes the right to lock out. This arguably raises questions of constitutionality. In any case, however, the Constitution places the right to lock out at an inferior position to the right to strike as the procedure of amendment of ordinary legislation is loose compared to the procedure of amending the Constitution.

[66] See FDRE Constitution, Art. 41. This is in line with Article 4 of the ICESCR which allows developing states to determine the extent to which the rights will benefit non-nationals.

[67] For instance, Article 41(4) provides: "The state shall have the obligation to allocate ever increasing resources to provide to the public health, and other services". This does not establish a right to health or education as such.

[68] In fact, since the House of Federation is itself a political body, the legitimacy question may not arise. Moreover, it seems that the justiciability argument is gradually declining (at least internationally) especially with the adoption of the Optional Protocol to the ICESCR (adopted by the UN General Assembly on10 December 2008) which recognizes complaint procedures for the rights enshrined in the ICESCR. This at least has a persuasive value in understanding the justiciability of socio-economic rights.

formulated in a way that establishes individual justiciable rights. In this regard, the Constitution should follow the formulation employed in the ICESCR or the UDHR, in a way that creates rights than establish abstract obligations on the government.

The Constitution also guarantees several socio-economic rights as part of the National Policy Principles and Objectives.[69] However, it does not expressly declare the non-justiciability of the provisions of the National Policy Principles and Objectives.[70] Hence, the House of Federation or other institutions may either directly apply the principles as binding undertakings, or at least use them to guide the interpretation and understanding of the fundamental rights and freedoms.[71]

3.3- Group or solidarity rights

One essential feature of the Ethiopian Constitution is the recognition of what are called third generation or group or solidarity rights. The right to self-determination up to secession, the right to development and the right to a clean and healthy environment are clearly enshrined.[72]

The right to development is recognized as a benefit of the peoples of Ethiopia as a whole, and in the form of a right to participation. The right to clean and healthy environment similarly recognizes the right for the benefit of all persons; as such it appears more like a guarantee which accrues to each individual. The

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[69] See FDRE Constitution, Arts. 89-91. These provisions are generally similar in formulation with Art. 41 (the ESC rights provision), except that they are more elaborate.

[70] The 1999 Nigerian Constitution, Section 6(6)(c) and the 1950 Indian Constitution, Section 37 unequivocally declare the non-justiciabillity of the provisions in the respective constitutions dealing with state policy principles and guidelines.

[71] In India, for instance, the Supreme Court has read the Directive Principles of State Policy (DPSP) into the justiciable guarantees of the Constitution despite an explicit declaration of non-justiciability. At the same time, the DPSP are employed to insulate certain measures from attack based on violation of certain justiciable rights; see for instance the case of *State of Kerala v. N. M. Thomas* (1976) 2 (SCC) 310 – where it was held that the fundamental rights and DPSP are complementary, 'neither part being superior to the other'. In *Keshavananda Bharati v. State of Kerala* (1973) 4 SCC 225 it was held that 'In building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles'. See generally 'Justiciability of ESC Rights: The Indian experience' Circle of Rights - Economic, Social and Cultural Rights Activism available at: <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm> (accessed 28 July 2010).

[72] See FDRE Constitution, Arts. 39, 43 and 44.

Constitution also recognizes the right to monetary or alternative means of compensation for individuals when *state programmes* entail displacement or adversely affect their livelihood.[73]

The right of "nations, nationalities and peoples" to self-determination, up to secession[74] includes the right to speak, write, develop their language; to express, promote and develop their culture; preserve their history; and to self-government and equitable representation in the regional state and federal governments. The preconditions for secession are listed under Article 39: a two-thirds majority support of the Legislative Council of the nation, nationality and people concerned; a simple majority vote in a referendum to be organized in a maximum of three years from the time the demand has been espoused by the relevant Legislative Council, and when transfer of power and division of assets has been effected. All this process is conducted under the auspices of the House of Federation.[75]

In conclusion, the Ethiopian Constitution embodies a progressive list of rights compared to its predecessors.[76] The special features of the Constitution include the recognition given to the ethnic diversity and the willingness to accommodate it through the right to self-determination. However, the provisions concerning ESC rights are insufficient and there is a need to re-formulate them in tune with the ICESCR and other relevant instruments ratified by Ethiopia.

3.4- The distinction between 'human rights' and 'democratic rights'

The Ethiopian Constitution unduly classifies the provisions on fundamental rights and freedoms into *human rights* (Articles 14–28), and *democratic rights*

[73] The right to compensation only relates to state programmes. The protection does not accrue if the displacement or the adverse effect is a result of non-state programmes.

[74] This, it should be noted, is a natural extension of the sovereignty conferred on nations, nationalities and peoples of Ethiopia (FDRE Constitution Art. 8(1)).

FDRE Constitution, Art. 39(5) defines a "Nation, Nationality or People" as "a group of people who have or share a large measure of common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory".

[75] Art. 62(3) of the FDRE Constitution, and Proclamation to Consolidate the House of Federation No 251/2001 Art19.

[76] See, however, the discussion on the limitation and derogation of rights below. The extensive nature of permissible limitations and the list of derogable rights has significantly reduced the level of protection.

(Articles 29–44). [77] Article 10 of the Constitution creates the impression that human rights are those that emanate from the nature of mankind, and democratic rights as those inherent in democracies.[78] The preparatory work of the Constitution moreover suggests that human rights are those rights that a person is entitled merely because he or she is a human being, and democratic rights are those conferred only on citizens.[79] This was, for instance, how the Minster of Justice argued during a preliminary debate on the draft bill of the Ethiopian Civil Society Law.[80] The Constitution clearly limits the application of a right to Ethiopians whenever it deems it necessary regarding each right.[81] Moreover, limiting the application of rights to citizens will be inconsistent with international human rights instruments adopted by Ethiopia. The ICCPR for instance applies to all persons within the territory or jurisdiction of ratifying states.[82] Hence, no substantive distinction should be made merely on the ground of whether a right appears under the 'human rights' or 'democratic rights' section.

[77] For a deeper analysis of the reasons and arguments regarding this classification, see Gedion Timothewos (2010), 'Freedom of Expression in Ethiopia: The Jurisprudential Dearth', 4(2) *Mizan Law Review* 207-213 arguing that the classification is 'without significant impact' and that any other interpretation of the classification will be 'absurd'. Any difference, if any, seems to be in the underlying reasons for incorporating the different category of rights rather than their practical implications i.e. human rights are recognized because they are imbued in humanity and human nature, and democratic rights are recognized because they are expressions of desirable democratic principles and governance. We should not attach practical significance to the classification especially when to do so runs against clear constitutional provisions.

[78] Some commentators criticize this as artificial and confusing as what are traditionally called human rights are also found in the part dealing with democratic rights. See SA Yeshaneh, "The Justiciability of Human Rights", *supra* note 30 above, at 275 &276.

[79] See Minutes of the Discussion on the Draft Constitution at the Council of Representatives, May 1994. See also T. Regassa "Making legal sense of human rights", *supra* note 3 above, at 303.

[80] Ethiopian Television, 5 January 2009. The Minster mentioned this in justifying the exclusion of foreign NGOs and domestic NGOs receiving more than 10% of their budget from a foreign source from engaging on issues touching upon, even tangentially, human rights and good governance.

[81] Thus the right to vote and be elected, ESC Rights, right to nationality, right to property, and the right to development are clearly granted to Ethiopians. Freedom of expression and the right to association are, however, granted to the benefit of everyone though they are placed in the part dealing with democratic rights.

[82] Art 2(1) ICCPR.

4. Limitation of Rights under the Ethiopian Constitution

Most human rights are not absolute. There may therefore be certain limits to the exercise of rights. Limitations refer to infringements or encroachments on guaranteed rights under narrowly contoured permissible circumstances.[83] There are different approaches to limitation of rights in constitutions: some constitutions and international instruments include internal individualized limitation clauses within each particular right in different details;[84] others have adopted general limitation clauses whose application cuts across all provisions.[85] Still others adopt a combined approach because in addition to a general limitation clause they may include their own internal limitations.

The Ethiopian Constitution only contains claw-back clauses within most of the protected rights. Some of the internal limitations simply refer to those limitations determined or established by law;[86] while others are more detailed and require compelling circumstances and specific laws necessary to safeguard public security, peace, the prevention of crimes, public morality, and the protection of the rights and freedoms of others.[87] There are therefore different standards depending on which right the Constitution seeks to limit. The problem is exacerbated by the absence of a more sweeping general limitation clause in the Constitution that would have ensured uniformity of standards in scrutinizing the conformity of limitations of rights with the basic tenets of the Constitution.

The absence of a general limitations clause may have advantages as it leaves some rights, which do not have internal limitations, beyond limitations. For instance, the protection against torture and inhuman treatment or punishment in the Ethiopian Constitution may not in any way be limited. This will not generally be the case in a constitution that has opted for a general limitation clause. For instance, the South African Constitution allows the limitation of "the rights in the Bill of Rights" so long as it stands the constitutional test of

[83] They generally require legality, necessity, rational connection between the limitation and its stated purpose, and proportionality.

[84] For instance, the ICCPR, the Ethiopian Constitution, and the Constitution of the USA. The African Charter also does not have a general limitation clause although the African Commission on Human and Peoples' Rights has used article 27(2) as a general limitation clause – see for instance *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) Para 68.

[85] See for instance, the UDHR Art. 29(2), and the Constitution of the Republic of South African, section 36(1).

[86] For instance, the right to life, liberty, bail, (FDRE Constitution Arts. 15, 17 and 19 respectively).

[87] The rights to privacy, freedom of religion, belief and opinion, freedom of expression and assembly and association (FDRE Constitution, Arts. 26, 27,29, 30, 31).

reasonability and justifiability.[88] Hence, in the absence of a general limitation clause, it is possible to have a right that may not be limited in any way, if there is no internal limitation to that effect. However, lack of a general limitation clause can have its downsides, as it might invite arbitrary, limitless limitations. Some in fact describe the general limitation clause as the most important clause in a bill of rights.[89] If there is a general limitation clause, however, every right is potentially limitable and rights with internal limitation will be subjected to double limitation analysis.[90]

Several problems can be identified concerning the possible limitation of rights in the Ethiopian Constitution. First, there is no requirement in some cases, such as the right to life and liberty, that the limitation be rationally connected to the purpose it aspires to achieve, and be necessary and proportional so long as the limitation is based on law. [91] The provisions only adopt the legality requirement implying the acceptability of limitations so long as such limitations are established or determined by law without any inquiry into the fairness and propriety of the law. The minimum threshold for restraining fundamental rights and freedoms is significantly low. For instance, it is not clear whether a law that imposes capital punishment on children will stand the

[88] See section 36 of the Constitution of the Republic of South Africa. The Constitutional Court of South Africa has for instance held that even the rights of children are subject to the limitation analysis – see the case of *S v M 2008* (3) SA 232 (CC) Para 18.

[89] Stuart Woolman (1994), "Riding the push-me pull-you: Constructing a test that reconciles the conflicting interests which animate the limitation clause", 10 *South African Journal on Human Rights* 60, at 60.

[90] For instance, most of the socio-economic guarantees in the South African Constitution are internally limited to the availability of resources. They are moreover subject to possible limitation under Section 36 of the same Constitution - See for instance Sections 26(right to housing) and 27 (the right to health and social security).

[91] For the principles that should guide limitation and derogation of rights, see the Siracusa (1985), "Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights", UN Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Annex, UN Doc E/CN.4/1985/4. According to these principles, limitation of rights must be based on (1) law, (2) have a legitimate aim, and (3) be necessary.

The Indian Supreme Court during its initial stages accepted all limitations so long as established by law without any inquiry into its fairness. It for instance allowed preventive detention so long as provided by law - *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27. This understanding was later rightly reversed in favour of the requirements of guarantees of non-arbitrariness, reasonableness and fairness implicit in the provisions that protect human rights in *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

test of constitutionality.[92] Apparently, so long as the limitation emanates from a law, whatever its purpose, it is a permissible limitation. There is moreover no definition as to what 'law' means: does it include parliamentary statutes only? Or does it also include regulations, directives or even rules and practices of administrative agencies? Should it moreover be a law of general application, clear, precise and accessible allowing predictability?[93]

These are pertinent questions that need to be answered before limitations on the protected rights. In determining the justifiability of limitations, reference should be made to international and regional instruments and the jurisprudence of established treaty forums. The UDHR, for instance, includes a general limitation clause under Article 29. This should guide the determination of the justifiability of limitations on those rights that have internal limitations. It should, however, not be used to justify the limitation of rights whose limitation has not been anticipated by the Constitution i.e. provisions which do not incorporate internal limitations.

5. Derogation in Cases of Emergencies

The Ethiopian Constitution recognizes possibilities that may require the suspension of protected rights.[94] Derogation clauses relate to provisions that

[92] There is a provision in the Ethiopian Criminal Code (Proclamation No 414/2004) which prohibits the imposition of the death penalty on persons under the age of eighteens at the time of the commission of the crime (Art 117(1)). But this is only a guarantee by an ordinary legislation which may be reversed through an amendment or modification in an ordinary procedure. It is to be noted that new anti-terrorism proclamation, for example, imposes death penalty and does not embody an express exception to infants and young offenders. Yet, Articles 52 to 56 of the 2004 Criminal Code and other provisions such as Art. 117(1) of the same Code are applicable as the General Part of the Criminal Code applies to all special criminal legislation by virtue of Art. 3 of the Criminal Code. See also Article 36 of the Constitution which guarantees the right to life of the child.

[93] See for instance the European Court of Human Rights in the case of *Klass & Others c. Allemagne v. Germany* (1979) 2 EHRR 214, which defined law broadly, and *Sunday Times v United Kingdom* (1979) 2 EHRR 245, where it was held that the law must be clear and accessible with foreseeable consequences.

[94] FDRE Constitution, Art. 93. Derogations are different form limitations in that they are often temporary and may suspend a right wholly. Limitations on the other hand may be permanent and are meant to perpetually balance the public interest with the rights of individuals and groups; unlike derogations, limitations cannot negate the essential element of a right. Moreover, there is no need for emergencies to justify limitation of rights; but emergencies or crises are condition precedents for the legitimate derogation from or suspension of rights.

permit the temporary suspension of the application and enjoyment of rights in response to incidences of emergency that threaten the life of a nation.[95] Derogations do not, however, confer absolute discretion on the executive to act on its whims; there are substantive as well as procedural requirements that govern such emergency situations.[96] There are, moreover, certain rights, which may not be suspended even in threatening situations. These preconditions are designed as a protection against possible abuses of human rights on the pretext of emergencies while at the same time authorizing states to secure, maintain and ensure the sustenance of fundamental national and international interests.

Article 93 of the Constitution prescribes the requirements, both procedural and substantive. The only conditions that may justify derogations are occurrence of an external invasion, a breakdown of law and order which cannot be controlled by the regular law enforcement agencies and personnel, or the occurrence of a natural disaster or an epidemic.

The Council of Ministers of the federal Ethiopian government has the power to declare state of emergency under any of the above situations. The Regional States are also allowed to declare state of emergency to avert natural disaster or epidemic within their respective territories. The ultimate power to approve or annul a declaration of emergency made by the Council of Ministers, however, lies with the House of Peoples' Representatives (HoPR). This decision is required to be made within 48 hours if the HoPR is in session, or within 15 days

[95] See the Siracusa Principles and the Paris Minimum Standards of Human Rights Norms (International Law Association, 1985); RB Lillich (1985), "The Paris Minimum Standards of Human Rights Norms in a state of emergency", 79 *American Journal of International Law* 1072, at 1075.

[96] F.N. Aolain (1995), "The emergence of diversity: Differences in human rights jurisprudence" 19 *Fordham International Law Journal* 101, at 101.

The African Charter on Human and Peoples' Rights does not contain any derogation clause. The African Commission on Human and Peoples' Rights has interpreted this omission as prohibition of derogation from the Charter provisions. See for instance, the case of *Commission Nationale des Droits de l'Homme et des Libertes v Chad* (2000) AHRLR 66 (ACHPR 1995) Para 21; *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200(ACHPR 1998) Para 67 – implying that all the rights in the African Charter are essentially non-derogable. Some however argue that this should not be the case – see F Ouguergouz (2003), *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (Brill Academic Publishers); C Heyns "Civil and Political Rights in the African Charter" in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights the system in practice 1986-2000* (2002, Cambridge University Press) at 139.

if the HoPR is not in session at the time of the declaration of emergency.[97] Upon approval by a two-third majority vote, the state of emergency may remain up to six months subject to its renewal for up to four months on each occasion through the same procedure.[98] If annulled, the declaration will be repealed forthwith.[99]

The Constitution authorizes the possible suspension of most of the fundamental human rights and freedoms to "the extent necessary" with handful exceptions.[100] The only non-derogable rights are the prohibition against cruel, inhuman, and degrading treatment or punishment, and slavery or servitude, and trafficking (Article 18), the right to equality and equal protection of the law (Article 25), and the right to self-determination up to secession (Article 39).[101]

The Constitution requires the HoPR to establish, simultaneously with the approval of the state of emergency, an ad hoc State of Emergency Inquiry Board consisting of seven members chosen and assigned by the House from among its members and from legal experts.[102] This body, among others, monitors and follows up the situation to ensure that no measure taken during the state of

[97] It should be noted that the HoPR only has the final say over federal declarations of emergency by the Council of Ministers. States have their own constitutional provisions governing emergency declarations and there is no need for approval by the HoPR.

[98] The review power of the House of Peoples' Representatives (HoPR) is in line with the Paris Minimum Principles which require judicial or other review mechanisms. Note that the Constitution does not set a maximum period for the state of emergency; it may therefore last indefinitely so long as it gets approved by the HoPR.

[99] This implies that the annulment has only prospective effect. This is particularly worrisome in cases where the HoPR is not in session, but annuls the declaration of emergency later, as damage may already have been done within the 15 days. Hence, the procedure might leave victims without remedy.

[100] This is a significant internal limitation that exacts necessity and proportionality which relates to the severity, duration and scope (geographical) of the application of the emergency declaration. For more discussion on requirements of necessity and proportionality see Aly Mokhtar (2004) 'Human rights obligations vs Derogations: Article 15 of the European Convention on Human Rights' 8(1) *International Journal of Human Rights 68;* see also the case of *Lawless v. Ireland* (Merits) § 28, *European Court of Human Rights*, 1961, Ser. A.

[101] The other provision which is non-derogable is the Federal and Democratic structure of the state. See FDRE Constitution, Article 93(4) (b &c). The constitutional list of non-derogable rights clearly differs with the list of non-derogable rights in the ICCPR (Article 4) - the right to life and the prohibition of retroactive application of criminal law are for instance missing in the constitutional list.

[102] See FDRE Constitution, Art 93(5). The proportion between the number of members of the House and legal experts is left to the discretion of the HoPR – there is no minimum requirement.

emergency is inhuman and ensures the "prosecution of perpetrators of inhuman acts".

It is worth noting that the Constitution does not provide for the duty of the Council of Ministers or the HoPR to publish the State of Emergency declaration and ensure its accessibility. Moreover, it does not reaffirm the duty of the State to inform, *inter alia*, member states to the ICCPR.[103]

6. Amending the Fundamental Rights and Freedoms Provisions

Amendment is a mechanism by which constitutions adapt to changing circumstances through "perfecting imperfections".[104] Constitutional amendment procedures should set the balance between the inherent need to adapt and ensure stability, and the necessity to bar regressive gold-digging alterations.

The Ethiopian Constitution adopts two distinct procedures of amendment: one relating to the fundamental rights and freedoms provisions, and another for the rest of the Constitution.[105] The procedure for amending the bill of rights is more stringent.[106] This is a further manifestation of the commitment of the Constitution's preamble to fully respect and protect fundamental rights and freedoms as a pillar and precondition of an ordered and democratic society.

As a federal state, the Constitution represents, protects and preserves the mutual interest of the federal government as well as the regional states. Any amendment procedure should, therefore, accommodate the interest of both entities. Amendments to the human rights provisions of the Constitution may only be approved when all the Regional State Councils approve the proposed amendment; and when the HoPR and the House of Federation, in separate sessions, approve the proposed amendment by a two-third majority vote. Other provisions of the Constitution may be amended if: the HoPR and the House of

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[103] Art 4 of the ICCPR requires states to inform other member states when declaring emergencies.

[104] See J Hatchard (1998) "Perfecting imperfections': Developing procedures for amending constitutions in commonwealth Africa" 36(3) *The Journal of Modern African Studies* 381.

[105] FDRE Constitution, Art. 105. Note that these procedures are different from the way ordinary legislation is adopted and amended which is by a simple majority vote in the HPR. The State Councils are not in any way involved in the adoption and amendment of federal (ordinary) laws.

[106] Note however that under the current political realities, these procedural safeguards are irrelevant as the ruling Ethiopian People's Revolutionary Democratic Front (EPRDF) currently controls more than 99% of the federal parliamentary seats. There has been a similar trend of dominance since the first Ethiopian multi party elections in May 1995.

Federation in a joint session approve the amendment by a two-third majority vote, and when two-third of the State Councils approves the proposed amendment by majority vote.

Apparently, the *de jure* procedure of amending the human rights provisions of the Constitution is stringent enough to discourage retrogressive amendments. It is, however, at the same time so rigorous as to exclude any upgrading of the constitutional protection of rights. Hence, constitutionalization of new rights[107] as well as amendments to raise the level of protection of recognized rights[108] would have to pass through the same exclusionary procedure intended to preclude retrogressive amendments. Hence, the Constitution could have adopted two separate amendment provisions apropos its human rights provisions depending on the consequences of the amendment on the level of protection of the fundamental human rights and freedoms. Less stringent procedures for progressive amendments that aim at increasing the list of rights or the scope of guaranteed rights could have been preferable.[109]

Moreover, the Constitution does not anticipate the possibility of holding a referendum to amend the Constitution. This is the case even when there is a stalemate between the major actors. For instance, the HoPR, or the House of Federation, or the State Councils, or even the Council of Ministers may support an amendment, yet one of the others may be against it. In such cases, direct vote of the public on the amendment should have been called for.[110] However, there is no procedure that requires the participation of the public at large in approving certain sensitive amendment proposals.[111] Moreover, there is no room in the amendment procedure for representatives of civil society and other relevant actors. The Constitution does not also anticipate provisions that may not be amended under any circumstances. Most importantly, since the more stringent procedure applies to amending those provisions in Chapter 3, other provisions

[107] For instance, there is no right to remedy for violations of human rights in the Constitution. There is also no prohibition of arrest for failure to pay a civil debt. Moreover, all the socio-economic rights are not really couched as rights, rather as goals.

[108] For instance, to amend the right to life provision to abolish the death penalty.

[109] The author is aware that such a provision may be abused. However, whenever there are differences on the possible consequences of a proposed amendment, the dispute may be subject to judicial resolution, or to resolution by the House of Federation as it is the organ responsible for the interpretation of the Constitution.

[110] For instance, in the 1990 Constitution of the Republic of Benin, referendum is necessary when a proposal fails to secure 4/5th of the votes of the National Assembly. See Arts. 154-56.

[111] For more on the merits and demerits of holding referendum to amend Constitutions see Hatchard ''Perfecting imperfections", *supra* note 104 above.

relevant to human rights but that are found outside this Chapter, such as the provision dealing with derogation in emergency situations, may be amended through the ordinary procedure.

7. Adjudication of Constitutional Disputes

All judicial power rests with an independent judiciary and courts which are subject only to the law.[112] The Ethiopian Constitution establishes two parallel judicial structures: one at the Federal level, which hierarchically consists of the First Instance Court, High Court and the Federal Supreme Court, and one at the State (Regional) level consisting of First Instance (Woreda) Courts, High (Zonal) Courts, and Regional Supreme Courts.[113]

However, as mentioned earlier, the power of interpreting the Constitution lies with the House of Federation consisting of representatives of nations, nationalities and peoples.[114] Apparently, the Constitution either does not consider the role of the judiciary in the adjudication of constitutional disputes, or it has made an exception to the judicial power of courts. With regard to the legal expertise required in constitutional interpretation, the Constitution establishes the Council of Constitutional Inquiry, mainly composed of legal experts, to assist the House of Federation in determining whether there is need for constitutional interpretation, and if so, to provide recommendations to the HoF for a final decision.[115]

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[112] FDRE Constitution, Arts. 78 and 79.

[113] Note also that the Constitution authorizes the adjudication of personal and family disputes in accordance with customary and religious laws upon the consent of both parties (Article 34(5)). Consequently, Sharia Courts have been established all over the country.

[114] See FDRE Constitution, Art. 62(1). This is atypical of most other systems where such power is often vested in either ordinary courts or a special court established solely for such purpose. For a discussion on whether this approach represents a response to the counter-majoritarian dilemma and the legitimacy of the approach – see YT Fisseha (2004) "Who interprets the Constitution: A descriptive and normative discourse on the Ethiopian approach to constitutional review" LLM Dissertation (Faculty of Law, University of Pretoria). For a discussion of the most common type of institutions engaged in judicial review of constitutions in most countries, see WK Geck 'Judicial review of statutes: A comparative survey of present institutions and practices' (1965-1966) 51 *Cornell Law Quarterly* 250

[115] FDRE Constitution, Arts. 62(2), and 82 – 84. The Council has 11 members consisting of both legal experts and politicians: the President and Vice President of the Federal Supreme Court, six legal experts appointed by the President of the Republic upon recommendation by the House of Peoples' Representatives, and three persons appointed by the House of Federation from among its members.

The Constitution requires that 'all constitutional disputes' shall be decided by the HoF.[116] The jurisdiction of the HoF extends to contentions over the constitutionality of Federal or State laws.[117] Despite the clear constitutional provision empowering the HoF and the Council of Constitutional Inquiry to preside over constitutional issues, there has been an academic debate on whether there is anything left for courts to interpret the Constitution.

A. Fiseha argues that it is only the constitutionality of legislative enactments that is exclusively reserved to the House of Federation and the Council as implied in Art. 84(2) which only refers to 'any federal or state law'.[118] The Amharic version particularly makes it even clearer as it refers to laws made by legislative organs. Similarly, Donovan argues that the drafters of the Constitution only had the intention to take away from the ordinary courts the power to invalidate statutes as unconstitutional.[119] He reinforces his arguments with the constitutional duty of courts to enforce the Constitution as every small measure of enforcement unavoidably involves some kind of interpretation.[120] I. Idris moreover notes that 'any petition on the unconstitutionality of an administrative act or a decision or custom is within the judicial jurisdiction of an ordinary court'.[121] In short, they argue that the Courts have the residual power to consider constitutionality of cases that, for instance, involve violation of rights by the executive.[122] T. Regassa moreover states that judicial review is a normal

[116] Article 83(1).

[117] See FDRE Constitution, Art. 84(2).

[118] See A. Fiseha (2001), 'Constitutional Interpretation: The Respective Role of the Courts and the House of Federation', in Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution (Addis Ababa) pp. 6-26; A Fiseha (2005) 'Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience', *Netherlands International Law Review 1*; see also I Ibrahim (2002), 'Constitutional adjudication under the 1994 FDRE Constitution' 1(1) *Ethiopian Law Review 62*; T. Regassa (2000) 'Courts and the human rights norms in Ethiopia' in A. Fiseha (eds) *Proceedings of the symposium on the role of the courts in the enforcement of the Constitution*, (Ethiopian Civil Service College).

[119] DA Donovan (2002) 'Leveling the Playing field: the Judicial duty to protect and enforce the constitutional rights of accused persons unrepresented by counsel', 1 *Ethiopian Law Review* 31.

[120] Articles 9(2) and 13(1) FDRE Constitution.

[121] I. Idris (2002), 'Constitutional adjudication under the 1994 FDRE (Federal Democratic Republic of Ethiopia) Constitution' 1*Ethiopian Law Review* 63 71

[122] A. Fiseha (2005), 'Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience' *Netherlands International Law Review* 1, 21

inherent business of courts as is implied, in the Ethiopian case, in the vesting of all judicial power in the courts.[123]

'Law' has been defined very broadly to include proclamations issued by the Federal or State legislative organs, and regulations and directives issued by the Federal and States government institutions and also international agreements.[124] Some scholars consider this expansive interpretation as a 'blunder' and unconstitutional encroachment upon the implied residual jurisdiction of ordinary courts under the Constitution to consider the constitutionality, for instance, of directives, regulations, executive action as well as international agreements.[125]

The scholars who argue that Ethiopian courts have the power to look into the constitutionality of all acts and omissions except that of legislative statutes seem to rely exclusively on Article 84(2) which appears to only refer to legislative enactments ignoring Article 83(1) which simply says 'all constitutional disputes' shall be decided by the House of Federation. All constitutional disputes necessarily include any constitutional issue, whether or not it involves interpretation or application of the Constitution. Besides, it is Article 83 that determines the substantive issue on which organ has the power to interpret the Constitution. Article 84 only outlines the power relationships between the Council and the House of Federation and the procedure that should be followed to address constitutional issues.

The argument that courts have a residual power to adjudicate over constitutional issues not involving the constitutionality of legislative acts seems

[123] Article 79(1). See T. Regassa, "Courts and the Human Rights Norms in Ethiopia" in F A. Fiseha (ed) *Proceedings of the symposium on the role of the courts in the enforcement of the Constitution* (2000) 116. The argument which should be noted is what led the US Supreme Court to assume the power of judicial review in *Marbury v Madison* although the US Constitution did not explicitly grant such power.

[124] Art 2(2) of Proclamation No 251/2001. Note that there is a difference in the definition of the scope of 'law' in this Proclamation and the Council of Constitutional Inquiry Proclamation No 250/2001 which does not include directives of State or Federal institutions (see art 2(5) of Proclamation No 250/2001).

[125] See for instance A Fiseha (2005), 'Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience' *Netherlands International Law Review* 1, 20; see also I Ibrahim (2002),'Constitutional adjudication under the 1994 FDRE Constitution' 1(1) *Ethiopian Law Review* 62; R Tsegaye (2000) 'Courts and the human rights norms in Ethiopia' in A Fiseha (ed) *Proceedings of the symposium on the role of the courts in the enforcement of the Constitution*, Ethiopian Civil Service College); A Fiseha (2000) 'Constitutional interpretation: The respective role of courts and the House of Federation' in A Fiseha (ed) *Proceedings of the symposium on the role of the courts in the enforcement of the Constitution* (Ethiopian Civil Service College);

to be based on a selective reading of the provisions of the Constitution.[126] Even if we assume that there is actually a residual power, Fisseha convincingly argues that judicial review for constitutionality may not be understood as an inherently judicial power particularly in Ethiopia where historically 'declaring a law void for its repugnancy to the constitution has never been considered as the normal business of the courts'.[127] M. Haile also observed that the absence of a clear provision granting residual power to courts only creates a lacuna and does not necessarily imply that courts will arrogate that residual power, if any, to themselves.[128]

In Ethiopia, the power to pass final decision over all constitutional disputes lies with the House of Federation and the role of courts is utterly limited to referring cases to the Council of Constitutional Inquiry wherever a case may not be resolved without first determining the constitutionality of the law based on which it is to be decided.[129] There should not be confusion between *what ought to be* (i.e., courts should have some power in interpreting the Constitution) vis-à-vis *what is* the law as it currently exists (i.e., the power of constitutional review lies with the HoF and Council of Constitutional Inquiry). Since the House of Federation is a political organ, and judicial review inherently requires the involvement of the judiciary, it is hard to say that there exists judicial review in Ethiopia.[130] This is true to legislative acts, administrative acts or omissions or custom so long as the issue of their contradiction with the Constitution arises.[131] This has created a judiciary with a very limited role in the formulation, content

[126] This does not however mean that courts do not have any role in the enforcement of the Constitution. There are several means through which courts can play a role such as through interpreting domestic legislation in line with the Constitution or a precedent set by the House of Federation.

[127] Y. Fisseha, *supra* note 114, p. 16. Fisseha further indicates that constitutional review is not the role of courts in for instance France, England, New Zealand and several other countries.

[128] M Haile 'The new Ethiopian Constitution: Its impact upon unity, human rights and development' (1996-1997) 20 *Suffolk Transnational Law Review* 1 55

[129] *Ibid*, at 54, noting that 'ordinary courts have no jurisdiction to constitutional issues.

[130] Haile similarly notes that the House of Federation is not a judicial body - Haile ' (*supra* note 128) 54

[131] This means that if the issue is the contravention of administrative acts or custom with general principles of administrative law or a proclamation, then it is for the courts to determine whether there is such contravention. This is an administrative judicial review which should be distinguished from constitutional judicial review which essentially depends on the standard against which the constitutionality of any act or omission is to be tested.

and implementation of state policies in Ethiopia.[132] Since the HoF is itself a political body, all the human rights, including socio-economic rights, provisions should be justiciable and the relevance of the 'political question' doctrine as developed by the US Supreme Court seems less relevant.[133]

8. Constitutional Remedies

The Ethiopian Constitution does not have a provision that deals with remedies that may come out of constitutional dispute resolutions. However, Article 37(1) entitles everyone to access courts or other competent bodies to obtain a decision or judgment concerning any 'justiciable matter'.[134] The orders and remedies will therefore have to be determined by the House of Federation in each case. Quite surprisingly, there is no explicit duty on the HoF to declare the invalidity of a law or practice inconsistent with the Constitution although the Constitution deprives effect to any law, customary practice or a decision of an organ of state or public official in contravention of it.[135]

The legislation enacted to define the powers of the House, however, has some relevant provisions on the effect of its decisions. Any decision and remedy applies only prospectively unless otherwise indicated in the decision.[136] This is

[132] This does not mean that courts have no role in enforcing human rights. Courts can, for instance, ensure compliance with human rights that have been declared in proclamations, and can ensure the conformity of regulations and directives with the enabling proclamations. Courts can also exercise a significant role in interpreting the Constitution while determining whether to refer a constitutional issue to the Council of Constitutional Inquiry or the House of Federation. Such referral power presents for courts the opportunity to undertake preliminary constitutional interpretation. See AK Abebe (2010) 'Towards more liberal standing rules to enforce constitutional rights in Ethiopia' 10(2) *African Human Rights Law Journal* 401 at 419-420. See also Takele Soboka Bulto 'Judicial referral of constitutional disputes in Ethiopia: From practice to theory' (2011), 19 *African Journal of International and Comparative Law* 99.

[133] For a discussion of the political question doctrine, see P Daly (2010) "Justiciability and the 'political question' doctrine" *Public Law* 160.

[134] As indicated earlier, there is no clear definition of a 'justiciable matter'. The South African Constitution is very conspicuous in this regard as it grants access to courts in relation to 'any dispute that can be resolved by the application of law'. See section 34.

[135] FDRE Constitution, Article 9(1).

[136] Proclamation No 251/2001, Art 16(1). Compare the South Africa Constitution Section 172(1)(b)(i) which authorizes courts to limit the retrospective effect of the declaration of invalidity (without such limitation, the order will have retrospective application). - See for instance the case of *Occupiers of Olivia Road v City of*

apparently incompatible with Article 9 of the Constitution, which denies effect to inconsistent acts or omissions from the beginning (*void ab initio*), which necessitates a retrospective application of remedies.[137]

The legislation also authorizes the House to grant a grace period of up to six months to the Federal or the State legislative body to amend or repeal the law in question before a final decision on its unconstitutionality is taken.[138] This is a novel approach that gives the HoF a rather mediatory role between disputants. There is, however, no provision authorizing the suspension of a decision of invalidity made by the HoF if it opts to do so for different reasons.[139] This would have been used, for instance, to avoid legal gaps in the interim between declaration of invalidity and adoption of a new or amended legislation through giving the legislative body the chance to address the inconsistency that resulted in the declaration of invalidity. It is moreover not apparent if the HoF may grant any other remedy, such as compensation, than declaring the unconstitutionality of the defective act or omission.[140]

The interpretation of the HoF generally applies on similar constitutional matters that may arise in the future.[141] Although the decisions of the HoF are non-appealable, this should not be understood to preclude the HoF from changing or modifying its previous interpretations. The legislation also introduces the principle of severability which limits the effect of declaration of invalidity to parts of a given law which are inconsistent unless otherwise necessary to completely invalidate the whole law.[142] Hence, if the rest of the law can be given effect without the flawed provision, the law remains valid.

Johannesburg et al Case CCT 24/07[2008] ZACC 1 Para 52 where the Constitutional Court excluded retroactive application of its orders.

[137] Note that the Constitution says 'shall be of no effect' implying that the inconsistent act or omission is *void ab initio*. This requires that parties should be reinstated (by applying the remedies retrospectively) to their position prior to the violation to the extent possible.

[138] Proclamation No 251/2001, art 16(2).

[139] The South African Constitutional Court does not have a mediatory role *per se*. But it has the right to suspend its declaration of invalidity whenever considered just and equitable - see section 172(1)(b)(ii).

[140] This seems to be unlikely as the mere role of the House of Federation or the Council of Constitutional Inquiry is to ascertain whether the act or omission challenged is Constitutional. It is essentially an abstract review that does not require a concrete case.

[141] Proclamation No 251/2001, Art. 11(1).

[142] Proclamation No 251/2001, Article 12. The South Africa Constitution similarly says 'invalid to the extent of its inconsistency' (Section 172(1)(a)).

Conclusion

In conclusion, the Ethiopian Constitution contains a fairly long list of rights of all categories; hence, the main problem in Ethiopia does not seem to be lack of human rights guarantees. The interpretation provision of the Ethiopian Constitution should apply not only to the provisions in Chapter 3 but also in relation to all other provisions relevant to human rights particularly the applicability of the derogation provision. The mode of formulation of the socio-economic rights provisions of the Constitution is, however, problematic. There is therefore the need to amend it in the line with the ICESCR. There is also the need to clearly provide for possible remedies in the proclamations that regulate the powers of the Council of Constitutional Inquiry and the House of Federation. Moreover, there is no formal recognition of the judicial enforcement of the human rights provisions of the Constitution. Despite various scholarly works suggesting otherwise, the Ethiopian Constitution has kept courts at arm's length from constitutional interpretation. This has diminished the role of Ethiopian courts as the ultimate custodians of human rights protected under the Constitution and other laws.

In light of international and regional human rights instruments that can be used as guides, the House of Federation, the Council of Constitutional Inquiry, courts, the Ethiopian Human Rights Commission and other organs which may be involved in constitutional interpretation can indeed explore good practices from the experience and rich jurisprudence of international, regional and foreign jurisdictions in the area of human rights. Meanwhile, any limitation that may be imposed on the rights recognized in the Ethiopian Constitution should only be accepted when it is justifiable and necessary in accordance with a law (that is clear and accessible), and with due regard to the implications for its proportionality in a democratic society. ■

LEGAL PLURALISM, SHARIA COURTS, AND CONSTITUTIONAL ISSUES IN ETHIOPIA *

Mohammed Abdo ♣

Abstract

State laws employ different approaches in addressing the effect of pluralistic normative ordering in a multicultural setting. A legal regime may resort to the uniform application of state laws and reject religious and customary norms, or may recognize and allow the application of the norms and practices of identity groups as long as they are in conformity with constitutional and human rights standards. Another option is to adopt a *hands-off approach* whereby the norms and practices of cultural and/or religious groups are permitted to operate and are not necessarily required to meet constitutional and human rights standards. Against the backdrop of the notion of legal pluralism adopted by the FDRE Constitution, this article examines whether final decisions rendered by sharia courts in Ethiopia are required to meet constitutional standards (such as the supremacy clause, gender equality and non-discrimination). Based on the analysis of the relevant provisions of the law and literature, it is argued that decisions of sharia courts (whose jurisdiction is not compulsory, but based on the consent of litigating parties) seem to be exempted from constitutional standards even where they may be in conflict with state laws.

Key words:

Legal pluralism, sharia courts, constitutional standards, a hand-off approach, Ethiopia.

Introduction

The 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution recognizes the ethno-linguistic and religious diversity in the country. It does so, *inter alia*, by giving recognition to the settlement of disputes by customary and

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religious systems on matters affecting the personal status of individuals. The plurality of sources of normative ordering sanctioned by the Constitution opens room for the potential discord between non-state (i.e. customary and religious) laws and state laws (including the Constitution and international human rights treaties ratified by Ethiopia). A case in point relates to matters that fall within the jurisdiction of sharia courts. Such cases are to be resolved by Islamic law, which has normative and conceptual differences with state laws regarding the rights of women in general and their treatment in, among others, divorce, inheritance, and sharing of estate upon divorce. Decisions rendered by sharia courts using Islamic law could conflict, in general, with human rights norms, and can also, in particular, be inconsistent with rules on gender equality and other rules espoused by the Constitution.

This article examines mechanisms, if any, adopted by the FDRE Constitution to manage the potential clash of state laws with Islamic law and the decisions of sharia courts. It also examines whether final judgments pronounced by sharia courts are required to be compatible with constitutional standards (such as the supremacy clause and human rights provisions). As a prelude to this discussion, the article highlights the background of Islam in Ethiopia. It further discusses a brief history of the sharia courts in Ethiopia, the jurisdiction of sharia courts their structure and administration, and their place in the legal system. Moreover, two cases decided by sharia courts are reviewed with a view to shedding some light on the exercise of their jurisdiction and on their relationship with courts of law and the House of Federation (HoF) which is empowered to interpret the Constitution.

Although sharia courts are set up both at the federal and regional levels and in the units of the Ethiopian federation, the focus here is on the Federal Sharia Courts. The discussion on the issues raised is based on the analysis of the relevant provisions of the FDRE Constitution and laws related to the jurisdiction of sharia courts. These laws include the Proclamation to Consolidate Federal Courts of Sharia (Proclamation No. 188/1999) which is alternatively referred to as the *1999 Sharia Courts Proclamation* in this article, the Civil Code, the Federal Courts Establishment Proclamation, and the laws relating to the power of the House of Federation. This is further informed by the relevant literature referred to in this article.

I argue in favour of a *hands-off approach* which enables final substantive decisions on matters affecting personal status to fall within the purview of sharia courts by placing them outside state laws. To put it differently, state laws should not regulate final decisions of sharia courts, and in effect, final decisions rendered by sharia courts should not be expected to meet standards of state laws as long as the procedural requirements to institute a case before sharia courts

(which require the *consent* of the litigating parties to be adjudicated in a sharia court) are fulfilled.

1. Background of Islam in Ethiopia

Islam arrived early in Ethiopia soon after the advent of the message of Prophet Muhammad. Ethiopia is the first country that accepted Islam after Arabia and this happened following the taking refuge in Ethiopia of some of the followers of the Prophet owing to the persecution they suffered at the hands of the then powerful tribe of Mecca, Qureysh, to which the Prophet belonged. The Ethiopian king offered kind treatment and is eventually believed to have been converted to Islam, after considering the message they were persecuted for. As a result of the hospitality offered to the followers who sought safe haven and protection in the country, the Prophet ordered Muslims in general and his followers to respect and protect Ethiopians and not to engage in fighting with Ethiopians except in self-defense. This is found in the statement of the Prophet: '*leave the Ethiopians alone as long as they leave you alone*', and this edict is well-known by Muslims throughout the world and Ethiopia.

During the following centuries, a limited immigration mainly from the Arab territories increased the number of Muslims in coastal areas around Ethiopia,[1] in the present day Somalia and Eritrea. This enabled Islam to penetrate into these areas peacefully and Islamic norms took root gradually. The presence of Islam in the area created discontent in the dominant Christian kingdoms in Ethiopia, which considered Islam a threat. A significant conflict occurred in the 16th century during the campaign led by the Muslim leader Ahmed Ibn Ibrahim, commonly called *Ahmed Gragn*, who was from the currently eastern part of the country. His aspiration was to weed out Christianity, end the leadership of kings who claim to have blood ties to *King Solomon*, and replace it with Islamic traditions.[2] Ahmed Gragn's campaign dethroned the Christian regime and established his own rule, under the banner of Islam, in the central part of the country for about 15 years and Ethiopia nearly became a Muslim state.[3]

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[1] Hussein Ahmed (2000), *Islam in Nineteenth Century Wallo, Ethiopia, Revival, Reform and Reaction*, Brill, Pp. 30-35; see also Horn of Africa: The Region and Its History <http://www.law.emory.edu/ifl/region/hornofafrica.html> (Accessed on 25 March 2011).

[2] Jon Abbink (1998), "An Historical-Anthropological Approach to Islam in Ethiopia: Issues of Identity and Politics", *Journal of African Cultural Studies*, Volume II, No. 2, p. 114.

[3] John Miles (2004), *Customary and Islamic Law and Its Development in Africa*, Legal Brief Africa, African Development Bank, p. 136; See also Jan Abbinik (1999), "Ethiopian Islam and the Challenge of Diversity" *ISIM Newsletter*, Vol. 4, p. 24. The

One notable attempt by Christian rulers to forcefully convert Muslims against their will was made by Emperor Yohannes IV in the 19th Century, who persecuted those Muslims who opposed his doctrine of forcing Muslims to embrace Christianity.[4] His aim was to outlaw the practice of Islam and foster national unity through mass conversion of Muslims to Christianity.[5] The whole exercise was part of the grand 'national integration' scheme designed, ever since the emergence of the imperial state, for the purpose of putting in place an overarching 'one national identity' defining Ethiopian citizenship.

Following series of campaigns of expansion of territory, the current frontiers of Ethiopia took shape under Emperor Menelik II. There has been no significant clash between Muslims and Christians thereafter and the two religions have pursued peaceful co-existence.

The emergence of the federal form of government in the 1990s has paved the way for express recognition of religious courts to deal with some personal matters. Accordingly, the FDRE Constitution has allowed a favourable legal framework for the operation of sharia courts. This gives rise to some questions regarding their jurisdiction and operation, and their relationship with organs such as courts and the House of Federation, an organ vested with the task of authoritative interpretation of the Constitution.

2. Sharia Courts in Ethiopia: A Brief Historical Account

Sharia courts have existed *de facto* since Islam was embraced in the country.[6] They acquired official state recognition after the Proclamation for the Establishment of Kadis Courts was enacted in 1942.[7] The Proclamation defined the jurisdiction of sharia courts which are essentially the same with the present jurisdiction of the courts. It provided that the Government would appoint judges serving in these courts. This proclamation was repealed in 1944 by the Khadis and Naiba Councils Proclamation, [8] which established a three tier court structure.[9]

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fighting led by *Ahmed Gran* took place between 1529 - 1543. The fighting went on after his death in 1543 under the leadership of his successor.

[4] Bahiru Zewde (2001), *A Modern History of Ethiopia: 1885-1991*, 2nd eds., Addis Ababa University Press, p. 48.

[5] Abbink, *supra* note 2, p. 115.

[6] J. Spencer Trimingham (1965), *Islam in Ethiopia*, (London: Frank Cass & Co.) p. 15.

[7] The Kadis Court Proclamation No. 2/1942. This Proclamation set up a two-tiered court structure- the *Kadis Court* that would serve as a court of first instance, and the *Sharia Court* , which would act as an appellate court.

[8] The Khadis and Naiba Councils Proclamation, Proclamation No. 62/1944.

[9] *Ibid.*

The enactment of the 1960 Civil Code, which calls for the uniform application of its rules regarding all civil matters, put the legal status of the sharia courts in difficulty. Article 3347 of the Code provides that "[u]nless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and hereby repealed." Some contend that this provision repeals the law establishing sharia courts.[10] According this interpretation, the repeal of the sharia courts by Article 3347 is implied as the Civil Code contains no exceptional provisions relating to personal laws of Muslims and sharia courts. Since the Civil Code repealed all previously enforced written and customary rules, there is no exception made to any group, and in effect, the argument is that sharia courts are no longer recognized and their jurisdiction to apply Islamic law is annulled.[11]

A contrary argument is that since such courts were in existence and applying Islamic law to some extent, the Civil Code, which makes no reference to the courts, did not intend to revoke their jurisdiction.[12] In the midst of this debate regarding the effect of Article 3347 of the Civil Code on sharia courts, the *Minister of Justice* issued a circular which allowed the sharia courts to continue to exercise their jurisdiction.[13]

The ambiguity regarding the status of the Sharia Courts under the 1960 Civil Code appears to have been deliberate. Ethiopia at that time was struggling to come to grips with the question of allowing a distinct law for Muslims.[14] One can, therefore, realize the dilemma created by the desire for uniform law under

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[10] Zaki Mustapha (1973), "The Substantive Law to be Applied by Muslim Courts in Ethiopia", *Journal of Ethiopian Law*, Vol. 9, No. 1, p. 140; James C. N. Paul and Christopher Clapham (1971), *Ethiopian Constitutional Development: A Source Book Volume II* (Haile Sellassie I University), p. 849, citing Robert A. Sedler (1967), " The Development of Legal Systems: The Ethiopian Experience", *Iowa Law Review*, Vol. 53. see also Ibrahim Idris (1999), "Sharia Courts in Eight secular African and Asian Countries", a Paper presented at the Conference Reviewing the Draft Proclamation to Consolidate Sharia Courts, (Addis Ababa, Ethiopia), p. 14.

[11] *Ibid*. In the family law section of the Code, the expert drafter of the Code, a French Jurist, Rene David, had incorporated, addition to Article 3347, provisions governing Muslim community. However, during the deliberations in parliament on the draft Code, the proposed provisions relating to Muslims were set aside and Article 3347 was retained. See Zaki Mustapha, *op. cit*., p. 142.

[12] *Ibid*.

[13] *Ibid*. The issuance of the circular came following the request of the then President of Sharia courts for the continuation of operation of the courts after the entry into force of the *Civil Code* that put the status of the courts in doubt.

[14] Paul and Clapham, *supra* note 10, p. 849.

the Civil Code (legal universalism), and the competing need to recognize a religious law for the Muslim communities. Ultimately, the action of the Minster of Justice gave regard to the interest of Muslims and allowed the sharia courts to exercise their jurisdiction.

The FDRE Constitution of 1995 recognized the sharia courts and it is the first Ethiopian Constitution to give such recognition to religious and customary laws in dispute settlement. Questions that emanate from the constitutional recognition of the courts are the subject of treatment in the last section of this article.

3. The Role of Sharia Courts in a Predominantly Christian Country

Although Ethiopia is the first country that embraced Islam after the Arabian peninsula, it is long considered as an island of Christianity. Christianity had the status of state religion up to the mid-1970s and the Ethiopian Orthodox Church had a significant leverage on the emperors of the country because they were required to have the consecration of the Church to secure legitimacy to rule the country. The Church was also entitled to the ownership of a third of the land in Ethiopia, and it had a significant influence in the political and legal traditions of the country.[15]

There has been tolerance between Muslims and Christians in the country. Yet, the state considered itself to be the steward of the Orthodox Church and relegated Muslims to a second-class status.[16] Prior to the 1970s, Muslims especially in the Northern part, were excluded from the customary land-holding system.[17] Moreover, they could not hold senior political positions, and were barely represented in various posts commensurate with their number.[18] Muslims were also disadvantaged in the realms of education, employment, and other realms.[19] Thus, they were mostly engaged in trade and commerce.[20]

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[15] Christopher Clapham (1969), *Haile-Selassie's Government*, Praeger Publishers, p. 82; see also Abbinik, *supra* note 3.

[16] Bahru Zewde, *supra* note 4, p. 7; see also Abbink, *supra* note 2, p. 114.

[17] *Ibid*. See also Abdalla Bujra (2002), 'Islam in Eastern Africa: Historical Legacy and Contemporary Challenges', p. 4.

[18] Abbink, *supra* note 3, p. 24, see also Clapham, supra note 15, p. 83. Muslims were not allowed to assume any positions in the army, police and security apparatus before 1974. See Bujra, *supra* note 17, p. 4.

[19] Clapham, *supra* note 15, Pp. 83-84. The reason for what appears to constitute a systemic discrimination against Muslims has to do with the nature of Muslims in the country. Islam has emerged, in the words of Abbink, in the shadow of Christianity and has always been a secondary and inferior religion in the country. See Abbink, *supra* note 2, p. 113.

One wonders why the sharia courts received state recognition, tacitly for a long time before the 1940s, and expressly after 1942, under these conditions. At least three factors can be stated in relation with the *de facto* operation of sharia courts before the 1940s. The first factor may be ascribed to the prolonged periods of peaceful co-existence and the culture of tolerance between Muslims and Christians, which entitled Muslims to practice their religion freely.[21] The second reason that explains their tacit recognition is that historically, the settlement of personal and family matters have been based on each community's religions and customary norms.[22] Moreover, the particular geographical location of most Muslims who were predominantly concentrated in the peripheries of the country made it difficult for state laws to penetrate into these areas.

One could raise other factors for the state recognition of Sharia Courts in the early 1940s. The first may be attributable to the criticism levelled against the Ethiopian government, during the reign of Emperor Haile Sellassie I, by states such as Egypt for the treatment Muslims in the manner discussed above.[23] The *de jure* recognition of the courts may, to a certain extent, be an act of appeasing foreign criticism and showing that Muslims had the right to be governed by their own religious law and that they enjoy freedom of religion.

The second reason may have to do with the timing of the request of Muslims to set up the sharia courts. The request of Muslims came soon after the end of the brief occupation of Ethiopia by Italy from 1936 to 1941. To achieve its colonial aspiration and to attract support from one group against the other, Italy devised different strategies including the administrative division of the country along ethnic, linguistic and religious lines. With this end in view, the Italian occupation systematically favoured the Muslims at the expense of the Christians. They recognized freedom of religion of Muslims, invigorated Islamic education, and introduced Arabic in schools.[24] Muslims were encouraged to make use of the sharia courts as a ploy of getting their support and thereby creating division in the country along religious lines.[25] This explains the proliferation of sharia courts during the occupation.[26]

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[20] Bujra, *supra* note 17, p. 4. In fact, business activities in which Muslims have been engaged were despised by Christians and the ruling elite in the past and this also explains why Muslims were dominant in commerce and trade.

[21] *Ibid*; see also Paul and Clapham, *supra* note 10, p. 849.

[22] Miles, *supra* note 3, p. 137; see also Paul and Clapham, supra note 10, p. 849. Christians had such courts that deal with family issues but their jurisdiction was abolished in 1940s.

[23] Miles, *supra* note 3, p. 137.

[24] Abbink, *supra* note 2, p. 117.

[25] Italy had encouraged the use of local languages to create division along language lines as well. Accordingly, the Oromo language was made, for the first time, a media

At the end of the occupation, the Emperor accepted the request for the recognition of sharia courts possibly in order to prevent the threat of division along religious lines.[27] This may indicate why the Emperor accepted the request of Muslims to set up sharia courts in 1942.

The Government's move in recognizing sharia courts and their jurisdiction in personal and family affairs are intrinsically tied with the preservation of one's culture and identity. On the contrary, the uniform application of the Civil Code irrespective or religion would have been strongly resisted by Muslims and could have led to social unrest. [28]

4. Sharia Courts under Ethiopian law: Contextualizing the Operation of Sharia Courts

A brief overview of the relevant human rights norms under the FDRE Constitution and a brief outline about the legal system of Ethiopia are necessary in order to shed light on the structure within which the sharia courts operate. Moreover, they can enable us to look into the relationship of sharia courts with the regular courts and with the organ in charge of the interpretation of the Constitution itself, i.e., the House of Federation.

The FDRE Constitution of 1995 has adopted a federal system and it has established a secular and parliamentary system. The Constitution gives due regard to fundamental rights and freedoms, and human rights are among the fundamental principles of the Constitution. It is to be noted that nearly a third of the provisions of the Constitution deal with human rights and an entire chapter (i.e., Chapter Three) is devoted to human rights. This is not surprising given the fact that it was adopted following the demise of the 17-year military dictatorship

language in the history of the country during the period of the brief occupation. The use of the language was banned after Italy was defeated and soon after the Emperor returned from exile in UK. The Emperor thought the use of local language would create a rift in the country and undermine the unity of the state.

[26] Mohammed Siraj (1999), "The Constitution of the FDRE Constitution and the Application of Sharia Law", a Paper presented at the Conference Reviewing the Draft Proclamation to Consolidate Sharia Courts, (Addis Ababa, Ethiopia), p. 8.

[27] This may be discerned from the famous speech of the Emperor emphasizing that "The country is common to all while religion is personal", which was delivered to Muslim leaders and elders at the occasion of the day marking the end of the Muslim month of fasting. See Mohammed Siraj, *supra* note 26, p. 8. Following the speech, Muslims at the gathering asked the Emperor himself for the official setting up of sharia courts.

[28] Paul ad Clapham, *supra* note 10, p. 849.

in 1991 and at the time when the wave of democratization started to spread after the disintegration of the former USSR, marking the end of the Cold War.[29]

The Constitution embodies a *Bill of Rights* under Chapter Three, which divides fundamental rights and freedoms into human rights and democratic rights.[30] The civil and political rights stipulated under Articles 15-28 are more or less in line with the UN Covenant on Civil and Political Rights, while Articles 29-44 provide for democratic rights. Social and economic rights are embodied in Article 41 of the Constitution and other provisions which are relevant to these rights.

The Constitution seems to have given a strong adherence to international treaties with respect to their domestic application. Article 9(4) provides that international treaties ratified by Ethiopia are the integral part of the law of the land. Furthermore, Article 13(2) of the Constitution requires the provisions on human rights to be construed in conformity "to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia." This, *inter alia*, requires the constitutional provisions on equality and non-discrimination to be interpreted in conformity with the principles of international human rights instruments to which Ethiopia is a party.

Article 25 of the Constitution guarantees equality before the law and equal protection of the law. Accordingly, it states that all persons are equal before the law and are entitled without discrimination to equal protection of the law. The provision stipulates that "the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status." To ensure that other laws are compatible with the constitutional provisions on human rights and equality, some laws, including the 1960 Civil Code provisions on family law and the 1957 Penal Code were revised in 2000 and 2004 respectively.

Article 35 of the Constitution, titled 'Rights of Women' reiterates the right to equality of men and women in the enjoyment of rights and the protection provided for by the Constitution. The provision also states the equal rights of women with men in marriage, employment, and property ownership and administration. Moreover, Article 35(3) prohibits laws, customs, practices that oppress or cause harm to women and it champions affirmative action for women

[29] Mohammed Abdo (2011), "The Status and Enforcement of Social and Economic Rights under the FDRE Constitution", *Journal of Ethiopian Law*, Vol. 24.

[30] Such distinction does not exist under international human rights instruments and is not the case with the conventional classification of human rights either.

to rectify the inequality between men and women in the political, social and economic realms. The Constitution thus provides a strong protection to the rights of women and forbids discrimination against them.

The Constitution sets up a parallel court structure at federal and regional state levels. Federal Courts are competent to handle federal matters and state courts entertain state matters. Details of the jurisdiction of the federal courts, their specific structure and relationships, and administration are set forth in the Federal Courts Establishment Proclamation of 1996.[31] Sharia courts pursue the same structure and they have a three-tiered structure: *First Instance Court, High Court and the Supreme Court*. The same structure is adopted by Regional States in establishing Regional sharia courts in their respective units.

Sharia courts are found at both the Federal and State levels[32] , and they are not part of the regular court structure. Consequently, their decisions cannot be subject to appeal to the regular courts of law. Once a case is submitted to civil courts, it may not be transferred to sharia courts and vice versa[33]. They can, therefore, be treated as distinct organs with a judicial function outside the regular judiciary.

The FDRE Constitution does not grant power to courts of law in relation to the constitutional review of acts of parliament. The power to examine the constitutionality of laws enacted by parliament is vested in the House of Federation, which is equivalent to a chamber of parliament, in other countries, but is devoid of law making power.[34] Thus courts of law at any level, including the Federal Supreme Court, do not have the power to proclaim laws enacted by parliament unconstitutional. In interpreting the Constitution and in examining the constitutionality of laws, the House of Federation is assisted by an organ known as the Council of Constitutional Inquiry. The Council is empowered to advise the House of Federation (HoF), investigate complaints on cases that involve constitutional issues and offer recommendation to HoF for final decision

[31] Federal Courts Establishment Proclamation, Proclamation No. 25/ 1996 (hereinafter referred to as the Federal Courts Proclamation).

[32] It is only one region, Gambella Regional State that has not yet set up Sharia courts.

[33] See Article 5(4) of A Proclamation to Consolidate Federal Courts of Sharia, Proclamation No. 188/1999.

[34] The granting of power to interpret the Constitution to the House of Federation is perhaps a unique arrangement introduced by Ethiopia as constitutional interpretation elsewhere is vested in the highest court of the land or a special constitutional court set up for such purpose. Aside from the interpretation of the Constitution, the House is entrusted with powers, among others, to decide on the right to self-determination, to formulate scheme for allocating budget to the units of the federation, and to settle disputes between the units and foster unity among the people.

on constitutional disputes.[35] The HoF acts as a constitutional court but is distinct from a regular court structure and forms part of the legislature.

Apart from regular courts, the FDRE Constitution recognizes the establishment of bodies that have judicial and/or quasi judicial functions that are required to follow due procedures.[36] This indicates that courts do not have the monopoly over judicial functions. That is why Articles 34(5) and 78(5) of the Constitution recognize the resolution of disputes by customary and religious systems so long as the parties thereof consent to the settlement of disputes by such organs. It is based on this constitutional framework that Sharia Courts that deal with some personal disputes have been established.

The recognition given to customary and religious courts to engage in dispute settlement implies that the Constitution recognizes the religious and cultural diversity in the country. This arrangement may raise some questions with regard to human rights norms, especially the equality clause, when it is applied, especially, to the rights of women. This is recently underscored by the *Committee on Elimination of All form of Racial Discrimination*. The Committee stated that it did not receive report on the measures taken regarding the application of religious and customary laws subject to the consent of parties but underscored that the state should take measures to ensure that the application of such laws would not lead to *de facto* discrimination against members of ethnic groups or against women, for instance, in family disputes.[37]

The application of the jurisdiction of customary and religious systems is limited to personal matters and family disputes and it is interesting to see whether they should meet the constitutional standards embodied under Article 9(1) which states that "[a]ny law, customary practice or a decision of an organ

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[35] Article 6 of the Council of Constitutional Inquiry Proclamation, Proclamation No. 250/2001(hereinafter referred to as the Council of Constitutional Inquiry Proclamation).

[36] See Articles 37 and 78(4) of the Constitution. However, it expressly prohibited the establishment of *special* or *ad hoc* courts which usurp judicial power from regular courts or institutions legally empowered to exercise judicial function. The aim of this provision is clear-it is to reverse the past history where such courts were established outside the regular court structure and had caused injustices against the accused persons tried by them, who in most cases received harsh decisions that were delivered contrary to all the rules of procedural fairness. See Mohammed Abdo (2010), "Civil Procedure: Monograph 55-Ethiopia," *International Encyclopaedia of Laws*, Kluwer Law International, p. 8.

[37] Committee on the Elimination of All Forms of Racial Discrimination (2009), "Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Ethiopia", at its 75th Session, 3-28 August 2009, CERD/C/ETH/CO/7-16, (7 September 2009, Geneva), p. 2-3.

of state or a public official which contravenes this constitution shall be of no effect." This provision evokes the issue whether decisions of sharia courts should yield to the supremacy clause of the Constitution and norms of human rights. Owing to the fact that customary and religious values and rules are frequently raised as perpetuating discrimination against women, it is important to examine this question.[38]

5. Structure and Administration of Sharia Courts

As a prelude to the discussion on the structure of Sharia Courts in Ethiopia, some comparative look can be made at the structure of such courts in various countries among which we can use Kenya and Zanzibar as examples. Both the previous and the current constitutions of Kenya recognize the establishment of sharia courts. The Revised 2010 Constitution of Kenya recognizes the setting up of *Khadis' Courts*, the equivalent of Sharia Courts in Ethiopia, and provides for their structure and jurisdction.[39] The Constitution provides that the Khadis' Courts are subordinate to the regular courts of the land.[40] The Khadis' Courts have a two tiered structure, Khadis' Courts and the *Chief Khadi*, which serves as an appellate court. As provided in the *Act* which is still in force in Kenya, appeal from the decisions of Khadis' Courts can be filed to the High Court and finally to the highest court in the judicial structure, i.e., the Court of Appeal.

In Zanzibar, the Constitution and a statute recognize the establishment of Khadi Courts with a structure and jurisdiction similar with that of Kenya. The final decisions of Khadi courts in Zanzibar are subject to review by the High Court, but unlike the practice in Kenya, the Court of Appeal in Tanzania does not have jurisdiction to see cases decided by such courts.[41] The courts are thus at liberty to interpret the substantive Islamic law based on the nature of cases appearing before them. However, if there is inconsistency between Islamic law and the general law of the land, an express provision of the latter law would prevail over the former as far as that particular inconsistency is concerned.[42]

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[38] In addition to Committee under the *CERD*, the *CEDAW* Committee also raised this issue during discussion on the reports submitted to the Committee by Ethiopia, see Committee on the Elimination of Discrimination against Women (2004), "Consideration of Reports Submitted by States Parties under Article 18 of the Convention: Combined fourth and fifth periodic report of Ethiopia", 646th meeting, 27 January 2004**,** CEDAW/C/SR.646, (New York), p. 6.

[39] See Article 169 and 170 of the new Kenyan Constitution of 2010.

[40] *Ibid*, Article 169.

[41] See Article 99(2) of the Constitution of Zanzibar of 1984.

[42] H. Majamba (2007), "Possibility and Rationale of establishing Khadi Courts in Tanzania Mainland", Paper Presented at the Research and Education for Democracy in Tanzania Workshop (University of Dar Es Salaam), p. 12.

This means that the substantive Islamic law used by the Khadi Courts to dispose of cases should be compatible with express rules of the general law of the land.

The structure of the sharia courts in Ethiopia is similar to that of the Federal and Regional State courts. It is of a three-tiered structure: the *First Instance Court of Sharia*, the *High Court of Sharia*, and *Supreme Court of Sharia*, each with its own Kadis (judges) and has a registrar and other personnel to run the activities of the courts. The sharia courts are accountable to the *Judicial Administration Council*, an organ in charge of, among others, selecting judges and dealing with disciplinary matters of the judges of Ethiopia's regular courts.

Members of the Judicial Administrative Council are established, staffed and funded by the government. They do not form part of the regular courts of the land, i.e., they are distinct from the regular court structure and are not subordinate to the regular courts. Unlike the legal regimes in Kenya and Zanzibar, there is no possibility of appeal from the decisions of the sharia courts in Ethiopia to the regular court structure. Article 5(4) of the Federal Courts of Sharia Consolidation Proclamation No.188/1999 expressly provides that "[u]nder no circumstance shall a case brought before a court of Sharia the jurisdiction of which has been consented to, be transferred to a regular court; nor shall a case before a regular court be transferred to a court of Sharia".[43] This rule seems to have been designed with a view to delineating a clear line between the two different laws in the anticipation of the inevitable clash between the substantive law applied by (and the decisions of) sharia courts and formal state laws. The intention of Article 5(4), therefore, seems to enable the sharia courts to operate distinct from the regular courts.

In considering matters that fall within their competence, sharia courts are required to apply substantive Islamic law. However, they are obliged to follow the rules governing civil proceedings used by ordinary civil courts. The substantive sharia law is, therefore, to be applied through the implementation of the Civil Procedure Code that governs the proceedings before ordinary civil courts. For instance, hearing proceedings, production and administration of

[43] It is not clear whether the word 'transfer' precludes a possibility of review by civil court of decisions of sharia courts, especially review by cassation exercised by the Federal Supreme Court. The word 'transfer' does not seem to have been intended to be used in the sense of the Civil Procedure Code whereby a case filed to one court may be transferred to another court if the hearing of the case is found to be inconvenient for the defendant owing to the location of the forum or if it is believed that there will be miscarriage of justice; See Article 31 of the Civil Procedure Code. Thus one could construe and employ the word 'transfer' in its wider meaning different from the ordinary usage of the term to merely refer to the transfer of a case from one court to another.

evidence, disposing cases and the execution of judgments of sharia courts are regulated by the Civil Procedure Code. The anomaly in the application of rules on civil procedures of ordinary courts to sharia courts lies in the fact that these rules of procedure may conflict with the substantive rules applied in sharia courts, as is to be briefly highlighted in the next section.

6. Jurisdiction of Sharia Courts

The constitutions and/or laws of many countries with a sizeable number of Muslim population recognize the need for the establishment of Muslim courts.[44] In full-blown theocracies such as Saudi Arabia, Islamic law applies across the board, and Islamic courts are the courts of the land and have general jurisdiction on all matters. The courts have limited jurisdiction in secular states (with a significant number of Muslims) and their jurisdiction is mostly confined to matters affecting personal status that involve Muslims.

For instance, in Kenya, the jurisdiction of Khadis' Courts is over matters relating to personal status, marriage, divorce, succession or inheritance in cases in which the parties thereof are Muslims.[45] In Nigeria, the jurisdiction of sharia courts is also regarding matters affecting personal status and family issues. They have jurisdiction over any question relating to the validity or dissolution of marriage involving Muslims or whether the marriage is concluded according to Islamic Law. Moreover, sharia courts in Nigeria assume jurisdiction with regard to family relationship or the guardianship of an infant, and regarding any question of Islamic personal law such as gift, will or inheritance where the endower, donor, testator or a deceased is a Muslim.[46]

In Ethiopia, the jurisdiction of sharia courts is drawn from the Constitution and the establishment legislation of the sharia courts. The FDRE Constitution does not directly determine the specific jurisdiction granted to sharia courts, but rather recognizes the possibility of settlement of personal disputes by customary and religious systems. It does not define the personal matters amenable to the jurisdiction of such systems. However, the Constitution provides the general areas of competence (i.e., personal matters) and the condition attached (i.e., consent of parties) to the exercise of jurisdiction by sharia courts. The specific types of cases falling within the competence of sharia courts are defined under the Federal Courts of Sharia Consolidation Proclamation No.188/1999 that was promulgated pursuant to Articles 34(5) and 78(5) of the Constitution.

[44] The courts could appear in different names such as Khadi Courts, Khadis' Courts, Sharia Courts, and Cadi courts.

[45] See for instance Article 170(5) of the 2010 Constitution of Kenya.

[46] See Article 262(2) and 277(2) of the 1999 Nigerian Constitution.

Ever since sharia courts were set up by official state law in the 1940s, the jurisdiction of sharia courts has remained the same, and the courts are granted mandate in two types of cases, which are stated under Article 4 of Proclamation No.188/1999.[47] It is in fact in the areas of family law that the influence of religious as well as customary rules are most visible and the jurisdiction conferred upon sharia courts is made in recognition of this fact.[48] As is clearly indicated in the provisions that deal with the jurisdiction of sharia courts, personal and family matters are the only cases to which Islamic law applies, and thus sharia courts do not have the power to deal with other matters. This is the case with sharia courts in many states that confine the jurisdiction of the courts to matters affecting personal status of Muslims, except full-fledged theocracies, such as Saudi Arabia where their jurisdiction is wider.[49]

As provided under the1999 Sharia Courts Establishmen Proclamation and the FDRE Constitution, the condition attached to the exercise of jurisdiction by sharia courts is the consent of the parties. Sharia courts do not, therefore, have compulsory jurisdiction over parties on the matters that fall within their reach unless both parties demonstrate their express and unequivocal consent to the exercise of jurisdiction by the courts.[50] There is no clear guideline as to when and how the consent of the parties must be expressed.[51] However, one can draw the rules relating to consent from the Civil Procedure Code as the 1999 Sharia Courts Proclamation provides that the rules of procedure governing the proceedings before the sharia courts are those of the Civil Procedure Code.[52]

Normally, a party who files a case as a plaintiff can be presumed to have shown his/her consent to the jurisdiction of the court. However, there can be a problem in establishing the consent of the party against whom a claim is made. The 1999 Sharia Courts Proclamation provides that along with the notice to be

[47] Article 4 of the 199 Sharia Courts Proclamation provides that the courts have jurisdiction on any question regarding marriage, divorce, maintenance, guardianship of minors and family relations; provided that the marriage to which the question relates was concluded, or the parties have consented to be adjudicated in accordance with Islamic law; any question regarding *Wakf*, gift succession of wills, provided the endower or donor is a Muslim or the deceased was a Muslim at the time of his death.

[48] The old and new family codes recognize the validity of marriage concluded as per religious rules and ceremonies.

[49] Zaki Mustapha, *supra* note 10, *op. cit.*, p. 138.

[50] See Article 34(5) of the Federal constitution and Article 4(2) of the 1999 Sharia Courts Proclamation.

[51] Miles, *supra* note 3, *op. cit.*, p. 142.

[52] Article 6(2) of the 1999 Sharia Courts Proclamation. A party who wishes to object to the jurisdiction of any court on the basis of want of jurisdiction can raise it as a preliminary objection under Article 244 of the *Civil Procedure Code*.

served on the defendant, a form shall be attached in which the defendant declares that he/she expressly consents to the hearing of the case by sharia courts. It is possible that the defendant may not fill in the declaration but appear during the opening of the hearing of a suit and raise his/her preliminary objection orally against the exercise of jurisdiction by a sharia court.[53] There is a tacit consent and a sharia court proceeds to hear a case, *ex parte*, if the defendant who has been duly served with the summons fails to appear at the first hearing of a suit.[54] Some of the issues in connection with securing consent of parties will be reviewed in the next section.

Another condition attached to the exercise of jurisdiction by sharia courts is that the jurisdiction can only be invoked where the marriage was concluded according to Islamic law, which normally means that the parties are Muslims, or where the parties (who may even be non-Muslims) consent to get their cases handled by sharia court.[55]

7. Main Issues in relation to Jurisdiction and Performance of Sharia Courts

This section examines the performance of sharia courts on the basis of the relevant laws. Reference is also made to cases decided by sharia courts, one of which was reviewed by the Federal Supreme Court and the House of Federation. The cases highlight the relationship between sharia courts and the regular court system.

7.1. Issues related to Securing Express Consent of both Parties

Securing the consent of parties to the adjudication of a dispute in a sharia court is one of the debatable issues and it has led to the revision of some final decisions of the courts by the Federal Supreme Court and the House of Federation. Some cases show that the final decision rendered by the sharia courts can be reviewed by the Federal Supreme Court and the House of Federation if it is established that no express consent was secured by sharia courts before it decided on a case. One famous case in this regard is the *Kedija Beshir case*.[56] Kedija got a house following the passing away of her husband. Close relatives of her husband lodged a case to the First Instance Sharia Court

[53] This is derived from Article 244 of the Civil Procedure Code, which equally apply to the proceedings before Sharia courts.

[54] See Article 5(2) of the 1999 Sharia Courts Proclamation. This is in line with Article 70 of the 1965 Civil Procedure Code of Ethiopia.

[55] Article 2 of the first sharia courts legislation (Proclamation No. 12/1942*)* limited the jurisdiction of sharia courts to Muslims only.

[56] Federal Supreme Court Cassation Division File No. 12400/1999.

with a view to claiming a share from the estate. She raised an unequivocal objection to the jurisdiction of the Court. In spite of her clear objection, the Court considered the case and finally decided on the claim filed by the relatives of her husband and forced her to relinquish the house she acquired. She appealed against the decision to the High Sharia Court and Supreme Sharia Court, and both upheld the decision of the First Instance Sharia Court.

She submitted her application for the Cassation Division of the Federal Supreme Court, pursuant to Articles 80(3) of the Federal Constitution and Article 10 of the Federal Courts Establishment Proclamation. The Cassation Division decided against her by stating that there was no fundamental error of law in the decisions made by all the Sharia Courts that could lead to the review of the case.

Acting on behalf of Kedija, the Ethiopian Women Lawyers' Association brought the case to the House of Federation, the final arbiter of constitutional cases, by alleging that the adjudication of the case by the Sharia Courts against her express objection violates the Constitution. The House of Federation held the decision unconstitutional and stated its is regular courts that have compulsory jurisdiction and that sharia courts can assume jurisdiction only based on the consent of the parties pursuant to Article 34(5) of the Constitution. It also rejected the reasoning of the Sharia Court that the requirement of consent under 1999 Sharia Courts Establishment Proclamation would not apply to the case because the case was filed prior to the Proclamation's publication in the *Negarit Gazzeta*.[57]

In *Hajji Kassim Mohammed and Zenit Ali*'s case [58] marriage was concluded before a sharia court judge in the presence of two witnesses. Zenit's two brothers and her uncle filed an objection to the marriage before the First Instance Sharia Court alleging that there was no consent of her parents and relatives to the marriage. Zenit's relatives argued that under Islamic law parents and relatives must consent to the marriage. They claimed that they were never consulted and that the spouses did not invite them to attend the process before a judge. The spouses did not appear and express their consent to the jurisdiction of

[57] The Proclamation had not entered into force when the case was filed, but it entered into force when Kedija appeared for the first hearing of the suit. The Sharia Court held that the Proclamation would not apply to an already filed case but the House of Federation decided that what is important is securing the consent of parties indicated in the Constitution irrespective of whether or not the Proclamation had entered into force.

[58] *Abdurahman Ali et al Vs Hajji Kassim Mohammed and Zenit Ali. S*ee Miles, *supra* note 3, at 144.

the First Instance Sharia Court. Nevertheless, the court decided to annul the marriage.

It appears that the court assumed jurisdiction because it considered failure of the parties to appear before it amounts to tacit acceptance of its jurisdiction. The law establishing the sharia courts provides that it can assume jurisdiction on the basis of an implied consent. Tacit consent may be inferred from the failure of the party to appear before the court so long as summons has been duly served on the defendant(s). However, the court did not investigate whether the summons has been duly served. The couple appealed to the High Sharia Court and then to the Supreme Sharia Court. Both upheld the decision of the lower court.

A problem worth noting in this regard is that sharia courts are lenient towards the interpretation of the consent of litigating parties to their jurisdiction. They do not usually ask the parties to give their express consent to the jurisdiction of the court upon their first appearance. The reason for this is probably because the judges assume that the parties have agreed, by virtue of their faith, to be governed by Islamic law; and thus they will be committed to it by their perceived prior consent. The problem is exacerbated by the behavior of the parties who do not usually express their explicit rejection of the jurisdiction of sharia courts for fear of negative perception and reaction from the Muslim community. Or they may feel that such an express objection will be considered as an affront to one's religion. In effect, they may be put under social pressure not to demonstrate opposition to the jurisdiction of sharia courts.

7.2. Procedural Problems related to Sharia Courts Proceedings

The application of the Civil Procedure Code to sharia courts may compromise the effective operation of the courts. Islamic law in general has a less complex procedure in the submission and administration of evidence, on the number of witnesses, examination of witnesses, and hearing of parties. The application of the Civil Procedure Code could also be in conflict with substantive Islamic law,[59] which is applicable in a given case. Lack of Islamic rule of procedure seems to have led the legislator to prescribe the Civil Procedure Code for the proceedings of sharia courts. Likewise, the Khadis' Courts in Kenya are bound to follow the procedural rules of their regular courts until the *Chief Justice* puts in place rules regulating their procedures.[60] The legislation establishing sharia courts in Ethiopia does not, however, authorize them to adopt their own rules of procedures.

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[59] Ibrahim Idris (2002), "Status of Federal Sharia Courts under the 199[5] FDRE Constitution", in Centre for Contemporary Islam eds., *Islamic Law in Africa Project*, Proceedings of Symposium (University of Cape town, South Africa).

[60] Majamba, *supra* note 42, at 9.

7.3. Lack of Codified Islamic Law and Inconsistency in Decisions

Articles 4 and 6 of the 1999 Sharia Courts Establishment Proclamation allow sharia courts to adjudicate the expressly indicated matters in accordance with Islamic law. There is, however, absence of guiding substantive rules for the settlement of disputes submitted to sharia courts. Thus judgments are usually influenced by the particular school of thought to which a judge adheres.

In Sunni Islam, there are four schools of thought and three of them are found in Ethiopia, the predominant of which is claimed to be the Shaffie school.[61] Except for the basic pillars of the faith and some limited issues regarding primary sources of Islamic law (the *Quran* and *Sunna*), there are different opinions among Islamic jurists thereby allowing the flexible application of Islamic law. The judges may be from different schools of thought and this may lead to inconsistency in decisions in cases involving similar issues and material facts.

This occurs especially on matters that involve the application of the secondary sources of Islamic Law (the scholastic consensus and analogy), which depend much upon the school of thought to which the judge belongs. Lack of codified and uniform Islamic substantive law to be applied by the sharia courts has thus created the likelihood of decisions to be inconsistent. The absence of codified rules means that there are no guiding rules for settlement of disputes submitted to sharia courts on different matters that come under their jurisdiction. It is to be noted that the presence of a codified sharia law does not eliminate the inconsistency in interpretation, but may mitigate the problem.

7.4. Secularism

Secularism is one of the basic principles of the FDRE Constitution and, in effect, the state and religion are separate - with each not allowed to interfere in the affairs of the other.[62] However, sharia courts are set up, staffed and funded by the government although they are not part of the regular court structure. One could challenge the propriety of sharia courts on grounds of secularism, and may object the role of the government in establishing sharia courts and its act of providing them with budget.

In principle, it is a legitimate concern to invoke secularism to challenge the establishment and operation of sharia courts. However, the interest of the sizeable Muslim population in Ethiopia seems to justify the exception to

[61] Zaki Mustapha, *supra* note 10, at 143. Although they do not identify themselves as such, one can also find Shia Muslims in Ethiopia in different parts of the country as manifested by their practice of the religion.

[62] See Article 11 of the FDRE Constitution.

secularism in relation to the jurisdiction of sharia courts. In other words, secularism is compromised in the interest of religious diversity permitting parties to choose the forum of adjudication in personal matters. To this end, the FDRE Constitution embodies a provision that guarantees parties to have choice of forum without, however, being subjected to the compulsory jurisdiction of the sharia courts.[63] This is in concordance with the legal pluralism recognized under the Constitution according to which a compromise is made to the notion of secularism in favour of the settlement of personal and family matters by religious and customary systems.

8. The Sharia Courts, the Supreme Court and the House of Federation

The Federal Supreme Court has an extraordinary power of review of any court's final decision through its cassation power as indicated under the FDRE Constitution and the Federal Courts Proclamation. Whether or not final decisions made by sharia courts fall within the cassation power of the Federal Supreme Court is examined on the basis of the *Kedija Beshir's* case and the relevant laws.

The *Kedija Beshir* case shows that if a sharia court proceeds to see and makes final determination on a case, the decision can be reviewed by both the Federal Supreme Court and the House of Federation. However, if one reads the provision of the Sharia Proclamation, a case filed to sharia courts may not be reviewed by ordinary courts and vice versa and this rule seems to bar the possibility of review of decisions of sharia courts by ordinary federal courts in general including the Federal Supreme Court.

The Cassation Division of the Federal Supreme Court reviewed the *Kedija Beshir* case on the basis of Article 80(3)(a) of the FDRE Constitution and Article 10 of the Federal Courts Proclamation. The issue that arises at this juncture is whether Article 80(3) of the Constitution is relevant to justify the cassation jurisdiction of the Federal Supreme Court to review final decisions of sharia courts even upon the failure of the latter courts to secure the express consent of the parties.

As stipulated under Article 80(3)(a) of the FDRE Constitution: "The Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law. Particulars shall be determined by law". The phrase "*any final court decision'* under Article 80(3) may not be construed to include decisions of sharia courts. This is because the scope of Article 80(3) is limited to the final decisions of regular courts, be it federal or regional courts, and does not

[63] Majamba, *supra* note 42, p. 18.

seem to extend to sharia courts as the preceding and subsequent sub-articles of Article 80 of the Constitution refer only to the regular courts of the land.[64]

This interpretation is substantiated by Article 10 of the Federal Courts Proclamation that specifies the types of final decision of regular courts that qualify for review by the Cassation Division of the Federal Supreme Court. The provision makes express reference only to regular courts and does not cover final decisions delivered by sharia courts.[65] Moreover, the list of cases stated

[64] Article 80 of the Constitution:

Concurrent Jurisdiction of Courts

1. The Federal Supreme Court shall have the highest and final judicial power over Federal matters.
2. State Supreme Courts shall have the highest and final judicial power over State matters. They shall also exercise the jurisdiction of the Federal High Court.
3. Notwithstanding the Provisions of sub-Articles 1 and 2 of this Article;
   (a) The Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law. Particulars shall be determined by law.
   (b) The State Supreme Court has power of causation over any final court decision on State matters which contains a basic error of law. Particulars shall be determined by law.
4. State High Courts shall, in addition to State jurisdiction, exercise the jurisdiction of the Federal First-Instance Court.
5. Decisions rendered by a State High Court exercising the jurisdiction of the Federal First-Instance Court are appealable to the State Supreme Court.
6. Decisions rendered by a State Supreme Court on Federal matters are appealable to the Federal Supreme Court).

It is to be noted that many proclamations stipulate that decisions of different tribunals are subject to review by regular courts. For instance, almost all proclamations establishing administrative tribunals such as the ones dealing with tax, labour civil service, and pension matters incorporate provisions stipulating that final decisions of such tribunals on questions of law are subject to review by courts of the law and in most cases the review is made by the Federal High Court and in a limited case by the Supreme Court as in the case of Civil Service Appeal Tribunal. Once decisions of administrative tribunals appear before regular courts, they fall under Article 10 of the *Federal Courts Proclamation* and Article 80(3) of the Constitution and one could still say it is cassation review of final decisions of regular courts. Such scheme is not indicated when it comes to the sharia courts.

[65] The *Federal Courts Proclamation* No. 25/96 provides that the *Federal Supreme Court* has a final judicial power over federal matters. The final decision subject to cassation review by the Cassation Division of the Federal Supreme Court include final decisions of the Federal High Court rendered in its appellate jurisdiction, final decisions of the regular division of the Federal Supreme Court, and final decisions of the Regional Supreme Courts rendered as a regular division or in its appellate jurisdiction. See Article 10 of the Federal Courts Proclamation.

under the Federal Courts Proclamation that qualify for cassation review refers only to regular courts. The list embodied in the Federal Courts Proclamation thus confirms the interpretation that the scope of Article 80(3) of the Constitution does not include the final decisions of the sharia courts. In short, the Federal courts, including the Federal Supreme Court, do not have jurisdiction to review decisions rendered by sharia courts since the interpretation of the relevant provisions of the law does not confer such power on them.

The House of Federation, as an organ entrusted with the authoritative power of interpretation of the Constitution, was involved in the *Kedija Beshir* case. The case culminated with the decision of the HoF which declared the final decision of the Sharia Courts unconstitutional on the ground that there was no prior consent of one of the parties to the case. The review made by the HoF can be justified on the basis of the constitutional provisions that mandate the *House* to make the final authoritative decision on all constitutional disputes and by virtue of the proclamations relating to the power of the House and its subsidiary organ, the Council of Constitutional Inquiry.

The Council has the power to investigate complaints which claim that a certain law or a decision of state organ contravenes the Constitution.[66] The word 'state organ' includes organs with judicial function, and this seems to extend to sharia courts as they have such power.[67] It then makes recommendation to the House of Federation on a decision to be adopted by the House regarding a complaint that gives rise to constitutional interpretation. The Federal Courts Proclamation states that a question of the constitutionality of final decision made by the sharia courts falls within the competence of the Council of Constitutional Inquiry and the HoF. But, there is a limit to the power of the House of Federation to hear and make decisions on final judgments delivered by sharia courts. As will be discussed in the next section, the review made by the House is confined to procedural questions and not in relation to substantive final decisions of sharia courts. However, there is no case-law that supports this contention and the reasoning is based entirely on the arguments invoked on the basis of analysis of the provisions of the relevant laws and literature.

9. Legal Pluralism, Sharia Courts and Constitutional Issues

Legal pluralism is capable of different connotations, depending on the context in which it is employed. It mainly refers to the incorporation or recognition of customary norms or institutions within state law or to the independent co-

[66] See Article 17(2) of Council of Constitutional Inquiry Proclamation.
[67] *Ibid*, Article 2(6).

existence of indigenous norms and institutions alongside state law.[68] Legal pluralism makes it inevitable that there are multiplicities of legal orders that are diverse, uncoordinated, co-existing or overlapping bodies of law.[69] The diverse sources of normative ordering include official legal system, and customary, religious, functional and community systems.[70] These different norms apply to different persons in the same situation.[71] Thus in a heterogeneous society, the recognition accorded to legal pluralism realizes multicultural accommodation. This is why states try to facilitate practices and norms, for example, by exempting group members from certain laws, or by awarding identity groups some degree of self-rule.[72] If the state grants various religious or and cultural groups self-governance over areas like family law (marriage and divorce), this increases the autonomy that these communities enjoy.[73]

Legal pluralism and the resultant recognition of non-state laws are advantageous because they are said to be 'closer' geographically and culturally, more accessible and flexible, well-suited to address deep conflicts, relatively inexpensive. The overall burden of engaging with them is also considerably less than in the case of the state's legal system.[74] One of the demerits of legal pluralism is that it is not sensitive to human rights of individuals. Moreover, its downsides include non-conformity (or even difference) which may involve discrimination, and the potential for the emergence of competing clams of authority; and the imposition of conflicting demands of norms.[75]

The diverse sources of normative ordering under legal pluralism can clash with each other and state laws, particularly when their underlining norms and processes are inconsistent, and such clashes are the most dynamic aspects of legal pluralism.[76] This is best depicted in what Shachar called 'the paradox of

[68] Brian Tamanaha (2007), "Understanding Legal Pluralism: Past to Present, Local to Global", *Sydney Law Review*, Vol. 30, p. 390.
[69] *Ibid*, 375.
[70] *Ibid*, 397; see also International Council on Human Rights Policy (2008), "An Approach Paper: *Research Project on Plural Legal Orders and Human Rights"*, p. 4
[71] Grant R. Woodman (1996), "Legal Pluralism and the Search for Justice", *Journal of African Law*, Vol. 40, p. 160.
[72] Ayelet Shachar (1998), 'Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation', The *Journal of Political Philosophy*, Vol. 6, No. 3, p. 286.
[73] *Ibid*, p. 289.
[74] International Council on Human Rights Policy, supra note 70, p. 5.
[75] *Ibid*, see also Tamanaha, *supra* note 68, p. 375
[76] *Ibid*, p. 400

multicultural vulnerability'.[77] There are different schemes adopted by states to deal with such discords through, for instance, provisions like conflict rules, and choice of law rules.[78] Some of the specific provisions to manage the conflicts among different normative ordering include the following:

a) One common arrangement is for the state legal system to assume a position of *neutrality* with respect to the various communities and religions, allowing a degree of autonomy to each.[79] For example, there can be an exemption from compliance to state law such as the clauses in Zambia's and Zimbabwe's constitutions, which exempt customary norms from compliance with the constitutional standard.[80]

b) Another mechanism is for state law to *absorb* competing systems. A common mechanism is to explicitly recognize customary, religious, economic, or community norms, or to explicitly recognize and lend them some support (which may be financial or enforcement).[81] To this end, the state may, as in the cases of India, Pakistan or Niger opt to recognize or even create institutions outside the formal state legal system to mediate and resolve disputes.[82] In other words, the state legal system recognizes the validity of private arbitration decisions, or even encourages parties to have recourse to such arbitration.[83] The state may also allow the application of different normative ordering by limiting its scope. For instance, the legal regimes in Israel, Malaysia, and Indonesia permit the application of different laws, especially those affecting personal status (such as marriage, adoption, and divorce) to different people depending on their religious identity, or, legal regimes may allow indigenous people to be subject to their own customary rules as in USA and Canada.[84]

c) The other means is for the state official system to recognize the special status of customary systems but only in so far as they are *not contrary to constitutional standards*, as in South Africa.[85]

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[77] Shachar, supra note 72, p. 289. The paradox of multicultural vulnerability is the phrase used to indicate the possible clash between the recognition given to cultural and religious groups' autonomy over family matters on the one hand and the individual rights of vulnerable groups such as women, minority, and children in the society, on the other. See Shachar, p. 289-290).

[78] *Ibid*, at 400, and 403-407.

[79] *Ibid.*

[80] International Council on Human Rights Policy, *supra* note 70, p. 6.

[81] Tamanaha, *supra* note 68, p. 404.

[82] International Council on Human Rights Policy, *supra* note 70, p. 6.

[83] Tamanaha, *supra* note 68, p. 404.

[84] International Council on Human Rights Policy, *supra* note 70, at 6.

[85] *Ibid*.

d) Another option available is for state law to make aggressive efforts to subjugate the different normative systems that are in conflict with state law by declaring them illegal and trying to eliminate them.[86] This constitutes part of an '*abolitionist approach'* and, in relation to certain issues, it resonates the feminist stance that calls for the elimination of customary practices that contradict human rights.[87] This approach rejects religious and cultural norms as mere sources of oppression of and discrimination against women.[88]

In light of the above courses of action, let us see how the FDRE Constitution deals with legal pluralism and the relationship between different normative ordering (including the law relating to the Sharia Courts) and the concern for human rights issues.

One of the challenges that legal pluralism poses to human rights relates to the uniform application of human rights in Ethiopia as envisaged under the Constitution. There is a tension between legal pluralism (which is in favour of particularity in application) and the human rights instruments adopted by Ethiopia and enshrined under the Constitution (which are universal in nature and require uniform application). Different normative ordering recognized under the Constitution could, therefore, constrain the uniform application of human rights enshrined under the Constitution as their underpinning norms and processes are obviously bound to differ in many instances. This is most visible with respect to the constitutional guarantee of the rights of women in general and gender equality in particular vis-à-vis the treatment of women in the customary and religious laws and systems.

Sharia courts apply substantive sharia law that has different perceptions and approaches to issues of gender equality. There are different ways of treating women in Islamic law that are to be applied by the sharia courts in such areas like divorce, partition of property, and inheritance.[89] How can one reconcile

[86] Tamanaha, *supra* note 68, p. 404

[87] Celestine I. Nyamu (2000), "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?", *Harvard International Law journal*, Vol. 41, p. 392.

[88] *Ibid*; See also Rhoda Howard Hassman (2002), "Duelling Fates: Should the International Legal Regime Accept a Collective or Individual Paradigm to Protect Women's Rights?", *Michigan Journal of International Law*, Vol. 24, Pp. 381-382.

[89] Islamic law applies different rules regarding inheritance, divorce, partition of property upon divorce on the basis of sex and offers rich explanations for doing so. For instance, a woman is entitled to half a share of a man in inheritance; a husband may divorce his wife through a unilateral pronunciation of divorce but the same right is not given to a wife. For the Status of women in Islam and their differential treatment

such variation in the treatment of women depending upon on the type of the law applied by the Sharia Courts, and how can these be reconciled with issues such as the principles of gender equality and non-discrimination enshrined under the Constitution? Which mechanism is used by the Ethiopian Constitution when the decisions rendered by sharia courts are alleged to be against the provisions of the Constitution or its human rights norms? Should decisions of the sharia courts be in compliance with the Constitutional standard? In other words, does the supremacy clause under Article 9 of the FDRE Constitution apply to decisions of sharia courts that are alleged to contravene the Constitutional standard set by Article 9? Do the human rights provisions that are enshrined under the Constitution override judgments of sharia courts that are found to be against these human rights norms? Can the House of Federation as an authoritative interpreter of the Constitution review final substantive decisions of sharia courts and declare them unconstitutional if they are found to be incompatible with the provisions of the Constitution?

Unlike the constitutions of some countries (such as Kenya), the Ethiopian Constitution has not crafted an explicit rule designed to contain the potential conflict between state laws and the various normative ordering that it recognizes. Besides, there is no case-law regarding this question that could clarify the problem. However, on the basis of the analysis of various legal provisions, two broad strands of opposing arguments can be developed. One line of argument is in favour of the assertion that final decisions of the sharia courts should be compatible with the supremacy clause of the Constitution and human rights norms enshrined under the Constitution, and human rights treaties ratified by the country.[90] One can also contend that final decisions of the Sharia Courts are not necessarily expected to be in line with the norms of the Constitution. According to this course of argument, the decisions of sharia courts should rather be treated as exception to the supremacy clause and human rights norms.

Arguments in support of the first line of argument can be found in the provisions of the Constitution itself and the legislations that regulate the power

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and its justification, see Jemal Badawi (1971), "The Status of Woman in Islam", *Al-lttihad*, Vol. 8, No. 2; Yusuf Al Qaradawi (2002), *The Status of Women in Islam*; see also, Hammudah Abd' Al Lati (1998), *Islam in Focus*, 3rd ed.

[90] Getachew Assefa indirectly holds this view on the basis of his brief comment on the Kedija Beshir Case. He seems to suggest that the decisions of sharia courts have to be in line with the fundamental rights and freedoms and his suggestion is based on the mere involvement of the Supreme Court and the House of Federation in the case. See Getachew Assefa (2008), "Assessment of Ethiopian Courts", in National Judicial Institute, *Independence, Transparency and Accountability in the Judiciary of Ethiopia, A research Report,* commissioned by the *Canadian International Development Agency*, p. 110.

of the House of Federation. The Constitution contains a supremacy clause that provides that any law, decision of state organ or official and customary practices that are contrary to the spirit of the Constitution shall be of no effect. The phrase *'any decision of state organ'* can be constructed to include any decision made by the executive, legislature, judiciary, or any organ with judicial power. This includes, therefore, decisions rendered by sharia courts. Hence if decisions of the sharia courts are alleged to be in transgression of the constitutional provisions, they shall be of no effect. This means that any final decision of sharia courts should be compatible with the supremacy clause of the Constitution and other provisions of the Constitution relating to fundamental rights, including the rights of women.

This line of argument is, in the final analysis, pursues the abolitionist approach. In the end, it essentially means the substitution of religious and customary norms by the state laws. It does not take note of the religious and cultural concerns and sensitivities involved in family matters subject to the jurisdiction of religious and cultural systems. This is because it ignores the values and essence of religious and customary norms as being a source of cultural attributes and social cohesion in the lives of many women.[91] In customary and religious matters, women who assert their interests may not necessarily identify themselves as women, but rather in terms of other affiliations such as religion, culture, and ethnicity.[92] This is the case in Ethiopia, particularly in areas where Islam has a stronghold, such as the Somali, Afar, Hararri, and East and South East part of Oromia Regional States. As a result, in the event of conflict between matters governed by religious and customary laws on the one hand and state laws on the other, one needs to give due regard to customary and religious concerns. Uncompromising antagonism towards religion can indeed be counter-productive. In effect, it forces women in the religious or cultural communities to choose between individual rights vis-a-vis spiritual or social cohesion, and they usually prefer the latter.[93]

The arguments against the first perspective are also based on the Constitution which expressly grants constitutional recognition and status to the settlement of disputes related to personal matters by customary and religious bodies so long as parties refer a matter to such institution though their own consent. This implies that the Constitution acknowledges the difference in the norms and processes

[91] See Cheryl B. Preston (2003), "Women in Traditional Religions: Refusing to Let Patriarchy (or Feminism) Separate Us from the Source of Our Liberation", *Mississippi College Law Review*, Vol. 22, Pp. 199-200; see also Rhoda Howard-Hasman, *supra* note 88, Pp. 381-382.

[92] Rhoda Howard-Hasman, *Ibid.*

[93] Preston, *supra* note 91, p. 199-200; see also Rhoda Howard-Hassman, *Ibid.*, p. 386.

between state law and customary and religious laws; and also tolerates their final decision in matters affecting personal status of individuals when the parties thereof voluntarily submit their cases to such organs. This argument is reinforced by the arrangement under the 1999 Sharia Courts Establishment Proclamation. As stated earlier, Article 5(4) of this Proclamation provides that once a case is submitted to sharia courts after meeting all procedural requirements, it shall not be taken to the regular courts and vice versa.

According to the second line of argument, this arrangement is made to draw a parallel structure between the two different court systems and thereby maintain the non-reviewability of decisions of one by the other. Hence, it can be argued that the supremacy clause under Article 9(1) of the Constitution does not apply to decisions of sharia courts even if the substantive decisions made by sharia courts are discriminatory in nature or in conflict with human right issues under the Constitution. This interpretation leads to the conclusion that decisions of sharia courts that may even breach constitutional norms can be treated an exception to Article 9(1).

Unlike Zambia and Zimbabwe, the Ethiopian Constitution fails to explicitly articulate this exception. Yet, personal matters settled by religious and customary institutions need to be exempted from compliance with the standard stipulated under Article 9(1) of the Constitution. Reviewing such decisions and declaring them unconstitutional is inconsistent with the role of sharia courts in adjudicating personal and family matters that are important to Muslims and that are also the manifestation of their identity. Such review also implies the imposition of uniform laws on Muslims regarding matters that are intrinsically associated with them.

The Ethiopian legal regime pursues a compromise formula because it gives Muslims the right to consent to or reject the jurisdiction of the court, and at the same time avoids the uniform application of civil laws to Muslims who constitute a significant segment of the Ethiopian population.[94] The pre-condition of consent of both parties on the exercise of jurisdiction by sharia courts protects

[94] Currently, Muslims are found in all parts of Ethiopia. They have a stronghold in some part, especially in Somali, Afar, Harrari Regional States and some Zones in Oromia (Bale, Arsi, East and West Harrarghe and Jimma) and in Silte Zone in South Nation, Nationalities and Peoples' Regional State. As per the Housing and Population Census of 2007, Muslims account for 33.9% of the population. See the *Federal Democratic Republic of Ethiopia Population Census Commission* (2008), "Summary and Statistical Report of the 2007 Population and Housing Census: Population Size by Age and Sex", p. 18. A large number of cases concerning personal matters among Muslims end up before sharia courts, especially in area such as Afar, Somali and Harrari Regional States.

the rights of Muslims who do not want to be adjudicated by these courts. And on the other hand, personal law to be enforced by the sharia courts may be exempted from the uniform application of civil law for those who consent to the jurisdiction of sharia courts.[95] So, if parties to a dispute voluntarily take their case to a sharia court, the outcome should be exempted from constitutional standards. Furthermore, subjecting final decision of sharia courts to the supremacy clause and the human rights norms of the constitution goes against the very essence of legal pluralism advocated by the Constitution. Thus, final decisions made by sharia courts on matters within their remit have to be considered in the context of legal pluralism and be treated as a compromise to the constitutional standard set under Article 9(1).

However, the House of Federation is entitled to review final decisions made by sharia courts. But, for the aforementioned reasons, the scope of its power is limited to procedural questions such as failure to comply with express consent, or where sharia courts exceed the mandate granted to them under Articles 34 and 78 of the Constitution. Thus the authority of the House of Federation to review and examine the constitutionality of the outcome of final decisions of sharia courts should be limited even if the decisions may be inconsistent with a provision embodied in the Constitution.

If final decisions rendered by the sharia courts are reviewed by the House of Federation and finally declared unconstitutional, this may be treated by Muslim communities as an onslaught on their religious values and identity. This may trigger a counter-measure towards a stricter interpretation and practices. In the words of Shachar, such measure is called a 'reactive culturalism'. It arises from a reaction of identity group's active resistance to external forces of change and entails a strict adherence to the group's traditional laws, norms and practices.[96] A well-intentioned attempt to protect the rights of women may thus be perceived by religious and identity groups as an external pressure or threat to its values and identity and may then lead to a firm assertion of and obedience to their faith and values and even put women in a strict cultural, social and legal position.

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[95] Article 74 of the *Revised Family Code* provides that effects of marital ties are regulated by the Code whether a marriage is concluded as per civil, customary or religious system. However, as discussed earlier, marriage concluded according to Islamic law is exempt from the application of this rule so long as the parties thereof consent to settle their case by the application of Islamic law. This does not mean that the effect of marriage concluded according to Islamic rule is governed by Islamic law automatically. The Islamic law applies only when a dispute arises and the parties opt for the Sharia Courts.

[96] Ayelet Shachar (2001), *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, Cambridge University Press, p. 35.

The reaction of Indian Muslims to a decision of the Supreme Court of the country in one case enlightens the reaction of the Muslim community to what they perceived was an external threat to their identity and its consequences to the rights of women. The ruling of the Supreme Court of India in 1985 in a case that involved family matters generated fury and propelled a vigorous campaign by Muslims on the ground that the decision would impose the values of the majority Hindus on the minority Indian Muslims. The protests culminated in the enactment of legislation by parliament that exempted Muslim women from state laws on personal matters related to divorce thereby eliminating the protection they had under the state law.[97] A genuine restructuring of the differential treatment of women in religious and customary systems should not, therefore, be imposed on the system. As underscored by Shachar, the presence of state jurisdiction as a competitive optional forum in itself creates a spur for the religious and customary systems to react to the needs of the vulnerable groups or else risk losing members dissatisfied with the system.[98]

[97] The case was between *Mohammed Ahmed Khan v. Shah BanoBegum*, decided on by the *Indian Supreme Court* in 1985. The facts of the case, taken from Shachar's work, are the following: A Muslim woman, Shah Bano, was divorced by her husband, Mohammed Ahmed Khan, of more than forty years by way of a unilateral (*talaq*) divorce following a three year separation. Shah Bano lodged a case to the lower courts seeking maintenance payments from her ex-husband. The case finally reached the Supreme Court of India, which delivered a decision in her favour. The decision of the Supreme Court that was in favour of Shah Bano was perceived by the representatives of the Muslim minority community as attestation of attempts by the Hindu majority to undermine the identity of the minority Muslims. In response to the decision, Muslim religious leaders embarked on a massive political campaign in which they demanded that the government to "exempt" Muslim women from resorting to state law in determining the pecuniary effects of a religious divorce, thus depriving them of rights and remedies available to fellow Indian female citizens. The Indian Parliament conceded to the pressures of the campaigns of Muslims. It overruled the Court's decision in *Shah Bano* by promulgating an *Act* that protects the rights of Muslim women upon divorce. The legislation stripped off the rights of Muslim women to appeal to state courts for post-divorce maintenance payments. In addition, it relieved Indian Muslim ex-husbands from other post-divorce obligations toward their children. As a result, the legislation deprives Indian Muslim women of the benefits that they would receive if they lived in Egypt, as well as many other Muslim countries where Sharia family law codes are applied through state courts. For the facts of the case and its effects on the rights of Muslim women, see Ayelet Shachar, Religion (2005), "State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies", *McGill Law Journal*, Vol. 50, No. 1, p. 68.

[98] Shachar, *supra* note 96, pp. 140-141.

In short, the second line of argument appears to be sound by virtue of the schemes of legal pluralism adopted by the Constitution and the 1999 Sharia Courts Proclamation. The other abolitionist option thus violates legal pluralism to the detriment of sensitive concerns in religious and customary practices and norms related to family matters.

10. Implication to International Human Rights Obligations

The argument that final decisions of Sharia Courts have to be treated as exception to the constitutional standards has an implication to international human rights instruments ratified by Ethiopia. It triggers questions about Ethiopia's commitment under various human rights instruments ratified by the country that contain provisions prohibiting discrimination against women.[99] Personal status laws in Ethiopia, which could also fall within the jurisdiction of sharia courts, are often considered the area of the law in which discrimination is entrenched on the ground of gender.[100] That is why a state party to, for instance, the *CEDAW* is obliged to fight cultural practices that discriminate women. To this end, a state party is under obligation to undertake appropriate measures in order to eliminate discrimination against women in all matters relating marriage and family relations.[101]

The constitutional provisions that give recognition to customary and religious institutions in the settlement of personal disputes (subject to the consent of parties) may not be in conformity with the provisions of these international human rights instruments. This in turn triggers issues related to the status of international human rights under the Federal constitution, which in itself is a subject of debate in Ethiopia and in itself can become a separate topic for

[99] Ethiopia has become a party to the CEDAW in 1981. It signed it on 8 July 1980 and ratified it on 10 September1981. <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en> (Accessed on 11 June 2011). The reservation Ethiopia made to the Convention upon the ratification is on paragraph 1 of Article 29 of the Convention and the then government expressed that it would not be bound by the stated paragraph. See Convention on the Elimination of All Forms of Discrimination against Women: Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women, UN, CEDAW/SP/2006/2,Geneva, 2006; See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/309/97/PDF/N0630997.pdf?OpenElement> (Accessed on 11 June 2011).

[100] Jasmine Mousa (2005), *The Reform of Sharia-derived Divorce Legislation in Egypt: International Standards and the Culture Debate*, p. 1.

[101] See Article 16 of the 1979 *Convention on the Elimination of All Discrimination against Women.*

discussion.[102] What appears to be impliedly evident from the interpretation of the Constitution is that the particularity of application of some human rights issues as related to personal matters are given preference over universal application of human rights as well as national laws. This is done with the objective of accommodating, to some extent, religious and customary rules governing personal status when parties mutually choose such rules in the settlement of their disputes.

Concluding Remarks

The sharia courts have not been performing well with respect to the rights and concerns of women.[103] It has been alleged that women would not tend to prefer them for resolution of family and personal disputes as a result of the differential treatment of women in Islamic law.[104] However, the problem is usually attributable to the prejudices of judges in sharia courts towards the position and status of women in the customary norms of the society.[105] In the Ethiopian context, the application of sharia law is influenced by the customary rules of a region or a dominant ethnic group, which in many instances are not in tune with

[102] See the following literature in relation to the status of international human rights treaties in Ethiopia: Rakeb Messele (2003), "Enforcement of Human Rights in Ethiopia", Research Report, *APAP* (Addis Ababa), Gebreamlak Gebregiorgis (2008), "The Incorporation and Status of International Human Rights under the FDRE Constitution", in Girmachew Alemu and Sisay Alemahu, eds., "The Constitutional Protection of Human Rights in Ethiopia: Challenges and Prospects', *Ethiopian Human Rights Law Series*, Vol. 2, Faculty of Law, AAU; Sisay Alemahu (2008), 'The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia', *African Human Rights Law Journal*, Vol. 8; Chi Mgbako, et al (2008), "Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights", *Fordham International Law Journal*, Vol. 15, No. 1; Takele Seboka (2009), "The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia", *Journal of Ethiopian Law*, Vol. 23, No. 1; Mohammed Abdo (2011), "The Status and Enforcement of Social and Economic Rights under the FDRE Constitution", Vol. 24, *Journal of Ethiopian Law*.

[103] Communiqué of Addis Ababa Muslim Women's Council (2003), at 1.

[104] Original Woldegioris (2002), "Democratization Process and Gender", in Bahru Zewde and Siegfried Pausewang, *Ethiopia: The Challenge of Democracy from Below*, Elanders Gotab (Sweden), p. 175.

[105] It does not mean that Islamic law does not have rules contradictory to human rights norms. The sharia law enforced by sharia courts make a different treatment on the basis of gender as mentioned earlier. Of course, there are ample justifications for preferential treatment on the basis of gender in Islamic law. For details read Jemal Bedawi and Yusuf Al Qaradawi, *supra* note 89.

the rights of women.[106] This may have a role in shaping the mindsets and views of judges in matters involving women.

The jurisdiction granted to sharia courts raises questions and concerns about human rights provisions enshrined under the FDRE Constitution regarding gender equality and protection against discrimination. However, the Constitution has not provided a specific mechanism as to how decisions of sharia courts that are in conflict with constitutional standards can be dealt with. In other words, the Constitution fails to clearly state whether its supremacy clause and provisions on human rights prevail over final decisions of sharia courts that are in conflict with them.

As indicated in the preceding discussion, the Constitution seems to have recognized the final decisions delivered by sharia courts as exception to its supremacy clause and human rights norms. This seems to have been made mainly in favour of legal pluralism. With regard to the potential for conflict between the decisions of sharia courts and human rights instruments, the legal pluralism enshrined in the Ethiopian Constitution and the 1999 Sharia Courts Proclamation seem to have pursued the notion of '*cultural relativism*' in personal matters rather than the universality of human rights. This is because the FDRE Constitution recognizes parallel personal and family laws based ethno-religious frameworks and such structure has to be maintained if the parties opt for such systems.

The concerns of the '*abolitionist'* option can be addressed by raising the awareness of women so that they can make informed decision as to which forum is to their best interest. Such pursuits coupled with the power of the state to encourage and facilitate reforms regarding the treatment of gender issues in the sharia courts as well as customary systems can indeed gradually address the constitutional and human rights concerns discussed in this article. ■

[106] *Ibid.*

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN CIVIL AND COMMERCIAL MATTERS IN ETHIOPIA

Tecle Hagos Bahta ♣

Abstract

Ethiopia is not yet party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It can also be said that Ethiopian arbitration laws fail to cope with the emerging modern laws and practices in international commercial arbitration. However, as of 1965, with the introduction of the Civil Procedure Code (CPC), rules on the recognition and enforcement of foreign judgments and arbitral awards are set out whose interpretation, unfortunately, have remained thus far inconsistent. Thus, the criteria must be clearly interpreted and applied so that the rules can be conducive to the steadily increasing practice of modern arbitration. This article attempts to shed some light on these conditions.

Key words:

Foreign arbitral awards, commercial arbitration, enforcement of foreign judgments, Ethiopia.

Introduction

Commercial arbitration is becoming increasingly indispensable in international trade. The ease of enforceability of arbitral awards across borders should have, *inter alia*, been the driving factor for the eminence of international commercial arbitration in international trade. Thus, award-creditors may need to move across borders looking for a forum within which the award-debtor might have placed or deposited sufficient assets towards the satisfaction of the arbitral award.

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It is believed that once an arbitral award is rendered, the award-debtor unconditionally complies[1] with it or attempts to negotiate for discounted settlement over the arbitral award, or, at times, refuses to comply with it at all. In the second scenario, the award-creditor may have to trade-off between the offer and the available options. The third scenario, however, leaves the award-creditor with no option but to pursue legal action[2] in the optimal forum for the 'recognition and enforcement of the foreign arbitral award'.

States favorably tend to recognize arbitral awards rendered in other countries with the objective of avoiding continued harassment against the defendant, waste of time, money and effort and with the view to promoting international investment and trade. In so doing, to ensure that proper justice is administered, it is expected that national courts should ascertain that any foreign arbitral award is free from substantial defects which may hinder its enforcement in the state in which recognition and enforcement is sought.

This article is aimed at expounding the conditions set out under Article 461 of the Civil Procedure Code for the recognition and enforcement of foreign arbitral awards. Incidentally, however, an attempt has also been made to put the doctrine of reciprocity in its proper perspective in its application not only to the recognition and enforcement of foreign arbitral awards but also to foreign judgments.

1. Recognition and Enforcement/Execution: The Conceptual Framework

1.1- Execution or Enforcement

'Execution' or 'enforcement'[3] of foreign judgments and arbitral awards should be distinguished from the actual attachment and sale of property in satisfaction of the judgment or award decree. This article does not deal with the procedures

[1] S. Azadon Tiewul and Francis A. Tsegah, (1975) 'Arbitration and The Settlement of Commercial Disputes: A Selective Survey of African Practice', *Int'l & Comp. L. Q*, vol. 24, at 410 ("… compliance with arbitral awards is in most cases voluntary because of the desire of the parties to continue their business relationship and the spirit of goodwill which is engendered by the resort to arbitration rather than the courts.")

[2] *Ibid*, ("For people to have confidence in any system of arbitration, there must be a mechanism whereby the award rendered can be enforced").

[3] It seems that the draftsman of the CPC preferred to use the terms 'execution' and 'enforcement' interchangeably [Art.15(3)]; thus, the consistent usage of the term 'execution' for foreign judgments [Arts.456-460] and 'enforcement' for foreign arbitral awards [Art.461] could only be taken to serve the purpose of observing internal consistency rather than intending to treat them differently.

of attachment or other procedures by which the decision in the award will be carried out. Such technical procedures, which are different in all countries of the world, are not the purpose of this Article; furthermore, they present nothing special as far as arbitration is concerned. The purpose of this Article is rather only to scrutinize the litmus paper under which an arbitral award classified as 'foreign' must pass so as to merit a 'go-ahead' order by the Ethiopian courts by which the claim embodied in it may earn the status of having full legal force and be enforced by the claimants.

1.2- Recognition and Enforcement

Briefly put, the difference between recognition and enforcement is that, "an award may be recognized, without being enforced; but if it is enforced, then it is necessarily recognized by the court which orders its enforcement."[4] Thus, an award-creditor in a foreign arbitral award may seek only for its *recognition* or its *recognition and enforcement*.[5] The purpose of recognition on its own is to act as a shield; it is used to block any attempt to initiate fresh proceedings, issues which have already been decided in the arbitration that gave rise to the award whose recognition is sought.[6] The purpose of enforcement is, however, to 'act as a sword, not a shield'.[7]

The recognition of an award by a court gives a *res judicata* effect thereto. Enforcement, however, goes a step further than recognition. As Redfern and Hunter noted, "… where a court is asked to enforce an award, it is asked not merely to recognize the legal force and effect of the award, but also to ensure that it is carried out by using such legal sanctions as are available".[8] Thus, the terms 'recognition' and 'enforcement' can be used together where the latter is the necessary follow-up of the former in judgments and awards which carry pecuniary obligations.

The difference between 'recognition' and 'enforcement' is further summarized as follows:[9]

> Recognition is an undertaking by a state to respect the bindingness of foreign arbitral awards. Such awards may be relied upon by way of defence or set-off in any legal proceedings concerning the subject- matter of the award commenced in

[4] Alan Redfern and Martin Hunter (1999), *Law and Practice of International Commercial Arbitration*, 3rd ed., (London: Sweet and Maxwell), at 10-09. (Hereinafter referred to as 'Redfern and Hunter').
[5] See also *ibid.*
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*

> the courts of the state concerned, whereas enforcement is an undertaking by a state to enforce foreign arbitral awards, in accordance with its local procedural rules.

The word 'recognition' is hardly used in the Ethiopian laws in this context.[10] However, for domestic arbitral awards, an equivalent term "*homologation*" is employed under Art. 319(2) of the Civil Procedure Code (hereafter CPC).[11] For a purely domestic judgment, the test as to whether that judgment has a *res judicata* effect would solely rest on Art. 5.[12] However, for international policy reasons, the test whether a foreign judgment or arbitral award has a *res judicata* effect needs to pass the litmus paper test provided under Arts. 458 and 461of CPC respectively.

Art. 461 of CPC provides:

> (1) Foreign arbitral awards may not be enforced in Ethiopia unless:(a) Reciprocity is ensured as provided for by Art.458 (a); (b) The award has been made following a regular arbitration agreement or *other legal act in*_[sic][in accordance with the law of] the country where it was made; (c) The parties have had equal rights in appointing the arbitrators and they have been summoned to attend the proceedings; (d) The arbitration tribunal was regularly constituted; and (e) The award does not relate to matters which under the provisions of Ethiopian laws could not be submitted to arbitration or is not contrary to public order or morals; and, (f) The award is of such nature as to be enforceable on the condition laid down in Ethiopian laws;
> (2) The provisions of the preceding Articles shall apply by analogy when the enforcement of a foreign award is sought.

Thus, if the foreign arbitral award for which 'recognition' or 'recognition and enforcement' is being sought satisfies the requirements enumerated under Art. 461(1)(a) through (f) *cum* Art. 461(2) of CPC, it can have a *res judicata* effect in Ethiopia. In other words, the foreign arbitral award will have legal force and binding effect in Ethiopian courts and cannot be subject of a new litigation.

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[10] The phrase 'recognition and enforcement of arbitral award' is preferable in international arbitrations (including the awards which only 'recognition' is sought for); in our case, as 'enforcement' should necessarily be preceded by 'recognition', the issue of the absence of the latter word remains mere academic.

[11] Civil Procedure Code of Ethiopia of 1965 (Hereinafter referred to as 'CPC'). The Federal and States' courts apply their own respective procedural rules, although thus far all remain significantly loyal to the CPC with some minor improvements to the part of the CPC that deals with court jurisdiction.

[12] Inter-State recognition and enforcement of judgments and arbitral awards under the Ethiopian federal system may take a different course. As this is largely uncharted territory in under Ethiopian law, the scope of this article is limited to the enforcement proceedings involving foreign arbitral awards.

1.3- Nationality of Arbitral Awards

Art. 3 of CPC defines a 'foreign court' to mean a court situated outside Ethiopia. A 'foreign judgment' is as well defined to mean the judgment of a foreign court. However, 'foreign arbitral awards' are not supplied with a definition in our laws. The question is then, when is an arbitral award said to be 'foreign'?

This is an issue of essential importance because the whole issue of recognition and enforcement, from its inception, centers on whether an award is national or foreign. In a domestic arbitral award, the losing party (award debtor) has two options if he/she is not satisfied with the award; they are the option to appeal against the award or to apply for an order towards setting aside the award. In Ethiopia, for instance, whenever the award is believed, by the award-debtor, to have been tainted with the defects specified under Art.351 of CPC, the former is resorted to. Whenever the award is believed to have been rendered with the defects specified under Art.356 of CPC, the latter would be resorted to pursuant to Art. 355 of CPC.

Despite the importance of distinguishing between a domestic and foreign arbitral award, there is yet no legal provision to this effect under Ethiopian law. In such a case, it would have been helpful to resort to court decisions on the matter. Unfortunately, the practice does not seem to offer any help in this regard. For example, Art I (1) of the New York Convention (1958) on the Recognition and Enforcement of foreign Arbitral Awards provides the following:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought… it shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought

According to the Convention, an arbitral award is foreign if it is made outside of the territory of the state where the recognition and enforcement of such award is sought. The Convention also recognizes that an arbitral award may be foreign although it is made in the territory where recognition and enforcement of the award is sought. Thus, the following appear to be the means of determining the nationality of an arbitral award:

- the place of rendition of the award;
- the law applicable to the arbitration procedure (i.e. an arbitral award is considered foreign if it has been rendered according to foreign procedural law);
- the place of the proceedings and the nationality of the arbitrators; or,
- the substantive law which has been applied.

If an award has been rendered under foreign substantive law, it may be considered foreign. A foreign award may also be defined as an award which is

decided by a tribunal outside of the state in which recognition and enforcement is sought.

In modern arbitration laws, states provide for methods of distinguishing between foreign and national awards. In Ethiopia, we do not find such provisions. As will be shown below, however, it is essential both for the award debtor and creditor to clearly differentiate between the two. The legal remedies to be resorted to differ in differ in the two cases. In the absence of legally binding provisions to this effect, therefore, our courts need to resort to one or more of the above-mentioned criteria for determining the nationality of an arbitral award.

2. Procedures for the Enforcement of Foreign Arbitral Awards

In the main, the conditions for the recognition and enforcement of foreign arbitral awards in Ethiopia are provided for under Art. 461 of CPC. Apart from that, however, Art. 461(2) of the CPC makes a reference to the applicability of the provisions pertaining to the enforcement of foreign judgments. Hence the provisions governing the enforcement of foreign judgments also apply by analogy when the enforcement of a foreign award is sought. Thus, Art. 461(2) of CPC is an important provision forging a necessary nexus between the enforcement of foreign judgments, on the one hand, and the enforcement of foreign arbitral awards, on the other.

Proclamation No.25/1996[13] states that the Federal High Court is vested with the first instance jurisdiction over the 'application regarding the enforcement of foreign judgments or decisions'.[14] It is not clear whether the provision is advertently formulated so as to exclude foreign arbitral awards from its ambit. Moreover, it is not clear why the Proclamation considers the enforcement of foreign judgments to be outside the scope of private international law.

In the Ethiopian legal discourse (academic and judicial practice), private international law (PIL) rules comprise three major parts, i.e., judicial jurisdiction, choice of law (conflict of law rules), and proceedings for the recognition and enforcement of foreign judgments and foreign arbitral awards. It is to be noted, therefore, that matters involving the recognition and enforcement of foreign judgments and decisions are part of the domain of private international law.[15] For some unknown but, according to this author,

[13] The Federal Courts Proclamation No.25/1996.

[14] *Ibid*, Art.11(2)(c).

[15] This does not mean, however, that the issue is not controversial. Nor does it mean that it does not differ from a legal system to another. For example, in France, private international law covers conflict of laws (i.e., choice of law), jurisdictional conflicts

unjustified reason,[16] the drafters have set out disparate provisions to separately deal with the 'enforcement of foreign judgments' under Art.11(2)(c) and cases regarding private international law under Art. 11(2)(c) of Proclamation No.25/1996. In both cases, the power to hear cases regarding 'private international law' and 'applications regarding the enforcement of foreign judgments or decisions' are vested in the Federal High Court's first instance jurisdiction.

It has been the tradition in the Ethiopian legal system that the recognition and enforcement of foreign arbitral awards can be subsumed under the umbrella of private international law. The appropriate court that has jurisdiction to decide on the application for the recognition and enforcement of foreign arbitral awards is the Federal High Court as per Art. 11(2)(c) of Proclamation No.25/1996.

That aside, an application for the enforcement of a foreign judgment must be in writing.[17] Furthermore, the application must be accompanied by "a certified copy of the judgment to be executed; and a certificate signed by the President or the Registrar of the court having given judgment to the effect that such judgment is final and enforceable".[18]

By virtue of Art. 461(2), this requirement is also applicable for the recognition and enforcement of foreign arbitral awards. The UNCITRAL Model Law on International Commercial Arbitration (1985)[19] provides that the party applying for the enforcement of a foreign award must supply the '*duly*

(i.e., jurisdiction and the recognition and enforcement of judgments), nationality law and the status of foreigners. In Germany, it covers only choice of law; jurisdiction and the recognition and enforcement of judgments fall under 'international civil procedure law'. In the United States and England, the usual nomenclature is 'conflict of laws' and covers the jurisdiction, choice of law, and the recognition and enforcement of judgments. See Trevor Hartley (2009), *International Commercial Litigation: Text, Cases and Materials on Private International Law*, (Cambridge: CUP), p.4. For more on the French PIL, see also Brice Dickson (1994), *Introduction to French Law*, (London: Longman Group Ltd), chapter 14, pp.238-252.

[16] Pursuant to the House of the Federation's decision on June 07, 2010 to communitarize PIL rules and arbitration laws, PIL rules will cover choice of law, jurisdiction, and the recognition and enforcement of judgments. It should be noted that the recognition and enforcement of foreign arbitral awards is to be covered under the arbitration laws. See House of the Federation, Research documents on the process of Communitarization (2009), (unpublished), (On file with the Author).

[17] Art.457 of CPC.

[18] *Ibid.*

[19] Chapter viii, Art.35(2) of the UNCITRAL Model Law on International Commercial Arbitration of 1985. The full text of the UNCITRAL Model Law is available at <www.uncitral.org/> (Last visited on January 10, 2011).

authenticated original award or a duly certified copy of it', and the original arbitration agreement or a duly certified copy of it. Moreover, it provides that if the award or agreement is not made in the official language of the state where enforcement is sought, the party must supply a duly certified translation of it into such language.

Similar requirements are set forth in the United Nations Convention on the Recognition and Enforcement of foreign Arbitral Awards (New York Convention) (1958).[20] The New York Convention further requires that the translation must be 'certified by an official or sworn translator or by a diplomatic or consular agent'.[21] Thus, Art. 457 of CPC appears less stringent than what is required by the instrument setting forth the minimum international standards. The practice has, however, evolved in tune with what the New York Convention has set forth. Amharic is the working language[22] of the Federal Courts. Thus, an application for the enforcement of foreign judgments submitted to the Federal Courts is required to be translated into Amharic. Moreover, the current judicial practice requires foreign judgment (that is submitted to an Ethiopian court for recognition and enforcement) to be authenticated by the Ethiopian consulate in the country in which the judgment was pronounced.[23] These requirements equally apply in cases of foreign arbitral awards.

To sum up, an application for the recognition and enforcement of a foreign arbitral award is made to the Federal High Court (or to the Supreme Court of any State which exercises the Federal High Court's jurisdiction by delegation) by the winning party (award-creditor). The award-creditor has to provide (a) the duly authenticated original award or a duly certified copy of it, (b) the original arbitration agreement or a duly certified copy of it, and (c) a duly authenticated translation of it into Amharic language.[24]

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[20] Art. IV(1) and (2) of United Nations Convention on the Recognition and Enforcement of foreign Arbitral Awards (New York Convention) (1958). The full text of the New York Convention is available at <www.uncitral.org/> (Last visited on January 10, 2011).

[21] *Ibid*, Art. IV(2).

[22] See Art.5 of the 'Constitution of the Federal Democratic Republic of Ethiopia Proclamation No.1/1995', Aug.21, 1995. (Hereinafter referred to as 'The Federal Constitution'). See also Art.25 of the Federal Courts Proclamation No.25.1996, *supra* note 1.

[23] Ibrahim Idris Ibrahim (1999), 'Ethiopian Law of Execution of Foreign Judgments', *Journal of Ethiopian Law*, Vol. XIX, p.23.

[24] It is noteworthy that if the award-creditor is making the application to the courts of one or more of the Federated states, the award should be translated to the working language of the state of the seized court.

The court is, then, required to enable the party against whom the award is sought to be enforced to make his representations of the case[25] within the time fixed by the court.[26] The Court is empowered to decide whether or not pleadings may be submitted, [27] and in case of doubt may suspend its decision on the application until all doubtful points have been resolved.[28] The decision is to be made on the basis of the application unless for some special reason to be recorded, the court decides to hold a hearing.[29] The court may also award costs.[30] If the application is granted, the award is enforced as if it had been given by an Ethiopian court.[31]

3. Validity of the Arbitration Agreements

Art. 461(1)(b) of CPC provides that foreign arbitral awards can be enforced only if they are made based on a regular arbitration agreement or in accordance with the law of the country where they are made. Let us pose the following questions to elaborate the conditions enshrined in the aforementioned provision. Firstly, what does a 'regular arbitration agreement' mean? Secondly, what is it meant by the phrase '*in accordance with the law of the country* where it was made'? [Emphasis supplied]. Finally, what is it meant by 'the country where it was made'?

3.1- Regular Arbitration Agreement

The Civil Code and the Civil Procedure Code have consistently used the terms 'arbitral submission' to mean arbitration agreement although they signify different kinds of arbitration agreements. In modern arbitration laws, arbitration submission would not include arbitration clauses. An arbitration agreement basically means two things: arbitral submission and arbitration clause. In other words, an arbitration clause refers to the arbitration agreement which is incorporated in the main contract signed between the parties. On the other hand, an arbitral submission refers to an arbitration agreement which parties may make at the time when a dispute arises in the event that they have not already stipulated for an arbitration clause in the main contract out of which the dispute has arisen.

[25] It is this opportunity that the award-debtor should seize to adduce his available defenses against the enforceability of the arbitral award in Ethiopia.
[26] Art. 459(1) of CPC.
[27] *Ibid* Art.459(2).
[28] *Ibid* Art.459(3).
[29] *Ibid* Art.460(1).
[30] *Ibid* Art.460(2).
[31] *Ibid* Art.461(3).

However, the word 'regular' in this context does not seem to be clear. A regular arbitration agreement is meant or, at least, includes an arbitration agreement concluded in accordance with the law (or valid arbitration agreement). An issue arises whether this includes arbitration agreement concluded on the basis of customary rules or usages. The author is of the view that, as long as these customary rules or usages do not contradict with the mandatory arbitration rules of the country where the award was made, a regular arbitration agreement includes such agreements as are concluded on the basis of any customary rules or usages. Thus, a regular arbitration agreement should be interpreted to mean an arbitration agreement that does not violate the mandatory rules (or the public policy rules) in the country where it was made.

Needless to mention, arbitration agreement is a contract to submit existing or future disputes to arbitration for settlement. Thus, the arbitration agreement is governed by the basic principles of contract law. In Ethiopia, for instance, an arbitration agreement is not only subject to the special provisions governing arbitration agreements[32] but also to the general provisions on contracts.[33]

Thus, a valid arbitration agreement made or concluded in Ethiopia must pass, *inter alia*, the test under Art.1678 of the Civil Code of Ethiopia which provides the following:

"No valid contract shall exist unless:
(a) The parties are capable of contracting and give their consent sustainable at law:
(b) The object of the contract is sufficiently defined and is possible and lawful:
(c) The contract is made in the form prescribed by law, if any."

For an arbitral award made in Ethiopia to be enforced in another country, the latter's courts should make sure that, *inter alia*, the parties to the arbitration agreement are capable of concluding the arbitration agreement and that the consent of one of the parties was not vitiated by mistake (of a fundamental and decisive nature), deceit, duress, *lesion* (unconcionability) *or* illicit cause (if the purpose in view is discernible from or denoted in the contract documents). Furthermore, the courts should make sure that the arbitration agreement was made in accord with Art. 3326(2) of the Civil Code, i.e., it must have been drawn up in the form required by law for disposing without consideration of the right to which it relates. It should also be noted that the arbitration agreement must be in writing.[34] Likewise, Ethiopian courts cannot enforce an arbitral

[32] Art.3325-3346 of the 'Civil Code Proclamation No. 165 of 1960', May 5, 1960. (Hereinafter referred to as 'CC'). The existing Ethiopian Arbitration laws also include Arts.315-319, 350-357 of CPC.
[33] See Arts.1675-2026 of CC.
[34] Art.315(1) of CPC.

award that is a result of defective arbitration agreement in the country in which it is made.

3.2- Foreign award made in accordance with the law of the country where the award is made

Similar requirements are laid down under the New York Convention[35], and under the UNCITRAL Model Law.[36] However, the question as to where an award is deemed to have been made is relevant. Some argue that where an award states that it is dated and signed in a particular place, then, that is considered the place where it has been made.[37] However, in an international commercial arbitration, with a tribunal of three arbitrators, the award in its final form may be signed in three different countries, each member of the tribunal adding his or her signature in turn.[38]

Some institutional arbitration rules and some national laws deal expressly with the place in which an award is 'made'.[39] The International Court of Arbitration (ICA) of the International Chamber of Commerce (ICC) Arbitration rules provide that an award is deemed to have been made at the place (or seat) of the arbitration and on the date stated therein.[40] The UNCITRAL Model Law also provides that the award is deemed to have been made at the place of arbitration.[41] Thus, the general trend seems to suggest that the seat of arbitration is the place where the award is deemed to have been made.

3.3- Arbitrability

The fulfillment of the requirement of arbitrability means that the subject matter that is in dispute must be capable of settlement by arbitration. *If* the dispute submitted to arbitration by the parties is not arbitrable in the country where the award is made, or according to the law to which they subjected it *(lex electionis)*, the award *may* face the risk of being set aside.

The Ethiopian courts may examine that the arbitration agreement relates to arbitrable matters in the country where the award is made. It is not, however, clear whether the courts should further probe into the law to which the parties might have subjected it *(i.e., lex electionis*), if any, in an attempt to verify the arbitrability of the subject matter. It is, thus, good to see the difference between

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[35] Art.V(1)(a).
[36] Art.36(1)(a)(i).
[37] Redfern and Hunter, *supra* note 4, at 2-15.
[38] *Ibid.*
[39] *Ibid*, at 2-14.
[40] *Ibid.*
[41] *Ibid.*

Art. 461(1)(b) and Art. 461(1)(e) of CPC. These provisions are comparable with Art.V(1)(a) and Art.V(2)(a) of the New York Convention respectively.

If the arbitration agreement is aimed at settling a dispute which is not arbitrable, such an arbitral award will be invalid in a purely domestic arbitration agreement unless national courts give it effect. In an international commercial arbitration, however, the following line of argument by Arfazadeh should be noted.

> As a general rule, an award […] rendered in violation of the rules on arbitrability in force at the place of arbitration is open to challenge before the courts of that country;… if the award has survived the challenge at the place of arbitration, then the foreign enforcement courts should simply dismiss the defense. If the resisting party has failed to appeal and challenge the award, enforcement courts may reasonably conclude that the petitioner has failed to prove that non-arbitrability at the seat of arbitration would be a course of the nullity of the arbitration clause…[42]

This line of argument emanates from the belief that the validity of the arbitration agreement and its arbitrability *per se* are distinctly governed. The validity of the arbitration agreement is governed by the ordinary principles of contract law whereas arbitrability is connected with the statutory jurisdiction of courts, the public administration of justice and the organization of the judiciary.[43] It is also submitted that the necessary prerequisite for determining non-arbitrability is the existence of a rule that establishes the mandatory jurisdiction of a state court to the exclusion of arbitration.[44] Thus, to identify possible restrictions upon arbitrability, attention needs to be focused first on the jurisdiction of the courts. As this is primarily the function of the courts in the rendering country, courts in the enforcing country would ease their scrutiny on the arbitrability of the subject-matter based on the laws in the rendering country.

Hence, Ethiopian courts should not worry whether or not the dispute that the award purports to have settled is arbitrable in the country where the award was made. It should, therefore, be noted that examining the issue of arbitrability by reference to foreign standards of arbitrability rather than the law of the forum, is quite unwarranted in the context of current international arbitration law and practice.[45]

This line of argument, the author holds, serves our courts with four major purposes: (i) it greatly simplifies the intricacies surrounding the arbitrability and non-arbitrability issues in those countries in which the foreign arbitral award is

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[42] H. Arfazadeh (2001) 'Arbitrability under the New York Convention: The *lex fori* Revisited', *Arbitration International*, Vol.17, No.1, p.86.
[43] *Ibid*, p.80.
[44] *Ibid*, p.77.
[45] *Ibid*.

made; (ii) our courts should not give a refuge to an award-debtor where not only it knowingly agreed to arbitrate on the matter but also failed to challenge it in the courts where the award is made; (iii) it is in a way encouraging international commercial arbitration and respecting the parties' private agreements; and (iv) by taking the order of *exequatur* given by a court in the rendering country, as required under Art.457(b) of CPC, as the conclusive evidence of the arbitrability of the subject matter, the cherished objective of according arbitral awards 'finality' can be enhanced. By so doing, Ethiopia would be considered as an arbitration-friendly country and capable of attracting foreign investment.

4. Equal Treatment of the Parties and Regular Constitution of the Arbitral Tribunal

4.1- Equal Treatment of the Parties

The idea that the parties to arbitration should be treated equally throughout the proceeding is the pillar for according an arbitral proceeding the status that it currently enjoys. Indeed, arbitration is predicated on the two minimum standards of natural justice tenets: *audita alteram partem* and *non judex in causa sua*.

Art. 461(1)(c) of CPC states that the parties must have had equal rights in appointing the arbitrators and that they have been summoned to attend the proceedings. In Ethiopia, it is established that the parties should have equal rights in appointing the arbitrators. It clearly states that "[t]he arbitral submission shall not be valid where it places one of the parties in a privileged position as regards the appointment of the arbitrator". [46]

An arbitral proceeding can be valid only if both the parties to the arbitration are given proper notice in respect of the arbitral proceeding. It is, therefore, essential for the court (in ensuring whether due process was followed) to enable both parties to fully participate in the arbitral preceding. The court is, thus, required to examine, *inter alia*, that:[47] (i) the award debtor had been properly represented in the arbitral proceeding; (ii) the right of defense is complied with that the award debtor was enabled to submit his defense and had access to the opponent's documents; and, (iii) all the claims in respect of which the foreign award was passed had been properly notified to the party against whom a decision was given.

Of great import here is that our courts should not grant permission to enforce a foreign arbitral award simply because proper summons have been served in

[46] Art.3335 of the CC.

[47] ITC/UNCTAD/WTO (2001), 'Arbitration and Alternative Dispute Resolution: How to Settle International Business Disputes', Trade Law Series, Geneva, p.126.

accordance with the Civil Procedure Code of Ethiopia. It must see into it that the parties had been properly and duly given the summons in accordance with the procedures drawn up by the law of the state in which that award had been delivered and that the procedures (applied to the servicing of the summons) according to that law did not conflict with public order considerations in the country in which it has to be enforced, in this case, Ethiopia.

4.2- Regular Constitution of the Arbitral Tribunal

Art. 461(1) (d) of CPC states that, for a foreign arbitral award to be enforced in Ethiopia, one of the conditions is that the arbitral tribunal that made the award must have been regularly constituted. No doubt, arbitral tribunal refers to a sole arbitrator or a panel of arbitrators sitting to decide the dispute. In Ethiopia, one or several arbitrators can be appointed. The term 'several' under Article 3331 (2) needs to be read in conjunction with Article 3332 which requires the appointment of another arbitrator where there is an even number of arbitrators. The combined reading of Arts. 3331 and 3332 of the Civil Code thus excludes an even-numbered arbitration.[48] Where the *lex arbitri* (or in the event of choice of a foreign procedural law, this procedural law and the mandatory arbitration rules of the *lex loci arbitri)* prohibits the constitution of an arbitral tribunal by an even number of arbitrators; and an arbitral tribunal which does not meet this requirement is not legally or regularly constituted.

In the Ethiopian case, therefore, the use of two arbitrators sitting to hear a case with a third arbitrator (the so-called *umpire*) cannot be considered as valid arbitration agreement. The use of an *umpire,* thus, voids the arbitration agreement for failing to have an odd numbered arbitral tribunal.[49]

[48] For more on this, see Zekarias Keneaa (2007), 'Formation of Arbitral Tribunals and Disqualification and Removal of Arbitrators under Ethiopian Laws', *Journal of Ethiopian Law*, Vol.XXI, p.150.

[49] Despite the poor draftsmanship of the arbitration clauses in many of the standard forms of insurance contracts and performance bonds that are currently in use in Ethiopia, the fact that the clauses require of the 'umpire' to sit with the two arbitrators and decide together offers life to the arbitration clause. Contracting parties should be well aware of the difference between a presiding arbitrator and an *umpire*. The latter is required to act only where the two appointed arbitrators disagree, upon which he takes over as sole arbitrator; depending on the parties agreement, he may or may not attend the hearing with the arbitrators. In our case, however, the arbitral tribunal consisting of odd-numbered arbitrators must act together and decide together; otherwise, either party may invoke Art. 356(b) of CPC for a set aside recourse on the basis of failure of the arbitrators to act together.

5. Finality and Enforceability of the Award

5.1- Finality

The Civil Procedure Code does not have express or implied definition pertaining to the concept of 'finality'. Nor does it feature in Art. 461 as a requirement for the determination of recognition and enforcement of a foreign arbitral award as it does in the case of foreign judgments (Art. 458(d) *cum* 457(b)). Nevertheless, finality is a concept of great import in the case of the recognition and enforcement of foreign judgments and foreign arbitral awards alike.[36] Thus, we can conclude that, by virtue of Art. 461(2), Art. 457(b) applies equally in the process of having an arbitral award recognized and enforced.

Finality refers to the situation when an arbitral award has acquired the force of *res judicata* in the sense that no ordinary appeal, set aside procedure, or other recourse (as may be provided for by the *lex loci arbitri* or by the *lex electionis*) against it is possible. An arbitral award having acquired the force of *res judicata* simply means that an arbitral award "already decided between the same parties or their privies on the same question by a legally constituted [arbitral tribunal] having jurisdiction is conclusive between the parties, and the issues cannot be raised again".[50] Although the concept of *res judicata***,** *per se*, is universally recognized, its definition may not be uniform across the board. Thus, the concept of 'finality' as used in this context must be distinguished from the concept of *res judicata* under Art. 5. They are two separate and independent conditions that a foreign arbitral award should satisfy for it to be recognized and enforced in Ethiopia. The concept of finality is seen in light of the *res judicata* rules of the legal system of which the arbitral award is national. Thus, the Ethiopian courts cannot recognize and enforce a foreign arbitral award that does satisfy the *'res judicata'* test, under Art. 5, which, however, fails to satisfy the 'finality' test of the legal system of which the arbitral award is a national or vice versa.

The Ethiopian court, seized to decide on the application, would in our case see to it that all recourses available in the *lex loci arbitri* are exhausted. These recourses are often appeal,[51] and set aside proceedings.[52] However, if the award-debtor did not, for instance, appeal or apply for the set aside proceedings within the prescribed time frame in the *locus arbitri*, then, it is considered that

[50] Margaret Moses (2008), *The Principles and Practice of International Commercial Arbitration*, CUP, p.188
[51] Art.350-351 of CPC.
[52] Art.355-356 of CPC.

those recourses are exhausted.[53] It should also be kept in mind that a right of appeal against arbitral awards can be waived in Ethiopia on the condition that it is made with full knowledge of the circumstances.[54]

Therefore, assuming that both the above-mentioned recourses are exhausted, the arbitral award is, then, considered to have passed the test of finality in Ethiopia. However, this Ethiopian finality test does not automatically grant the award a *res judicata* effect in the rendering country; the award must pass the test of *res judicata* in the rendering country. [55] Thus, it is unfortunate that the award-creditor has to obtain the declaration of the 'finality' of the arbitral award both in the rendering country and in the enforcing country. This is the process of obtaining double *exequatur* or double scrutiny.[56] By virtue of Art. 461(2) *cum* Art. 457(b) of the CPC, this process of obtaining double *exequatur* is required of a foreign arbitral award to enforce it in Ethiopia. Looked at from the perspectives of the award-creditor, the requirement of double *exequatur* is a cumbersome exercise as well as an obstacle from potentially taking advantage of the nascent bizarre possibility of enforcing 'annulled' arbitral awards by some countries.[57]

5.2- Enforceable Nature of the Award

Art. 461(1)(f) requires that the award be of an enforceable nature on the condition laid down in Ethiopian laws. What does it mean by "an award of enforceable nature"? What does 'the condition laid down in Ethiopian laws' refer to? To determine the significance of the term 'enforceable', let us consider what the nature of an award may look like. A final award may come up with

[53] The prescribed timeframe for an appeal and set aside proceedings is 60 days and 30 days of the making of the award respectively. See Arts. 323(2) and 355(2) of CPC.

[54] Art. 350(2) of CPC.

[55] This is why the award-creditor has to produce a certificate signed by the President or the Registrar of the court of the rendering country to the effect that the award is final and enforceable. This is what is termed as the order of '*exequatur*'. This is cumbersome to the award-creditor because not only does it have to authenticate the arbitral award and certify the copies thereof with a notary but also seek the order of '*exequatur*' from the courts in the rendering country.

[56] The New York Convention has got rid of the double e*xequatur* and the word 'final' or 'finality' in the enforcement proceeding as the latter also led to problems. See Hans Harnik (1983), 'Recognition and Enforcement of Foreign Arbitral Awards', *The American Journal of Comparative Law*, vol.31, p.708.

[57] France and USA are the two leading countries on this front. For more on this, See Gary Sampliner (1997), 'Enforcement of Nullified Foreign Arbitral Awards: Chromalloy Revisited', *Journal of International Arbitration*, Vol.14, No.3, pp.141-165; Peter Gillies (2005), 'Enforcement of International Arbitral Awards – The New York Convention', *Int'l Trade and Bus. Law Review*, Vol.9, pp.9-43.

one or more of the following remedies:[58] monetary compensation, punitive damages or exemplary damages, specific performance, injunctive relief, declaratory relief, interest, costs, etc.

Should Ethiopia, for example, enforce a foreign arbitral award granting the award-creditor exemplary damages and/or punitive damages? As Ethiopia does not itself recognize such a remedy, there is no possibility to enforce (execute) such remedies. Can Ethiopia also enforce an arbitral award that imposes *forced [specific] performance* against the award-debtor? The answer is possibly 'yes' provided that the conditions for executing it are available in the Ethiopian laws. The conditions are as laid down under Art.1776 of the Civil Code that "Specific performance of a contract shall not be ordered unless it is of special interest to the party requiring it and the contract can be enforced without affecting the personal liberty of the debtor".

From the reading of the above legal provision, Ethiopian courts should not enforce a foreign award granting specific performance if it affects the personal liberty of the award-debtor. Moreover, in the event that a dispute arising from an administrative contract is resolved by means of arbitration, Ethiopian courts cannot recognize and enforce an award granting specific performance[59] against an administrative authority. From this we can understand that Art. 461(1) (f) of the CPC enjoins the Ethiopian courts to be prospectively far-sighted, unlike the other sub-articles that require the courts to retroactively examine the circumstances surrounding the foreign arbitral award. In other words, the aforementioned provision is meant to set up an 'early warning system' to put the courts on guard to the question (before the permission to enforcement is granted).

6. Reciprocity Requirement

6.1- The concept

The other important but controversial criterion for the recognition and enforcement of foreign arbitral awards is that, by virtue of Art. 461(1)(a) of the

[58] Redfern and Hunter, *supra* note 4, p.361.

[59] See the non-applicability of specific performance remedies against an administrative authority under Art. 3194 of the Civil Code, a provision under Title XIX of the Civil Code (Arts.3131-3306 of CC) that deals with Administrative Contracts. In this regard, even for pecuniary awards, the court should be cognizant of the domestic rules, if any, on sovereign immunity against execution of state property or accounts when and if the award-debtor is the State, State entities, State-owned-Enterprises (SOEs) or Business Organizations (wherein the State is the majority or minority share holder).

CPC, reciprocity should be ensured as provided for by Art. 458(a)'.[60] If the courts of the rendering country refuse to execute Ethiopian judgments, the Ethiopian courts must, in turn, refuse to execute theirs. As Ibrahim Idris noted, "it has retaliation against a state as its basis, but which may simultaneously victimize innocent individuals … because of the policies of the country whose court has rendered the judgment".[61]

Despite this, however, many states uphold the principle. On the other hand, the recent trend, especially with regards to recognition and enforcement of foreign arbitral awards seems to relax or completely reject the doctrine of reciprocity. As Amazu Asouzu, noted, "it is good news that many member states to the New York Convention are reconsidering the reciprocity requirement."[62] It is advised that the Ethiopian courts should take note of the fact that there are 16 contracting states (to the New York Convention) in Africa without the reciprocity requirement.[63] The UNCITRAL Model Law also rejects the reciprocity requirement, and many states are adopting it into their arbitration laws. Therefore, a state adopting the Model Law is assumed to have foregone the reciprocity requirement unless it maintains it by modifying the Model Law. In fact, in matters of international commercial arbitration, the reciprocity prerequisite is gradually losing ground as states continue to join the New York Convention countries and/or adopting and adapting the UNCITRAL Model Law.

Despite the afore-mentioned trend, however, the doctrine of reciprocity, as it stands now, continues to gain currency in Ethiopia until it becomes a party to the New York Convention without the reciprocity reservation, or adapt the UNCITRAL Model Law, or revises Art. 461 of the Civil Procedure Code.

Furthermore, due consideration ought to be given to the grounds which gave rise to the reciprocity doctrine. It is stated that it is:

> '… necessitated by the absence of international sanction against states that refuse to enforce foreign judgments. It is a self-help measure designed to ensure respect for a state's judgment by another state. Pursuant to this principle, a state that has

[60] Art. 458(a) reads: "Permission to execute a foreign judgment shall not be granted unless (…) the execution of Ethiopian judgments is allowed in the country in which the judgment to be executed was given."

[61] Ibrahim Idris Ibrahim, *supra* note 23, p.24

[62] Amouzu A. Asouzu (1999), 'African States and the Enforcement of Arbitral Awards: Some Key Issues', *Arbitration International*, Vol.15(1), p.40; these are: Benin, Burkina Faso, Cameroon, Cote d'Ivore, Djibouti, Egypt, Ghana, Guinea, Lesotho, Mali, Mauritania, Mauritius, Niger, Senegal, South Africa and Zimbabwe.

[63] *Ibid*.

> adapted reciprocity shall refuse to enforce judgments of those states that do not enforce its judgments'.[64]

On the part of our courts, however, since the retaliatory action is to be taken on the basis of the existence or non-existence of reciprocity, great care must be taken in establishing it. The question as to when is reciprocity said to exist thus needs utmost prudence.

6.2- The Existing Conundrum

Incessant confusion looms large in our courts with regard to the interpretation and application of the principle of reciprocity. In this respect, Ethiopian courts have been giving inconsistent interpretations.[65] The prominent ones are briefly presented here: [66]

CASE I:

In the matters of *Paulos Papassinous,* the Federal Supreme Court's decision was the following:

> The only way to prove that another state allows execution of Ethiopian judgments is by showing a treaty of judicial assistance signed between Ethiopia and that state. If such a treaty does not exist, then the requirement of reciprocity is not satisfied. [67]

The decision unduly equates reciprocity with the existence of a treaty of judicial assistance, and this reasoning takes us nowhere! It, in effect, means that Ethiopian courts will have no foreign arbitral award to enforce because Ethiopia has not signed any treaty of judicial assistance concerning the recognition and enforcement of arbitral awards. It is also equally true of foreign judgments, as it will be described below, because Ethiopia has signed such treaty only with the Republic of Djibouti.

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[64] Samuel Teshale (2000), 'Reciprocity with Respect to the Enforcement of Foreign Judgments in Ethiopia: A Critique of the [Federal] Supreme Court's Decision in the Paulos Papassinous case' 12 *RADIC*, p.571.

[65] All the decisions that I have produced below to elaborate on the doctrine of reciprocity are given solely in relation to the recognition and enforcement of foreign judgments. The doctrine is, however, equally applicable to the enforcement proceedings of foreign arbitral awards. Thus, the cases help trace the murky trail of incoherent court decisions on the subject.

[66] Translations for all cases are mine.

[67] In the matters of Paulos Papassinous (Federal Supreme Court of Ethiopia, Civil Case No.1769/88), 1996, (unpublished).

CASE II:

The Federal High Court's decision (*In the matters of Paulos Papassinous*) states that "[t]he non-existence of a treaty of judicial assistance is the sole proof requisite to establish the fact that a state does not allow execution of judgments rendered in Ethiopia." [68] In other words, the Court would not enforce any foreign judgment or arbitral award unless it is accompanied by a treaty of judicial assistance in force between Ethiopia and the rendering country. As there is only one treaty of judicial assistance in force, this decision does not seem to have considered such realities.

CASE III:

The Federal High Court's decision in *Goh-Tsibah Menkreselassie* v *Dr. Bereket Habte-selassie*[69] reads:

> The absence of the treaty of judicial assistance should not limit the rights of private citizens: and that in the absence of an agreement to the contrary between the two states, it would be inappropriate to refuse the enforcement of a foreign judgment simply because there exists no treaty of judicial assistance.

In this case, the Court held that the absence of the treaty of judicial assistance should not limit the rights of private citizens and, that in the absence of an agreement to the contrary between the two states, it would be inappropriate to refuse the enforcement of a foreign judgment simply because there exists no treaty of judicial assistance. This holding takes us nowhere, too! In fact, it would be unlikely for states to enter into an agreement 'promising' each other that they would not enforce each other's judgments or arbitral awards. Therefore, the Court's decision, in effect, means that all foreign judgments or foreign arbitral awards will be recognized and enforced in Ethiopia. No doubt, this is tantamount to rejecting altogether the reciprocity rule in Ethiopia. This cannot be the intention of the legislators.

CASE IV:

The Federal High Court's decision in *Michel Kohler* v *Derlexia Kenyat* held that "[i]f there is no treaty of judicial assistance, proof that a state enforces Ethiopian judgments should be adduced". [70] As per the decision, the Court ordered the

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[68] In the matters of Paulos Papassinous (Federal High Court of Ethiopia, Civil Case No.1623/80), 1987, (unpublished).

[69] *Goh-Tsibah Menkre-Selassie* v *Dr Bereket Habte-Selassie* (Federal High Court of Ethiopia, Civil Case No.85/92), 2001, (unpublished).

[70] *Michel Kohler* v *Derlexia Kenyat* (Federal High Court of Ethiopia, Civil Case No.29/90), 1999, (unpublished).

applicant to adduce proof that the state (in this case USA) enforces Ethiopian judgments.

The applicant cited two decisions of Ethiopian courts, and he claimed that they were recognized and enforced in the United States of America. The Court ordered the Ministry of Foreign Affairs to confirm the information. However, the Ministry could not trace the decisions. The applicant argued that the US Uniform Child Custody Jurisdiction Act (the UCCJA) imposes the obligation on the US courts to recognize and enforce foreign judgments on child custody. This, according to the applicant, conclusively proves that the USA would enforce Ethiopian judgments. Thus, the Court held that child custody decisions given by US courts should be recognized and enforced in Ethiopia as US courts are legally obliged by the Act[71] to recognize and enforce Ethiopian decisions on child custody.

CASE V:

In *Commercial Bank of Ethiopia* v *Samson Yimenu et al*, the Federal First Instance Court's decision states that "[I]f treaty of judicial assistance exists, [and] if the foreign judgment satisfies the requirements enumerated under Art. 458, it can be allowed to be recognized and enforced". [72]

This case relates to a judgment of a Djiboutian court given in favor of the Commercial Bank of Ethiopia against an Ethiopian who is domiciled in Djibouti. The heirs of the judgment-debtor managed to flee all their assets to Ethiopia. The Commercial Bank of Ethiopia, instead of seeking for the recognition and enforcement of the Djiboutian Court's decision as per Art. 458 of the CPC, instituted a fresh suit against the heirs of the foreign judgment-debtor in the Federal First Instance Court. The heirs instituted a preliminary objection to the effect that the case has been settled as it has been decided in a

[71] The Act appears to apply only to the US inter-state child custody jurisdictional matters as the definition of "states" which are subjects to the UCCJA include: "*any state, territory, or possession of the United States, the Commonwealth of Puerto Rico and the District of Columbia …"* Despite the statutory definitional limitation, there is a growing tendency by some states to extend the applicability of the UCCJA for international circumstances. For more on this, See Christopher L. Blakesley (1997-98), 'Comparative Ruminations from the Bayou on Child Custody Jurisdiction: The UCCJA, the PKPA, and the Hague Convention on Child Abduction', 58 *Louisiana L. R* 449; see also William M. Richmond and William L. Reynolds (2002), *Understanding Conflict of Laws*, 3rd ed., (Toledo: Mathew Bender), pp.421-428 (wherein no mention is made or implied as to the applicability of the Act to international judgments).

[72] *Commercial Bank of Ethiopia* v *Samson Yimenu et al*., (Federal First Instance Court of Ethiopia, Civil Case No. 111/93), 2002, (unpublished).

Djiboutian court that had jurisdiction to hear the case. It was admitted by the litigating parties that the judgment was given, following due process of law, by a court duly established and constituted under the Djiboutian laws.

The Court had to decide whether the case should be litigated all over again. The Court held that Art. 5 of CPC applies to all courts (domestic or foreign) so long as the court (be it domestic or foreign) is legally entitled to dispose of the suit. Furthermore, the Court underscored that the wording 'any court having jurisdiction' used under Art. 5(1) of CPC is meant to include foreign courts. Thus, the Court decided that as the case involved the same *parties* and *cause of action* and as the decision was given by a competent Djiboutian court, it satisfies the requirements under Art. 5 of the CPC.

The Federal First Instance Court, thus, went on further to establish whether reciprocity exists between Ethiopia and Djibouti. Having established that reciprocity existed, it finally disposed of the case stating that the judgment-creditor can enforce the judgment by showing that the remaining requirements under Art. 458 of CPC are satisfied. This is an erroneous interpretation of the doctrine of reciprocity.

CASE VI:

In *Commercial Bank of Ethiopia* v *Demere Gobena & Senait Assefa*,[73] the Federal Supreme Court held that "[c]oncerning the enforcement of foreign judgments, neither a treaty nor an established practice exists between the United States and Ethiopia." This case was an appeal against the decision of the Federal High Court. The lower Court had ruled that the case has definitively been disposed of by the New York State Supreme Court (in the United States) and that the case at hand should be dismissed on the basis of Art.5(1) of the CPC.

However, the Federal Supreme Court, whilst noting that foreign judgments may be enforced on the basis of either treaty or CPC requirements, hastened itself into the conclusion that as there is no treaty and/or established practice between the US and Ethiopia, the judgment-creditor had no option, according to the Court, but litigate the case afresh in the Ethiopian courts. This decision of the Federal Supreme Court seems to be erroneous on two grounds. Firstly, prior to this decision, there was in fact an established practice of recognizing and enforcing each other's decisions.[74] And, secondly, in matters of private

[73] Civil Appeal No.15908, (2005) (unpublished).

[74] See, for example, Cases III and IV above. It is also good to note that the Ministry of Foreign Affairs (MoFA) in its letter to the Federal High Court had hinted, by which the Federal Supreme Court could also have informed itself, on the existence of such practice between the US and Ethiopia in its response to the lower Court's query as to

international law, each of the states in the United States should be scrutinized on its own.[75]

6.3- Cutting the Gordian Knots!

In order to salvage the situation, therefore, let us examine the *modus operandi* of the treaty of judicial assistance, on the one hand, and the reciprocity requirement, on the other. A treaty of judicial assistance may include, depending on the extent of the agreement between the two states, enforcement of foreign judgments, foreign arbitral awards, assistance to be provided by a foreign state in procuring evidence, serving summons, etc. In this respect, the Treaty[76] between the Transitional Government of Ethiopia and the Government of the Republic of Djibouti on Judicial Assistance signed at Addis Ababa on August 2,

whether there existed any treaty of judicial assistance between the two countries. For more on this point, see Zefania Alemu Biks (2005), 'A Critique on the Federal Supreme Court's Decision Concerning the Execution of Foreign Judgments in Ethiopia, *Awde Fith* (Amharic Newspaper), No.10, April 2005, pp.13-14. In the area of arbitration, the federal courts of the US seem to have passed the test of reciprocity as the US court recognized in 1976 an Ethiopian arbitral award in favor of the then Imperial Ethiopian Government (IEG) against Baruch Foster Corporation (BFC) despite the latter's attempt at frustrating the recognition process by claiming that the President of the Tribunal the late Professor Rene David had a material connection to Ethiopia as he drafted the Ethiopian Civil Code twenty years earlier. The Court rejected the award debtor's argument and decided that it was only an attempt to 'freeze the confirmation proceedings in their tracks and indefinitely postpone judgment'. See Georges R. Delaume (1997), 'Recognition and Enforcement of State Contract Awards in the United States; A Restatement', 91 *Am. J. Int'l L.*476. For the full text of the award, see EACC (2008), 'Report of Arbitral Awards', Vol.I, p.1-24.

[75] In our case, our courts have to scrutinize each of the States as to how it approaches the doctrine of reciprocity. It can be noted, for example, in Ibrahim Idris Ibrahim, *supra* note 23, p.19, that the New York and California States of the US do not require reciprocity for the recognition and enforcement of foreign judgments. Also for a brief remark on whether and which State requires the doctrine of reciprocity, see The American Law Institute (2004), *International Jurisdiction and Judgments Project* (Tentative Draft No.2 (April 13, 2004), pp.89-91. This does not, however, apply to the recognition and enforcement of foreign arbitral awards in which case the US courts apply the New York Convention of 1958 and, whenever it is 'more favorable' to the award-creditor, the American Federal Arbitration Law can be resorted to. For more on this, see Georgios C. Petrochilos (1999), 'Enforcing Awards Annulled in Their State of Origin Under the New York Convention', 48 *Int'l and Comp. L. Q.*, pp.856-888.

[76] A Proclamation to Ratify the Treaty on Judicial Assistance between the Transitional Government of Ethiopia and the Republic of Djibouti, May 31, 1995 (Hereinafter 'The Treaty') (the full text of the Treaty on file with the Author).

1994 and put in effect on May 31, 1995, includes judicial assistance in matters of enforcement of foreign judgments, procuring evidence, serving summons, etc. From both the literal and purposive readings of the Treaty, the author finds it difficult to assume that reciprocal enforcement of arbitral awards had been part of the bargain in the Treaty.[77]

For the purpose of our discussion here, however, the term treaty of judicial assistance is used to mean a treaty for the enforcement of foreign judgments and/or foreign arbitral awards. It should be clear from the outset, therefore, that if there is a treaty of judicial assistance between two states, then it would be inappropriate to inquire whether reciprocity exists. As noted by Samuel Teshale, "[t]he law has laid down two grounds for execution of foreign judgments in Ethiopia; namely, on the basis of treaty and on the basis of statutory requirements."[78] In other words, a foreign judgment or a foreign arbitral award is enforced either in accordance with the treaty provisions or the statutory provisions under Art. 458 or 461of CPC. Therefore, when the courts are seized with an application for the enforcement of foreign judgments or foreign arbitral awards, the first question to ask is: whether there is a treaty of judicial assistance with the state which gave the judgment or award whose enforcement is sought.

In practice, courts order the Ministry of Foreign Affairs to supply the information on whether a treaty of judicial assistance exists. If the response is in the *affirmative*, then the next step for the courts is to require its submission to them. To this effect, the courts may have to order once again the Ministry of Foreign Affairs to produce[79] the said treaty.[80] Once the treaty itself is presented

[77] The author is of the opinion that an arbitral award rendered in Ethiopia can be homologized into a court judgment and enforced under the Treaty. However, a word of caution is needed here because such act may have the effect of transforming the award into a judgment which may mean that it will henceforth be considered as a judgment.

[78] Samuel Teshale, *supra* note 64, p.574.

[79] The Ministry of Foreign Affairs is the repository of 'all authentic copies of international treaties and agreements concluded between Ethiopia and other states or international organizations' by virtue of Art.25(7) of the 'Definition of Powers and Duties of the Executive Organs of the FDRE Proclamation No.4/1995.'

[80] Ethiopia applies the 'Automatic *ad hoc* incorporation of the Legislative *ad hoc* incorporation' modality of implementation of international treaties whereby international treaties signed by the Executive and ratified by the Federal Parliament is given full force and effect by an enabling legislation which consists of a few provisions stating that the treaty to which reference is made has come into force in Ethiopia, without the need to publish the text of the treaty in the Federal Gazette. For

to it, the court should go through its provisions. This will enable the court to determine on what conditions, under the said Treaty, it should enforce the foreign judgment or foreign arbitral award.

Against this backdrop, we can see the Federal First Instance Court's decision in the case of *Commercial Bank of Ethiopia vs Samson Yimenu et al* (CASE V). The Court held that if a treaty of judicial assistance exists, then the foreign judgment can be allowed to be recognized and enforced if it satisfies the requirements enumerated under Art. 458. No doubt, if there is a treaty of judicial assistance, reciprocity exists as required under Art. 458(1) of CPC. But assuming that a treaty of judicial assistance exists between the two countries, should the foreign judgment given by the Djiboutian court be required to satisfy the requirements enumerated under Art.458? Should it also satisfy the formality requirements developed as judicial practice, such as consular authentication of the judgment? The Court's affirmative decision seems unequivocal in this regard. The Court errs in its decision because Art. 7 of the Treaty of Judicial Assistance between Ethiopia and Djibouti states that "[c]onsular legalization or any other like formality shall not be required for […] applications for the execution of judicial decisions."

Equally important is Art.18 of the Treaty which states, "Each contracting state shall, subject to the conditions laid down in the present Treaty, recognize the judicial decision of the other contracting state and shall cause same to be executed in its territory". It is clear from the reading of this provision that the clause *"subject to the conditions laid down in the Present Treaty"* automatically renders the application of Art. 458 of CPC unnecessary.

One cannot but wonder, then, on what conditions a Djiboutian judgment may be enforced in Ethiopia or the vice versa. Art.19 of the Treaty is worth noting. It reads:

> The judicial decisions rendered by the Judicial Authority of one contracting state shall be recognized and executed having the force of law in the territory of the requested state, if it satisfies the following conditions:
>
> - The Judicial decision was given by a Judicial Authority duly established and constituted according to the law of the requesting state;
> - The judicial decision does not violate the exclusive jurisdictional competence of the judicial authority of the contracting state in whose territory it is to be executed:
> - No judicial decision has been given previously or no case is pending on the same subject matter and between the same parties before a judicial authority of the requested state;

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more on the modalities of implementation of international rules, see Antonio Cassese (2005), *International Law*, 2nd ed., (New York: OUP), pp.220-223

- The judgment debtor was given the opportunity to appear before, and present his defense to the judicial decision;
- The judicial decision is final and enforceable according to the law of the requesting state.

Moreover, Art. 9 of the Treaty provides that "[t]he contracting state may refuse… applications for the execution of judicial decisions, if it considers that such execution is contrary to its basic legal principles or is prejudicial to its national sovereignty, security, public order or moral."

How much of the CPC's inconvenient hurdles the Treaty might have cleared away has not yet been scrutinized. Yet, by imposing the applicability of the CPC, the Federal First Instance Court's decision would have resulted in considerable miscarriage of justice. This is, therefore, a vivid evidence to show that a foreign judgment or foreign arbitral award, given in a country with which Ethiopia has signed a treaty of judicial assistance, must be scrutinized in light of the conditions provided for in the treaty itself. In other words, a treaty of judicial assistance or any other international convention of a similar nature may provide for a set of conditions for the enforcement of foreign judgments or foreign arbitral awards.[81]

The other issue that needs to be addressed is what the court should do once it has realized that no treaty of judicial assistance exists between Ethiopia and the rendering country. Art. 458 of CPC governs the rest of foreign judgments, i.e., those that do not invoke a treaty for their enforcement. Likewise, Art. 461 of CPC governs all foreign arbitral awards that do not invoke a treaty for their enforcement.

In scrutinizing the application for the execution of foreign Judgment or foreign arbitral award, therefore, the first question is whether judgments or arbitral awards of Ethiopian courts are enforced in the rendering country. The problem, therefore, is how to prove the existence of reciprocity. It is submitted that the decisions by the Federal Supreme Court and the Federal High Courts in the *Paulos Papassinous* case that only a treaty of judicial assistance shall prove the existence of reciprocity is erroneous.[82]

The reciprocity rule must be viewed in light of the objective it is intended to serve. It is a mechanism by which a state ensures that the enforcement of its arbitral awards is not rejected without sufficient and justified grounds. Thus, a state refuses to enforce arbitral awards of those states that do not enforce its arbitral awards. As Sedler noted, "in as much as most countries will execute the

[81] See the discussion below on the recognition and enforcement of arbitral awards under a treaty or convention.

[82] See also Samuel Teshale, *supra* note 64, p.574

judgment of other countries it should be presumed that any country will execute an Ethiopian judgment unless the contrary is proved". [83] Similarly, Ibrahim Idris wrote:

> A defendant who intends to attack the execution of a foreign judgment, among others, would be expected to plead and prove that the foreign court rendering the judgment in question would refuse to execute a judgment pronounced by an Ethiopian court. Where the Ethiopian court is satisfied by the proof presented by the defendant, the application to have the foreign judgment executed in Ethiopia will not be granted. [84]

Moreover, in light of the fact that many states are dropping the reciprocity requirement with respect to the recognition and enforcement of foreign arbitral awards, due care is necessary not to take a 'retaliatory' action against 'innocent' states that would not hesitate to enforce arbitral awards rendered in Ethiopia. After all, it would not be proper to presume that a state does not enforce Ethiopian arbitral awards until it is proved otherwise.

The reciprocity requirement enables states to punish 'the rogue states' (in matters of international commercial arbitration) that refuse to enforce foreign arbitral awards, and thus, there is no reason why states cannot be presumed 'innocent' until proven otherwise. Unfortunately, the Court took a different approach in the case of *Michel Kohler* v *Derlexia Kenyat* (CASE IV) by ordering the applicant (Mrs. Michel Kohler) to prove that US courts enforce Ethiopian judgments.

What would happen if, assuming for a while, the applicant could not prove that? It seems that the Court would deny recognition and enforcement of the judgment. The only option left to the applicant, then, was to produce to the Federal High Court the United States Uniform Child Custody Jurisdiction Act (UCCJA). This case involved a US (Los Angeles) court's judgment on child custody. The ensuing landmark decision by the Federal High Court (CASE IV above) was that:

> Since US courts are required to recognize and enforce Ethiopian judgments on child custody by virtue of the Act, Ethiopia cannot refuse to recognize and enforce US court's judgments on child custody given on the basis of the Act.

Samuel Teshale noted that "the jurisprudence of certain state is reflected in both its statutes and judicial practice; both must be adduced to establish whether or not that state allows execution of foreign judgments". [85]This statement can be used as a stepping stone to suggest that it is the defendant (award-debtor or

[83] Robert Allen Sedler (1968), *Ethiopian Civil Procedure* (Addis Ababa: OUP) , p.394
[84] Ibrahim Idris, *supra* note 23, p.30
[85] Samuel Teshale, *supra* note 64, p.574

judgment-debtor) who should prove (on the basis of the statutory law and judicial practices of the rendering country) that the latter's courts do not recognize and enforce Ethiopian judgments in order to successfully forestall the recognition and enforcement of the foreign judgment or foreign arbitral award against it.

This cogent argument also negates the Federal High Court's decision that would otherwise have a far-reaching negative repercussion. This is so because, firstly, it renders foreign judgments or arbitral awards (given in those states that have already rejected the principle of reciprocity) capable of being recognized and enforced in Ethiopia. Thus, this line of argument will accommodate states that do not attach conditions to the recognition and enforcement of foreign judgments[86] and foreign arbitral awards[87] on the doctrine of reciprocity. Secondly, it means that arbitral awards made in the states that have become parties to the New York Convention without reciprocity reservation may be recognized and enforced in Ethiopia.

It is submitted that the Treaty of Judicial Assistance signed between Ethiopia and Djibouti cannot be stretched to incorporate arbitral awards.[88] However, if the Ethiopian courts are seized with an application for the recognition and enforcement of an arbitral award made in Djibouti, Ethiopia should recognize and enforce it as Djibouti is presumed to recognize and enforce Ethiopian arbitral awards owing to its commitment under the New York Convention. This is because Djibouti is a party to the Convention without the reciprocity and commercial reservation.[89] This means that Djiboutian courts are presumed to recognize and enforce arbitral awards based on the Convention rules irrespective of the fact that the arbitral award is made in one of the contracting states to the Convention.

As part of their commitments in the promotion of unrestrained mobility of arbitral awards, Convention states, by becoming party to the Convention without the reciprocity reservation, not only extend their commitment to apply the Convention rules to the Convention states but also to the Non-convention states.

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[86] For example, The Argentine, Brazil, the New York and California states of the US are mentioned in Ibrahim Idris, *supra* note, 23, p.24

[87] For example, Brazil and The Argentine do not take reciprocity for the recognition and enforcement of arbitral awards. See Earnest Lorenzen (1935), Commercial Arbitration: Enforcement of Foreign Awards', *Yale Law Journal*, Vol.45, No.1, pp.39-68.

[88] It is pointed out that an Ethiopian arbitral award properly homologized (confirmed in a court judgment) , as per Art.319(2) of CPC, should come to the ambit of the Treaty.

[89] The list of Convention countries is available at <www.uncitral.org/> (Last visited on January 10, 2011)

Thus, making the latter beneficiaries of a Convention to which they are not parties, regardless of the traditional conception that 'treaties are binding only between the parties thereto'. In effect, such Convention states commit themselves to subscribe to what Lew *et al*[90] call the 'principle of universality' rather than the 'principle of reciprocity'. In other words, such Convention states are constrained from having another set of criteria for the recognition and enforcement of arbitral awards made in the Non-Convention states. Whether the Non-Convention states are legally entitled to invoke such commitment in their favor remains yet to be seen. It can, however, be safely presumed that, unless proven otherwise, the Convention state remains loyal to its commitment under the New York Convention.

In a similar vein, other states that are party to the Convention without declaring the reciprocity requirement should receive similar treatment in Ethiopia. Furthermore, it means that Ethiopia will also enforce arbitral awards made in the countries that have adopted the UNCITRAL Model Law into their legislation.[91] The UNCITRAL Model Law is designed in a way that requires the recognition and enforcement of an arbitral award irrespective of the country in which it was made.

7. Public Order and Morals

For a foreign arbitral award to be recognized and enforced in Ethiopia, it must be consistent and in accord with the public order or morals in Ethiopia.[92] As noted by Ibrahim Idris: "Public order is a doctrine which serves as a safety valve for country to enable its courts to deny effect foreign laws and judgments which, for one reason or another, should not be enforced."[93]

Public order is also referred to as public policy or *ordre public*.[94] Despite its expansive usage in the enforcement of foreign judgments and foreign arbitral awards, the concept of public policy is very difficult to define. Nor does it have a specific content; it is very malleable, to say the least. At times, public policy

[90] Julian Lew *et al* (2003), *Comparative International Commercial Arbitration*, (The Hague, London, New York: Kluwer Law International), p.702.

[91] By the end of 2010, the number of countries that have modeled their modern arbitration laws on the UNCITRAL Model Law has reached more than 60 countries and 7 states of the United States of America. For more on this, see <www.uncitral.org/ > (Last visited on January 10, 2011).

[92] Art. 461(1)(e) of CPC.

[93] Ibrahim Idris, *supra* note 23, p.30.

[94] In this work, the word 'public policy' is employed as is preferably used in the international commercial arbitration in relation to the recognition and enforcement of foreign arbitral awards.

has been branded as a very unruly horse, and "once one gets astride it he never knows where it will carry him".[95]

It has been submitted that public policy in international commercial arbitration is a double-edged sword: helpful as a tool, dangerous as a weapon.[96] It operates as a shield to the enforcement of foreign awards, which bear unwanted solutions, i.e., it serves as safety valve in the forum's legal system, protecting it from the application of foreign rules that might produce unbearable results. This is necessitated by the fact that international arbitration being a substitute for national courts, arbitrators should not be allowed to disregard public interests that would otherwise be protected by the judges. Thus, public policy may be considered:

> A defense which is available to the courts against foreign rules or court decisions and arbitral awards, the application and, respectively, enforcement of which might produce results that are inconsistent with the fundamental economic, legal, moral, religious, social, and political standards or principles of the forum state … the judge has to uphold those principles and standards which are so sacrosanct as to require maintenance at all costs and without exception. [97]

On the other hand, it can also be a sword in the hands of those who want to limit the mobility or finality of international commercial awards. Moreover, the fact that different states have differing concepts of their own public policy means that there is a risk that a particular state may not enforce an award that another state would regard as valid.[98] However, lack of due process, lack of equality between the parties, partiality of the arbitrators, the non-performance of contracts in good faith, usurious interest, peddling and kickbacks in international commercial arbitration, are against international public policy.[99]

The concept of morality also refers to the fact that those foreign arbitral awards appearing repugnant to the conduct, customs or accepted practices of the society of the recognition forum would not be carried out.[100] In spite of some ambiguities in relation with moral issues, states generally would not tolerate drug-smuggling, child pornography, bribery, corruption, prostitute-trafficking and other generally condemned practices.

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[95] ILA Committee on International Commercial Arbitration (2000), 'Public Policy as a Bar to the Enforcement of International Arbitral Awards', *London Conference Report*, p.248.
[96] *Ibid.*
[97] *Ibid.*
[98] *Ibid.*
[99] *Ibid.*
[100] Ibrahim Idris, *supra* note 23, p.30.

To sum up, public policy, by its very nature, is dynamic. Eventually, a lot remains to be desired on the certainty and predictability thereof. However, the general trend, in the recognition and enforcement of foreign arbitral awards, is that in applying their own public policy, states should give it an international rather than a domestic dimension.

8. Arbitrability of the Subject Matter

The concept of arbitrability has attracted scholarly attention and academic discourse.[101] Suffice it to reproduce here the words of Redfern and Hunter:

> Where certain disputes should, as a matter of public policy, only be adjudicated by the sovereign-appointed judges, the substantive laws provide that such disputes can never be disposed of by private adjudication, i.e., arbitration. Arbitrability involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts. [102]

Thus, pursuant to Art. 461(1)(e) of CPC, in order for a foreign arbitral award to be recognized and enforced in Ethiopia, the award must relate to matters that, under the provisions of Ethiopian laws, can be submitted to arbitration. In other words, it means that the dispute for the resolution of which a foreign arbitral award is given must be capable of being arbitrated, i.e. it must be arbitrable in Ethiopia in order for it to be recognized and enforced in Ethiopia.

The issue of arbitrability in international commercial arbitration is crucial. Parties to international commercial arbitration must always be well aware of what are arbitrable (i) under the laws of the place of the seat of arbitration, i.e. *lex loci arbitri*, (ii) under the laws of the state to which the parties would like to refer to as governing their arbitral procedures (*lex electionis)* other than the *lex loci arbitri***,** if any, and (iii) under the laws of the state in which recognition and enforcement may ultimately be sought. In the event that the commercial dispute submitted to arbitration is not arbitrable in accordance with the *lex loci arbitri* and in rare cases, the arbitration laws of the state to which the parties have

[101] In Ethiopia, for example, the issue has been dealt with by various scholars. See Zekarias Keneaa (1994), 'Arbitrability in Ethiopia: Posing the Problem', *Journal of Ethiopian Law*, Vol.XVII, pp.116-136; Bezawork Shimelash (1994), 'The Formation, Content and Effect of an Arbitral Submission Under Ethiopian Law', *Journal of Ethiopian Law*, Vol.XVII, pp.69-94;Tilahun Teshome (2007), 'The Legal Regime Governing Arbitration in Ethiopia: A Synopsis', *Ethiopian Bar Review*, Vol.1, No.2, pp.117-140; Tecle Hagos Bahta (2009), 'Adjudication and Arbitrability of Government Construction Contract Disputes', *Mizan Law Review*, Vol. 3, No.1, pp.1-32.

[102] Redfern and Hunter, *supra* note 4, at 3-21.

referred to as governing the arbitral proceedings **(***lex electionis*), it will be prone to the set aside recourse in the country where the award is made.[103]

What happens when a dispute, incapable of being submitted to arbitration in Ethiopia, has been validly submitted to arbitration in the country where the award is made lands in the Ethiopian courts having been already granted the order of *exequatur* as per Art. 457(b) of the CPC? Clearly, as per Art. 461(1)(e) of the CPC, it cannot be recognized and enforced in Ethiopia. What disputes are, therefore, non-arbitrable, in Ethiopia, by reason of which our courts would dismiss the application for the recognition and enforcement of foreign arbitral awards? To answer this question, suffice it to say that the non-arbitrability of a subject matter should be proven by showing that a particular court has exclusive jurisdiction to adjudicate the matter or that a particular legislative enactment prohibits the submission of the disputes in connection with a particular subject matter to arbitration. Thus, if the enforcement of a foreign arbitral award which settles disputes arising from or relating to subject matters that are not capable of being submitted to arbitration is sought, the Ethiopian courts are expected to dismiss the application for the enforcement thereof.

As stated earlier, the issue of arbitrability is a public policy issue and a court is required to reject it, *sua sponte*, on the ground that the dispute is non-arbitrable. The UNCITRAL Mode Law, taken as the international minimum standard, also approaches it in a similar way. The UNCITRAL Model Law provides that an arbitral award may be set aside by the courts if the courts *ex officio* find that the subject matter of the dispute is not capable of settlement by arbitration under the law of this state.[104] Similarly, the New York Convention employs similar approach in the process of recognition and enforcement of foreign arbitral awards. Thus, our courts should be vigilant of what is arbitrable and what is not in Ethiopia in dealing with the recognition and enforcement of foreign arbitral awards proceedings.

9. International Conventions

Art. 456 (1) of CPC states that "*Unless otherwise expressly provided for by international conventions*, foreign judgments may not be executed in Ethiopia except in accordance with the provisions of [the] chapter" that deals with the Execution of Foreign Judgments and Awards, i.e. Articles 456 to 461 of the CPC. [Emphasis added]. This provision also applies by analogy when the enforcement of a foreign award is sought. From the reading of this provision, it can be seen that courts are required to strictly follow the provisions (Arts. 456-

[103] See above notes 42-45 and the accompanying text.
[104] Art. 34(2)(b)(i) of the UNCITRAL Model Law

461) provided for the recognition and enforcement of foreign judgments and foreign arbitral awards in Ethiopia. It is also clear that there is only one situation in which courts can shun the 'golden rules' that feature in under Art. 461 of CPC as a precondition to be fulfilled for the recognition and enforcement of foreign arbitral awards. In other words, international conventions can expressly provide the conditions for the recognition and enforcement of foreign arbitral awards that derogate from the conditions already stated in the CPC.

There may be bilateral, plurilateral and multilateral conventions dealing with the recognition and enforcement of foreign arbitral awards. Prominent and successful multilateral conventions include the New York Convention.[105] The Convention has been praised as: "the single most important pillar on which the edifice of international arbitration rests."[106] And yet, Ethiopia is not a party to this Convention. The need for ratification of the Convention is long felt by the Ethiopian business community.[107] A thorough research undertaking by the concerned bodies on the pros and cons of ratifying it is, indeed, long overdue.

Assuming, however, that Ethiopia is a party to the New York Convention without declaring the reciprocity reservation, Ethiopian courts, seized with an application for the recognition and enforcement of a foreign award, will apply the Convention rules irrespective of where (Convention or Non-convention state) the foreign award is made.[108] On the other hand, if Ethiopia becomes a party to the Convention, declaring the reciprocity reservation, foreign awards made, in those countries, which are parties to the Convention, will be recognized and enforced in accordance with the conditions of the New York Convention. In this case, the requirements under Art. 461 of CPC will be

[105] As of September 2010, the number of ratifying states has reached 145 states.

[106] Redfern and Hunter, *supra* note 4, at 10-22.

[107] 'Imperative Ethiopia Sign 1958 New York Convention: Chamber of Commerce', The *Sub-Saharan Informer (October 22, 2004)*, English Newspaper (Ethiopia), (wherein the then Addis Ababa Chamber of Commerce (AACC, now AACCSA). Arbitration Institute stressed the need for the country to be a signatory of the 1958 New York Convention). See also Booz Allen Hamilton (2008), *Reinforcing Ethiopia's International Trade Law Framework For a Stronger Business Environment: A Case for the Ratifications of the New York Convention and CISG*, implemented under the auspices of the USAID- WTO Accession Plus Project (On file with the Author).

[108] On the other hand, if Ethiopia becomes party to the Convention by registering the 'reciprocity' reservation, Ethiopian courts should apply two sets of requirements based on whether the rendering country is a Convention country or a non-Convention country. In such cases, the Convention rules and the CPC rules apply respectively.

superseded. However, Art. 461 of CPC will remain in force for the foreign arbitral awards made in the countries, which are not parties to the Convention.

Some Conventions are even more sweeping in their application. The most interesting convention in this regard is the ICSID Convention.[109] The main purpose of the Center, it is claimed, is to facilitate the settlement of international investment disputes between ratifying host (investee) states and nationals (foreign investors) of other ratifying states[110] and thereby promote foreign investment.[111] ICSID provides a system of dispute settlement that is specialized in investor-state disputes.

Ethiopia signed the ICSID Convention on September 21, 1967[112] and yet, Ethiopia has not ratified it. Pursuant to Art. 9(4) of the Federal Constitution, international agreements become the integral part of the law of the land of Ethiopia only if they are ratified.[113] Thus, Ethiopia is not a party to the ICSID Convention.

Once again, let us assume, for the purpose of our discussion here, that Ethiopia is a party to the ICSID Convention. Let's further assume that a foreign investor, whose country is a party to the Convention, invests in Ethiopia and a dispute arises out of the investment contract. Art. 22(2) of the former Investment Proclamation (i.e. Proclamation No. 37/ 1996) [114] provided the following:

> A dispute not amicably settled may be submitted to the competent court of the country or to international arbitration within the framework of any bilateral or multilateral agreement to which the Government and the country of which the foreign investor is a national are contracting parties.

Failing a compromise, such provisions enable the dispute to be submitted to ICSID for arbitration. If the foreign investor emerges victorious (award creditor) and seeks to enforce the award in Ethiopia, the recognition and enforcement will

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[109] The International Center for the Settlement of Investment Disputes (ICSID) was established by the World Bank Group under the 1965 Convention on the Settlement of Investment disputes between States and Nationals of Other States (also known as the Washington Convention). The full text of the Convention as well as the list of ratifying states is available at: <www.worldbank.org/ICSID/> (Last visited on January 10, 2011). As of January 2010, 155 countries have signed and 144 have ratified the Convention.

[110] See the Preambular fourth recital to the Convention.

[111] See Redfern and Hunter, *supra* note 4, at 10-49.

[112] *Ibid.*

[113] Art. 9(4) of the Federal Constitution.

[114] This proclamation had been repealed by virtue of Art.40 of the Investment Proclamation No.280/2002, July 2, 2002. It is to be noted that Proclamation No. 280/2002 lacks a counterpart provision.

proceed in accordance with the rules under the ICSID Convention. Concerning the recognition and enforcement of an ICSID-arbitral award, Redfern and Hunter noted:[115]

> Unless an ICSID award is revised or annulled under ICSID's own internal procedures, each contracting state must recognize and enforce an ICSID award as if it were a final judgment of its own courts.

It means that ICSID awards are recognized and enforced short of any scrutiny in the country in which recognition and enforcement is sought.

Conclusion

The Civil Procedure Code does not define foreign arbitral award. Until such time that the Ethiopia can have new modern commercial arbitration laws (domestic and international), it is left to the discretion of courts to offer meaning to the term. Although it is far from an exhaustive list, some criteria by which the nationality of an arbitral award rendered in international commercial arbitration proceeding can be determined are alluded to.

Apart from the formalities to be met, the conditions set forth for the recognition and enforcement of a foreign arbitral award are in general: (i) that reciprocity must be ensured, (ii) that the award must have been given pursuant to a valid arbitration agreement or that it must have been given in accordance with the law of the rendition state, (iii) that due process of law, particularly the equality of the parties, has been properly heeded throughout the process, (iv) that the arbitral tribunal had been regularly constituted, (v) that the award does not relate to a subject matter which is not capable of being submitted to arbitration in Ethiopia, (vi) that the award is not contrary to public order or morals, and (vii) that the award can be executed under the prevailing Ethiopian laws.

In this Article it has been particularly shown that the applicability of the doctrine of reciprocity as a condition for the recognition and enforcement of international commercial awards is significantly on the wane owing mainly to the New York Convention and the UNCITRAL Model Law. Thus, it is suggested that Ethiopian courts should extricate themselves from the existing conundrum (especially discussed above in relation to its erroneous interpretation and application in the recognition and enforcement of foreign judgments) and apply it in a manner that encourages the international mobility of arbitral awards.

[115] Redfern and Hunter, *supra* note 4, at 10-49.

Finally, it should be pointed out that the existing arbitration laws in Ethiopia do not match up with the current development in international commercial arbitration. The recent move of the House of the Federation in 'communitarizing' the arbitration law is commendable. Thus, the Federal Government is expected to come up with modern arbitration laws (either modeled on the UNCITRAL Model Law or a tailor-made of its own). Such arbitration laws not only can enhance Ethiopia's attraction as a venue for international commercial and investment arbitration, but will also cater for the needs of the Ethiopian business community for a modern arbitral system commensurate with its domestic and transnational business and investment transactions. ■

SOCIOLOGICAL JURISPRUDENCE: ROSCOE POUND'S DISCUSSION ON LEGAL INTERESTS AND JURAL POSTULATES

Elise Nalbandian♣

Introduction

Having started to introduce the vast body of theories that make up the Sociological Jurisprudence in the last issue of Mizan Law Review, what emerges is that the discussion is far from complete. The previous notes referred generally to the "vital" links between Law and Society and Law within Society. Although the general role of society in law-making underlies most of the theories under sociological jurisprudence, this is hardly the whole picture about the school of thought.

This school is perhaps one which covers some of the biggest variety of different approaches but ultimately, the name most associated with this type of jurisprudence is that of Dean Roscoe Pound. At the time of the theory's development, Pound identified that sociological jurisprudence tended to either identify itself with the positivist type of jurisprudence insisting on a singularly mechanical interpretive approach. Others presented the ideas of sociological jurisprudence from an anthropological-ethnological stage which is also interpretive but instead of concentrating on the mechanisms of social forces like the first group, they rather are more concerned with ethnological interpretation – making comparative studies of primitive institutions or generalising jural materials gathered by "a purely descriptive social science."[1]

According to Pound, this leads to the "unhappy tendency" that is commonly identifiable in a lot of the older jurisprudential theory of insisting upon one approach or one method of investigation or interpretation. Pound's primary concern therefore was to advance a more unified approach blending the methodological and normative precepts which is a feature of his work as well as

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[1] R. Pound (1912) "The Scope and Purpose of Sociological Jurisprudence" 25 *Harvard Law Review* p. 489.

focusing more on the way law develops in society rather than analysis and interpretation of legal texts. In Pound's words: *"…in the past century, we studied the law from within. The jurists of today are studying it from without*".[2]

What this entails is a complicated and 6-tiered programme that Pound undertook in 1912.[3] The approach which he identified as vital (for the modern social jurist) to the question of sociological jurisprudence have the following elements:

a) Studying the actual/real effects of the legal institutions and doctrines;
b) Sociological studies of the preparation of legislation particularly comparative legislation;
c) Study of means of making legal rules effective;
d) Sociological legal history considering effects of legal doctrines that existed in the past;
e) Advocacy of reasonable and just solutions of legal cases (a realist approach);
f) Making effort more effective in achieving the purpose of law.

This somewhat wide list of tasks for the modern sociological jurist is a perfect example of how Pound tended to mix methodological as well as normative approaches to create his new theory. He looked at legal history, surveyed in detail a huge body of legal philosophy, and also discussed real legal problems. His 5 volumes of Jurisprudence provide a vast body of knowledge about a great many things from Comte to Ehrlich, the code of Hammurabi or the Anglo Saxon dooms.[4] In carrying out these studies, Pound reached the conclusion that his sociological jurisprudence would focus more on how law develops due to the link between law and society rather than an analysis and interpretation of statutes and cases.

To understand his actual theory, one need not be distracted by the wealth of information to be found in more than half a century's worth of academic work. Pound's actual contribution to the school of sociological jurisprudence indeed lies in his discussion on "legal interests" and "jural postulates".

1. Legal Interests

According to Pound, there are three categories of legal interests, namely, individual, public and social interests. *Individual interests* are "claims or demands or desires involved immediately in the individual life and asserted in

[2] R. Pound (1921) *The Spirit of the Common Law*, Boston: Beacon Press p. 212.
[3] *Id*. footnote 1 at 514-516.
[4] R. Pound (1959) *Jurisprudence*, St Paul, Minnesota: West Publishing Company.

title of that life".[5] *Individual interests* are asserted for the titles of individual life. What this logically leads to is the fact that as these interests by and large only involve the individual, the interests tend to fall into the scope of private law although in the actual balancing the interests this is a generalisation that may not be always true.

Public Interests are "claims or demands or desires involved in life in a politically organised society and are asserted in title of that organisation. They are commonly treated as the claims of a politically organised society thought of as a legal entity".[6] These types of interests are asserted for or in the title of politically organised society. Political interests can be generalised as falling within the scope of [public law which includes] criminal law although there is clearly an overlap with individual interests.

Social Interests were originally included by Pound as a distinct and vital set of interests whereby they were described as "claims or demands or desires involved in the social life in civilised society and asserted in title of that life. It is not uncommon to treat them as claims of the social group as such".[7] These interests have been regularly tied to the concept of security. As such, one vital part of security is for society to enjoy an organised legal system within the political organisation which could arguably also fall within the public interests as political organisation also requires the existence of some form of legal control which can only be provided by the legal system. This issue does rather obscure the difference between public and social interests and Pound himself seems to point out this issue.[8]

The distinction between the three types of interests is made so that they may be balanced against each other, which is the aim of sociological jurisprudence. However, Pound did not really emphasise these interests as being wholly distinct from each other. As described above, there is a level of differentiation while the overlap between the interests is also apparent because they are ultimately three perspectives of a single set of interests which co-exist in the context of unity and variation. For example, in the exercise of paying taxes – while this may very well appear to be an important activity for the public life (as they are clearly claims of a politically organised society to remain politically organised), they are also vital for the social interests as it is through taxes that the security both social and physical can be assured in a society. However, Pound's arguments on various issues would extend to highlight that the payment of taxes is essentially as much an individual interest (although he insists that

[5] R. Pound (1943) "A Survey of Social Interests" 57 *Harvard Law Review*, 99. 1-2.
[6] *Ibid.*
[7] *Ibid.*
[8] *Id*. footnote 4.

individual interests are never directly the source of new taxes[9]) as it is within the individual interests to contribute to and benefit from public resources. Ultimately, the public, social or individual interests are different ways of looking at the same thing. For further clarification on this issue, see Pound's discussion on Corruption.[10]

From the above arguments, the next question that arises is whether an issue which falls within private or individual interest may also be viewed from public or social perspectives.[11] This question arises because it may be convincing to argue that social and public interests overlap, and since the individual belongs to the politically organised society, the political and social interests can easily be brought down to the individual level. Yet, it is difficult to assume that every individual interest will be relevant within the perspective of public or social interests. While certain issues such as protection of individual property rights can be seen as socially significant which also require public response (laws granting private tenure rights), some private issues may preferably be dealt with at an individual level without taking it up to the public level.

Although Pound believes that weightier interests have the tendency to intrinsically prevail, he is sceptical "as to the possibility of an absolute judgement." He is in favour of harmony and balance which targets at securing interests.[12] According to Pound, the previous century gave priority to general security, and he states that the present century "has shown many signs of preferring individual and social life."[13]

Another vital issue dealing with interests deals with when the interests come into existence in relation to when the law comes into existence.[14] Oftentimes, it is assumed that the interests are created before the laws which protect them therefore the classification of the individual, social and public interests as "legal interests" may seem premature. To follow up on the above example of legal tenure and private property, the claim on private property is the source of the legislation which seeks to give security for the tenant over certain property rights. In fact one may observe that a number of laws come about as a result of

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[9] R. Pound (1942) *Social Control through Law*, New Haven: Yale University. Press, p.142.

[10] *Id*. footnote no. 5.

[11] I. McLeod (2007) *Legal Theory*, 4th Ed. Palgrave Macmillan Law Masters, NY, P. 153f.

[12] R. Pound (1922), *An Introduction to the Philosophy of Law*, Yale University Press [1954, 1982], pp. 45-46.

[13] *Id*, p. 46.

[14] M. Freeman and D. Lloyd (2001) *Lloyd's Introduction to Jurisprudence*, 7th Ed. Sweet & Maxwell.

claims based on developing interests. This adds to Pound's approach to legal theory in the sense that he sets out to study the development and reform of law rather than interpretation and analysis of existing statues and cases – therefore he studies the law in action.

Moreover, Pound deals with the issue of prioritisation and balancing of interest, and he underlines that it is interests which are essentially "on the same" plane that need to be compared. Nevertheless, there will be conflicts within the various categories of interests which exist on the same plane and balancing and prioritising these interests and resolving the conflicts is one of the most important segments of sociological jurisprudential theory as can be recalled from the discussion of Jhering's discussion on balancing of interests.[15] For this part of the discussion, Pound turns to the core concepts of "jural postulates" to explain how this process of balancing, comparing, prioritising or resolving conflicts between interests occurs.

2. Jural Postulates

Pound introduces the concept of "jural postulates" as the method by which interest may be tested and evaluated so that the conflicts between the various interests may be resolved. Jural postulates presuppose legal reasoning about rights and obligations at the various levels and involve what human beings must be able to (reasonably) assume in a civilised society. According to Pound, these assumptions may vary from one legal system to another based on ethno-cultural lines and can even be different within the same legal system while others are quite similar in all societies.

Pound seems to have formulated some jural postulates by generalising some values protected by existing laws within the American Legal system and suggests that these do not need to be tested against objective morality as they fit in with the "functions of law"[16] within the specific reality. Pound clarified that for the American Legal System's approach to property, possessions and legal transactions the postulates include[17]:

- People must be able to assume that others will not be intentionally aggressive;
- People must be able to assume that they can control things that they have discovered, created or legitimately acquired;
- People must be able to assume that other people will honour reasonable expectations which they create and undertakings which they give, as

[15] E. Nalbandian (2010) "Sociological Jurisprudence – General Introduction to Concepts" Vol. 4 *Mizan Law Review*, No. 2.
[16] J. W. Harris (1997) *Legal Philosophies*, 2nd Ed. London: Lexis Nexis Butterworths
[17] *Id*. Footnote 11.

well as making restitution in respect to unjust enrichment which they could not have reasonably expected to receive (good faith in dealings);

- People must be able to assume that other people will act with due care not to create unreasonable risk of injury to others;
- People must be able to assume that other people will control things which they maintain on their land and which are like to escape and cause damage.

Pound clearly indicated in the 1950's that these would be jural postulates that are quite specific to the country and to the issues under consideration, and he generally notes that the legal reasoning that goes towards forming the postulates must be incremental. In other words, new claims will be recognised if similar claims have already been recognised. Moreover, he underlined that the postulates change as they are relative to the social evolution stages in a particular society.

Pound's approach thus aspires beyond considering the law as it is. The latter view does not go into issues of suggestions for changes in judgements and law reform but confines itself to the tasks of analysing and interpreting the texts. Pound, however, states that the competing interests have to be balanced against each other considering the legal assumptions that can be held by a reasonable person in society. This, according to Pound is meant "*…to provide as much as society can of the total of people's reasonable expectation in life in civilised society within the minimum of friction and waste*."[18]

Pound is quite clear in rejecting the Benthamite felicific calculus in the balancing of interests. But in his discussion of the postulates, it seems as though Pound accepts that the interests which are being claimed are good. In trying to achieve as much of the claims/expectations with the minimum of friction and waste, he is not only reactive and does not only respond to claims which are made. He suggests that the balancing process is a form of social engineering in which the role of the law is to "provide as much as society can." This could suggest a level of pro-activity in providing the interest before the claims have been made based on identifying the interests. This is due to the fact that, in identifying the jural postulates, a reasonable person in the position of power can recognise the areas of deficiencies even before the claims have been made and using the position can plan to fulfil the interests even before society or individual have made demands. This part of Pound's theory relates to the proactive development of laws and reforms.

The last issue to be clarified is who does the balancing of the interests? It is clear that during legislation, the law-maker will have a significant role in this.

[18] R. Pound (1954) "The Role of the Will in Law" 68 *Harvard law Review* 19.

However, where two existing interests conflict with each other, Pound suggests that a judge with trained intuition can be trusted to reach the best resolution which actually echoes the theories being developed in the overlapping time periods by scholars.

3. Some Critical Reflections

Unlike many jurisprudential theories, Pound's theories tend to appeal to the more pragmatic and realist students of legal theories. There is the implicit and very rarely expressed criticism against Jurisprudence as a subject – the idea that legal theories are 'theoretical' and therefore quite artificial, having little bearing on reality and suggesting wholesale changes that are unrealistic. Pound's theory on the other hand sets itself up as the opposite of a theory. It is suggesting that it will look at the law as it is, and then addresses the issue of how it will change and grow based on social wants, needs and demands pragmatically and relatively. However, the question remains that if the law is the way Pound describes, then why is there a need to do such a detailed socio-legal research to problems that will arise and be dealt with on a case by case basis, one at a time?

Another issue which may easily be picked up as a criticism could be that Pound highlights the difference between the law in books and the law in action. Actually, Pound has only substantively paid little detailed attention to this "living law" leaving it quite theoretical which seems to go against the spirit of his jurisprudential approach. Ehrlich, on the other hand, was preoccupied by this issue and went into great detail of the "living law" almost to the exclusion of all else. Perhaps, in this author's humble opinion, the happy medium between the two authors is what needs to emerge for a proper understanding of the issue.

The following words from Roscoe Pound clearly indicate his view that the function of law is to fulfil individual, social and public interests as well as providing social control:

> For the purpose of understanding the law of today, I am content to think of law as a social institution to satisfy social wants – the claims and demands involved in the existence of civilized society – by giving effect to as much as we need with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For present purposes I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence – in short, a continually more efficacious social engineering.[19]

[19] *Id*. Footnote 4

There seems to be little distinction provided in the discussion between the functions and the effects of law. While one can easily argue that law and other factors can be seen as factors towards social control, the question that can arise is whether social control is a function of law or rather the result. In other words, in accepting that social control is a function of law, is the reader/writer looking at the effects and using a backward reasoning process, assuming the results that emerge were the cause of the actual reason for the law to have been made as it was.

Secondly, arguing from a Marxist or even Feminist perspective, one could take a more critical stance of what the law is and argue that law is one of the tools used to create and secure inequality, discrimination in conferring privileges and wealth. In line with this thinking, one may argue that the law in fact does not necessarily function to provide an ever-growing base for the gratification of individual wants and needs.

Conclusion

Notes on jurisprudence usually highlight strong critiques and some of the weaknesses of each theory. Although the preceding paragraphs are no different, one cannot discount the huge contribution that Pound has made in the 20th century in the field of law and legal theory. As a result of Pound's significant contribution during his long and illustrious career, jurisprudence has benefited immensely from the multitudes of his publications, and from the concepts and the ideas he put forward for more than 50 years. Roscoe Pound has indeed made the 20th Century version of Jurisprudence more pragmatic. And generally, he has provided us with a new set of tools that avail the bulk of approaches that have since become commonplace in modern jurisprudence.[20] ■

Major References

- Ehrlich, E. (1922) 'The Sociology of Law' 36 *Harvard Law Review* 130.
- Ehrlich, E. (1936) *Fundamental Principles of the Sociology of Law* (Moll trans) Cambridge, Massachusetts: Harvard University Press.
- Freeman, M. and Lloyd, D. (2001) *Lloyd's Introduction to Jurisprudence*, 7th Ed. Sweet & Maxwell.
- Harris, J. W. (1997) *Legal Philosophies* (2nd Edition), London: Lexis Nexis Butterworths.
- Llewellyn, K. (1960) Book Review, *University of Chicago Law Review*, p. 175.
- McLeod, I. (2007*) Legal Theory*, 4th Ed. Palgrave Macmillan Law Masters, NY, pp. 153ff.

[20] K. Llewellyn (1960) Book Review, University of Chicago Law Review, P. 175

- Nalbandian, E. (2010) “Sociological Jurisprudence – General Introduction to Concepts” Vol. 4 *Mizan Law Review*, No. 2.
- Pound, R. (1922), *An Introduction to the Philosophy of Law*, Yale University Press [1954, 1982].
- Pound, R. (1912) "The Scope and Purpose of Sociological Jurisprudence" 25 *Harvard Law Review* 489.
- Pound, R. (1921) *The Spirit of the Common Law*, Boston: Beacon Press, p. 212.
- Pound, R. (1942) *Social Control through Law*, New Haven: Yale University. Press, p.142.
- Pound, R. (1943) "A Survey of Social Interests" *57 Harvard Law Review*, 99. 1-2.
- Pound, R. (1954) "The Role of the Will in Law" 68 *Harvard law Review* 19.
- Pound, R. (1959) *Jurisprudence*, St Paul, Minnesota: West Publishing Company, Vol. 1 p. 98-99.

NOTES ON ARBITRABILITY UNDER ETHIOPIAN LAW

Aron Degol ♣

Introduction

Regular courts have a significant role in resolving disputes that arise between various members of the society. However, experience tells us that the task of settling disputes cannot be properly administered by the regular courts alone. Arbitration is one of the institutions designed to serve as an alternative dispute settlement mechanism, and it plays a vital role in dispute resolution.

In spite of its importance, not all matters can be referred to this institution. Certain matters, for different reasons, cannot be resolved by arbitration or in short, they are non-arbitrable. The main purpose of this note is, therefore, to highlight the conceptual underpinnings of arbitrability in general and its treatment under Ethiopian laws in particular.

1. The concept of Arbitrability

The question of arbitrability focuses on whether a particular dispute can be the subject of arbitration.[1] For different reasons, various states exclude disputes of certain categories from the ambit of arbitration.[2] Especially matters concerning high government or public policy such as grave crimes or felonies are non-arbitrable. As Redfern and Hunter noted:

> … Each state may decide, in accordance with its own public policy considerations which matters may be settled by an arbitration and which may not. If the arbitration agreement covers matters incapable of being settled by arbitration, under the law of the agreement or under the law of the place of arbitration, the agreement is ineffective since it is unenforceable. Moreover, recognition and enforcement of an award may be refused if the subject matter of the difference is not arbitrable under the law of the country where enforcement is sought."[3]

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[1] Jacquline M. Nolan-Haley (1992), *Alternative Dispute Resolution (in a nutshell,* (St. Paul Minnesota: West Pub., Co.), , pp. 131.

[2] Zekarias Keneaa, (1994), "Arbitrability in Ethiopia, posing the problem", *Journal of Ethiopian law* Vol. XVII, p. 116.

[3] A. Redfern, and M. Hunter (1986), *Law and practice of International Commercial Arbitration,* London, (cited in Zekarias Keneaa, *Ibid*., pp. 117). See also David, Rene (1985), *Arbitration in International Trade*, Kulwer Law and Taxation publishers, Netherlands, p. 186.

Arbitrability can be of two types,[4] substantive and procedural. Substantive arbitrability is concerned with whether a particular subject-matter was intended by the parties to be covered by their arbitration agreement, whereas procedural arbitrability is concerned with whether the procedural requirements for arbitration, such as timeliness and specificity have been satisfied.[5]

2. Arbitrability in civil matters

2.1- Family relations and successions

The former family law provisions in the 1960 Ethiopian Civil Code gave a very significant power to family arbtrators. Disputes arising out of an existing marriage, petitions for divorce or even disputes arising out of divorce were submitted to arbitration,[6] and courts could only decide whether a divorce has been pronounced by the arbitrators.[7] This was so because the institution of family arbitration was believed to have various merits. According to Aklilu W/Amanuel:

- it is a well-established and respectable tradition worth preserving for purposes of resolving family conflicts,
- it is a means of settling family disputes through arbitrators who are more qualified for this purpose, and
- family arbitration reduces the congestion of the courts by providing a special forum for the settlement of family disputes.[8]

But, in practice, it hardly attained the abovementioned objectives and as a result, the Revised Family Code of 2000 has significantly reduced the role of family arbitrators in matters of divorce. The role of arbitration has now been restricted to making efforts to reconcile the spouses to drop their idea of divorce; and arbitrators are no more entrusted with the power to give any order or decision of divorce.[9] Family Codes of some of the regional states also followed the same restrictive approach with respect to arbitrable issues in family matters.[10] In spite

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[4] Nolan-Haley, *supra* note 1, p. 131. See also *Arbitrability*, Domke on Commercial arbitration, West Thomson Business, (Compilation Material on *International Commercial Arbitration*, Compiled by Salomon, C.T., and Sterken, S.J.), AAU, Faculty of Law, 2008, p. 137.

[5] *Id.*

[6] Zekarias Keneaa, *supra* note 2., p. 118.

[7] Ethiopian Civil Code, (1960), Art. 729.

[8] Aklilu W/Amanuel (1973), "The Fallacies of Family Arbitration under the 1960 Ethiopian Civil Code", *Journal of Ethiopian Law*, Vol. IX, No. 1, p. 176.

[9] The Revised Family Code, Procl. No. 213/2000, Art. 121(1) and (3).

[10] The Oromia National Regional State's Family Code, Proc. No.83/2003 (as amended), Art. 108(1) and (3)

of such changes in the degree of arbitrability, family matters are among the disputes that are arbitrable (i.e subject to arbitration). With regard to successions, the only matter that is arbitrable, pursuant to Art. 945 of the Civil Code,[11] is a dispute arising between the heirs and the legatees regarding the liquidation or partition of the succession. According to this provision, the parties in dispute are at liberty to agree that their dispute be submitted to one or more arbitrator/s.

2.2- Property matters

In matters of property relations, there are three circumstances, which can be subject of arbitration. In cases of *joint ownership of property*, resolution of disputes by arbitration can be agreed upon either by inserting a clause in the original act which creates the institution of joint ownership or in the subsequent agreements entered into by the joint owners. The law does not seem to limit the scope of the issues that are arbitrable because "any dispute arising between the joint owners in relation to the thing jointly owned"[12] can be settled by arbitrators. With regard to the detailed procedures as to how the dispute is going to be settled, Article 1275(2) of the Civil Code makes a cross reference to the arbitration and compromise provisions of the Civil Code, i.e. Arts. 3307-3346.

The second situation where arbitration is possible with respect to property matters is *compensation in cases of expropriation*. The concept of expropriation involves compelling an owner of an immovable property to surrender the ownership of it, and it is done by the competent authorities for public purpose (public interest).[13] The compelled owner claims compensation. Under the Civil Code the person who seeks compensation submits a claim, but if the authorities against whom the compensation claim is made do not accept the amount of compensation claimed, such amount shall be fixed by an arbitration

- Art. 132(1) and (3) of the Amhara National Regional State's Family Code (Proc. No. 79/2003.
- Art. 136(1) and (3) of the Southern Nations, Nationalities and People's (SNNP) Regional State's Family Code of Proc. No. 75/2003.

[11] Art. 945(2) is deleted in the *Corrigenda* of the Civil Code (English version). Article 945(1) is thus considered as Art. 945 (as in the Amharic version).

[12] The Ethiopian Civil Code, (1960), Art. 1275(1).

[13] This notion "public interest" has been a subject of controvery for a long time as it is very much subjective. Under Art. 2(5) of Procl. No. 455/2005 (Expropriation of Land holdings for Public Purposes and Payment of Compensation Proclamation), public purpose (interest) is defined as "the use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the people to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development."

appraisement committee.[14] However, this provision, i.e. Art. 1472 of the Civil Code, does not seem to be applicable at present as it is tacitly repealed by arts. 10 and 11 of Proclamation No. 455/2005. According to these provisions of the Proclamation, any complaint arising out of grievances on amount of compensation, will be decided either by an administrative organ established for such a purpose by the government or by the regular courts as the case may be and as a result, such a claim is no longer subject to arbitration.

The third situation which is the subject of arbitration is where ownership passes to an association of land owners. In cases where the members of the association want to assign their share in the property of the association to any one for consideration or gratuitously, the consent of the association shall be sought. And if the association fails to give its consent within the prescribed period of time, i.e. three months, the person who wants to buy the share shall be informed by the association that it has the intention to retain the property by paying its value, and such person shall assign his share to the association or another buyer. Where there is no provision in the charter as regards to the price of the share, it shall be fixed by arbitrators.[15]

2.3- Matters of actions for damages in tortuous liability

With respect of liability in non-contractual obligation, parties may agree, in actions for damages, as to which compensation may not be paid; or they may compromise on the conditions on which it shall be made good.[16] So, the matters that are arbitrable in tortuous liability are exclusion of compensation and compromise regarding the manner of compensation.

2.4- Matters concerning contracts in general

Before looking into matters related to special contracts, we need to consider the general contract provisions concerning arbitration. When parties encounter a circumstance which modifies the economic basis of the contract, they may agree to refer the matter to an arbitrator concerning any decision relating to the variation, which ought to be made in the contract.[17] Therefore, readjustment of contracts, which become economically unbalanced, can be considered as

[14] Art. 1472 of the Ethiopian Civil Code.

[15] Arts. 1530-1534 of the Ethiopian Civil Code of 1960. Again these provisions do not seem to have an effect today as land is publicly owned as per art 40(3) of the current Ethiopian Constitution, and the issue of arbitrability, in this regard, may not be an issue here.

[16] Ethiopian Civil Code, (1960), Art. 2148.

[17] *Ibid*, Art. 1765.

arbitrable.[18] This provision, i.e. Article 1765, is found in Book IV, Title XII of the Civil Code which applies to *Contracts in General*, and in effect, it applies to any special contract "subject to special provisions applicable to" special contracts .[19] Let us now look at some provisions of the Civil Code with respect to arbitration in the special contracts.

2.4.1- Contract of sale

In a contract of sale, price estimation in particular can be referred to the arbitration of a third party in cases of dispute. This renders price estimation in sales contract arbitrable.[20] But it is to be noted that this provision may not be taken as a provision indicative of arbitration *per se* in the sense of Art. 3325 of the Civil Code. When a seller and a buyer, refer the determination (estimation) of a price to a third party arbitrator, it does not mean that the parties submit a dispute to be resolved. Article 2271 thus envisages arbitration to determine price, and "[t]here shall be no sale" where the arbitrator "refuses or is unable to make an estimate."[21] Unless the parties have unequivocally agreed that they will be bound by it, the 'price' to be quoted by the 'arbitrator', cannot be taken as a binding award similar to the one rendered in case of arbitration proper.[22] We find similar provisions in contracts of supplies whereby the price for each delivery shall be fixed by an arbitrator if supplies are to be made periodically. Such prices are not regarded as binding arbitral awards unless there is express provision in the contract to such an effect.[23]

2.4.2- Administrative contracts

An administrative contract is a contract concluded between individuals and administrative agencies. More specifically, a contract should be deemed to be an administrative contract where:

- it is expressly qualified as such by the law or by the parties; or,
- it is connected with an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service; or,

[18] George Krzeczunowicz (1980), *Formation and Effects of Contracts in Ethiopia*, AAU, Faculty of law, , p. 114.
[19] Ethiopian Civil Code (1960), Art. 1676 (2).
[20] *Ibid*,Art. 2271(1).
[21] *Ibid*,Art. 2271(2).
[22] Zekarias Keneaa, *supra* note 2, p. 121.
[23] Ethiopian Civil Code, 1960, Art. 2418 provides that under such situations, the provisions of Chapter 1 title XV, i.e. the provisions concerning price estimation by an arbitrator, shall apply.

- it contains one or more provisions which would only have been inspired by urgent considerations of general interest extraneous to relations between private individuals.[24]

In the Civil Code, there is nothing that prohibits the submission of disputes on matters of administrative contract to arbitration. However, the Civil Procedure Code,[25] embodies a prohibitive provision which provides that "[n]o arbitration may take place in relation to administrative contracts … or in any other case *where it is prohibited by law*." [Emphasis added]. Neither Title XIX of the Civil Code on administrative contracts nor Title XX on compromise and arbitral submission prohibit the submission of disputes arising out of an administrative contracts to arbitration.[26]

If there were restrictions to the type of disputes to be submitted to arbitration, surely the legislator would have stipulated them in the substantive law, i.e. the Civil Code. The legislator, however, did not provide any restriction. Nor did it envisage the inclusion of such restriction in the Civil Procedure Code. So, the question as to which law prevails becomes pertinent. The Civil Procedure Code seems to answer this question because it stipulates that nothing in this chapter (the Civil Procedure Code's Chapter on arbitration) shall affect the provisions of Arts. 3325-3346 of the Civil Code (the provisions of arbitration and compromise).[27]

Therefore, is it appropriate to argue that the Civil Code prevails over the Civil Procedure Code as the former is substantive law from which our substantive rights and duties emanate and the latter is the means by which these rights and duties are implemented. Nevertheless, the Civil Code is silent on the issue, and there are currently two courses of interpretation. One may use the principle that "*anything that is not prohibited is presumed to be permitted*", which leads to the interpretation that matters of administrative contracts are arbitrable.[28] And there are others who opt to confine their analysis to the inconsistency between the two codes regarding the arbitrability of administrative contracts.[29]

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[24] Ethiopian Civil Code, (1960), Art. 3132.
[25] Ethiopian Civil Procedure Code (1965), Art. 315(2).
[26] *Id*.
[27] *Ibid*, Art. 315(4).
[28] Bezawork Shimelash (1994), "The Formation, Content and Effect of an Arbitral Submission under Ethiopian law", *Journal of Ethiopian law*, Vol. XVII, p. 85.
[29] See for example, Zekarias Keneaa, *supra* note 2, p. 120.

2.4.3- Matters of labor relations

The legal regime that governs labor relations has undergone frequent changes and amendments. Before the Labour Proclamation which is currently in force,[30] the laws which were effective were Proclamation No. 64/1975 and Proclamation No. 42/1993. In the former Proclamation, the possibility of submission of a collective or individual trade dispute to arbitration was provided for in Art. 101(1). Under Sub-Art. 3 of the same law, arbitration, in fact, seems to have been envisaged as obligatory with respect to disputes arising in undertakings that do not have trade dispute committee.[31] Proclamation No. 42/1993 stipulates that parties to a dispute may agree to submit their case to arbitrators or conciliators, other than the Minister (the Minister of Labor and Social Affairs) for settlement in accordance with the appropriate law.[32] There is no change in the current labor proclamation as regards to the arbitrability of labor disputes.[33] Labor issues are thus among civil matters that can be subject to arbitration.

3. Arbitrability in commercial and maritime matters

3.1- Matters of dissolution of a partnership and a share company

When a partnership is going to be dissolved and in the process of winding-up, liquidator/s shall be appointed either by the partnership agreement or by all the partners; or, if none of these exists, they shall be appointed by a court.[34] One of the powers of these liquidators is referring any matter in issue, with respect to the liquidation, to arbitration or compromise.[35] So, liquidation in a dissolution and winding-up of a partnership is arbitrable. We find a similar provision in the process of dissolution and winding-up of a share company whereby liquidators have the power to compromise and arbitrate in relation to any matter concerning the share company.[36]

3.2- Matters of Bankruptcy

The commissioner (the person who has the power to supervise and deal with all matters concerning the bankrupt's estate, i.e. the whole property) may authorize trustees (three persons who are responsible for the administration of the bankrupt's estate under the supervision of the commissioner and represent the universality of creditors in relation to third parties). A trustee may be authorized

[30] Labor Proc. No. 377/2003, Federal Negarit Gazette, year 10 # 12, 26th February/2004.
[31] Zekarias Keneaa, *supra* note 2, p. 122.
[32] Proclamation No. 42/1993, Art. 143(1).
[33] Proclamation No. 377/2003, Art. 143(1).
[34] Ethiopian Commercial Code (1960), Art. 264(1) and (2).
[35] *Ibid*, Art. 267(2).
[36] *Ibid*, Art. 500(1).

"to compromise and arbitrate in respect of any claim concerning the bankrupt's estate" after, of course, hearing the opinion of the creditors' committee and the bankrupt, but the bankrupt may make an application to a court to set aside the compromise or arbitration.[37] So, at least in principle, matters in relation to the estate of the bankrupt person are arbitrable. We have similar provisions in the Commercial Code. For example, Art. 1103(3) of the Commercial Code of 1960 allows trustees to "compromise and arbitrate" without, however requiring the presence of the debtor.

3.3- Matters of contracts of carriage by air

With respect to the liability of the carrier in a contract of carriage of goods by air, provisions may be made for arbitration. The arbitration takes place either at the place where the carrier is domiciled, or has its principal place of business or has an agent [who made the contract) or at the place of the destination.[38] So, matters concerning the liability of the carrier in contract of carriage of goods by air are arbitrable.

3.4- Matters of contract of carriage by sea

The only provision concerning arbitration in the Ethiopian Maritime Code of 1960 is the provision which states that an arbitration clause inserted in a bill of lading may in no event grant to the arbitrators the power to settle a difference by way of composition.[39] This provision allows the arbitrability of contract of carriage of goods by sea with the reservation that the arbitrators are not allowed to settle the difference by way of composition; but in principle, it is arbitrable.

Concluding note

Arbitrable matters in Ethiopia, at least those clearly stipulated in the laws of the country, are the ones that are briefly mentioned above. Based on *a contrario* reading, all disputes other than the ones that are expressly stated as arbitrable can be considered as non-arbitrable. Moreover, as an exception to the general principle of non-arbitrability of criminal matters, offences punishable only upon private complaint can be settled by arbitration and the injured party. If the latter institutes a file in court of law, he/she has the right to withdraw the complaint pursuant to Art. 157 of the Ethiopian Criminal Procedure Code of 1961. This exception is allowed due to the degree and nature of the offence. ■

[37] *Ibid,* Art. 1038(1) and (2).
[38] *Ibid,* Art. 647(1) and (2).
[39] Ethiopian Maritime Code (1960), Art. 209.

ፍርዶች / Cases

ትኩረት- ሁከት ይወገድልኝ

Focus: Possessory Action

ማስታወሻ- የተከራካሪዎች የአባት ስም አልተገለፀም። (Patronymics of parties are omitted)

Federal Supreme Court Cassation Division

Cassation File No. 4072/92
Tahsas 16, 1994 E.C

Petitioner W/ro Alemanchi …
Respondent Ato Muche … *et al*

Disturbance of possession: Art. 1149(1) of the Civil Code:

The petitioner's house leans against the wall owned by the 1st defendant. Whether the defendant's act of forbidding the painting of the wall on the sideof the Petitioner's house constitutes disturbance of possession?

Petitioner brought this action at the Debre Tabor Woreda court stating that the defendants prevented her from painting her side of the wall and she requested the court to order the cessation of this disturbance and payment of compensation under Art. 1149(1) of the Civil Code. The Court decided that there is no disturbance of possession as the wall is the property of the 1st defendant. The High Court also affirmed the decsion because the defendants did not take possession of the Petitioner's house, but only prevented the painting of the wall owned by the 1st defendant. The Supreme Court affirmed the decision. This petition was brought for cassation review.

Decision

1. Even one incident such as prohibiting the plaintiff from painting her side of the common wall is disturbance of possession.
2. The property is held lawfully by the plaintiff and ownership of the wall by the defendant cannot be used as a defense to this action.
3. The decisions of the lower courts have been reversed.

* * *

Issues for reflection

The case involves two parties whose houses share a wall. The wall was built and solely owned by the 1st defendant who allowed the Petitioner's (late) husband to build a house that leans against the wall. Reflect on the following issues:

a) Who owns the wall? Relate the issue with Articles 1278, 1279 and 1280 of the Civil Code and reflect on the decision of the Cassation Division.
b) Can it be regarded as a common (or party) wall that is jointly owned?
c) Can a defendant invoke Article 1148 of the Civil Code if a petitioner is forbidden to paint the outer side of a fence that the former owns?

Federal Supreme Court Cassation Division

Cassation File No. 4723
Hamle 11,1994 Eth.Cal.

Petitioner Ato Mekuria …
Respondent Ato Mussa …

Disturbance of possession – Art. 1149(2) C.C. Statute of limitations of two years calculated from date of possession or construction?

Transfer of a business is not necessarily transfer of the house.

The present Respondent started the case at the lower court asking the court to order the cessation of the disturbance of possession caused on his house and land by the present Petitioner who has built a house on the property of the Respondent. The present Petitioner replied that the action is barred by the two-year[1] limitation under Art. 1149 (2) of the Civil Code and that he has a right to the house and land pursuant to the execution proceedings which he undertook against a third party possessor of the place in accordance with a judgment decree. The court rejected both pleas and stated that the two years should be calculated from the period of construction (without the owner's consent) and that the execution proceedings ordered only the transfer of the business and not the house. The decision was affirmed by the higher courts. This petition was brought to the Cassation Division of the Federal Supreme Court.

Decision

1. The two-year limitation stipulated under Art. 1149(2) C.C. should start to count only after the defendant (current Petitioner) started construction (without the Respondent's consent) and not from the date of mere possession. The case does not therefore fail because of this reason.
2. The Petitioner has not submitted a title deed in his name or the third party debtor from whom he received the property.
3. The execution proceedings against the third party debtor ordered the transfer of the business to the Petitioner but not of the house.
4. The Respondent has indicated that the loss of his title deed has been confirmed by a court. He has therefore presented better title on the property than the Petitioner.
5. The decisions of the lower courts are affirmed. The Petitioner should deliver the house to the Respondent.

* * *

[1] The period has been erroneaously stated as 'one year' in the English version of the Civil Code.

Federal Supreme Court Cassation Division

Cassation File No. 27506
Hamle 19, 1999EC

Petitioner Ato Samuel … *et al*

Respondent Ato Bezuneh …

Whether an action to recover possession of a house can be refuted by the defendant claiming that he is the owner (Arts. 1140 and 1149 Civil Code)?

The plaintiff's action started at the Jijiga Zone High Court demanding the cessation of the disturbance of possession caused by the defendant on the house which the plaintiff occupied by virtue of a lease agreement with the Kebele administration. In his statement of defense, the defendant answered that he occupied the house because he is the legal heir of the previous owner. The High Court decided that pursuant to Art. 1149(3) of the Civil Code, the plaintiff has proved that he is possessor of the house on the basis of his lease agreement with the Kebele Administration. The defendant has not been able to contest this fact but instead claims that he is the owner of the premises. This argument raises an issue of ownership of the house which can be invoked in a separate petitory action between him and the Kebele but cannot defeat the claim of the plaintiff based on possession. The Regional Supreme Court to which appeal was taken reversed this decision based on the Kebele Administration's statement that the property is not among he ones that have validly become the property of the state through nationalization. This petition to the Cassation Division of the Fedral Supreme Court was brought from this decision.

Decision

1. A person who demands the cessation of disturbance of possession has to prove that he has possession under Art. 1140 of the Civil Code.
2. The plaintiff has proved that he has possession of the house pursuant to a lease agreement.
3. The issue is whether this possession has been disturbed by the action of the defendant.
4. The defendant is claiming ownership of the house as heir to the previous owner but has not contested that he has not caused disturbance.
5. A claim of ownership cannot be invoked as a defence in relation with the issue whether possession has been disturbed.
6. A claim of ownership has to be established in a separate suit under a petitory action but cannot by itself be used to contest the claim of disturbance of possession. Therefore, the decision of the Regional Supreme Court is reversed in accordance with Art. 348(1) of the Civil Procedure Code.

* * *

Federal Supreme Court Cassation Division

Cassation File No.5028
Tikimt 9, 1994 Eth.Cal.

Petitioner Hurumu Town Administration

Respondent Ato Berhanu …

Disturbance of possession (Art 1149 (1) CC): Plaintiff need not possess a title deed if he is a lawful occupant.

The maximum holding of 500 square meters of urban land does not apply to land that was lawfully occupied prior to Proc. No. 47/67 E.C).

The case was instituted by the present Respondent (as plaintiff) at the Hurumu Woreda Court stating that most part of the land which he held since prior to the enactment of Proclamation No. 47/67 and for which he was paying taxes has been taken by the town administration for being in excess of 500 sq meters. The land taken was given to the three defendants and it was requested that this disturbance of possession cease based on Art. 1149 (1) of the Civil Code. The Court decided against him on the ground that he did not have a title deed issued under Oromia state law. The appeal did not result in any change. On further appeal, the Regional Supreme Court held that land above 500 sq meters can be held because the possession was prior to the enactment of Proc. No. 47/67 E.C. which forbade hoding land above 500 sq. meters. Regarding the legality of the possession, the Court ruled that the plaintiff (i.e. current Respondent) has been holding the house and the land lawfully, and it reversed the decisions of the lower courts. Appeal to the Regional Cassation Court confirmed the Regional Supreme Court's decision. This petition was hence brought to the Cassation Division of the Federal Supreme Court.

Decision

1. Proc. No 47/67 EC provides that directives shall be issued regarding land already held beyond 500 squrare meters prior to the Proclamation. This directive has not been issued, and it is not possible to say that a person cannot lawfully hold land above 500 squrare meters for possessions prior to the Proclamation.
2. The Respondent brought this case alleging disturbance of possession on land held prior to Proc. No 47/67 EC. He is not invoking ownership of the property.
3. The decisions of the Oromia Supreme Court and the Regional Supreme Court Cassation Division are affirmed because there is disturbance of possession under Art. 1149(1) of the Civil Code.

* * *

የሰበር መዝገብ ቁጥር 4072/92

የሰበር ችሎት መ/ቁ. 4072/92
የፌዴራል ጠ/ፍ/ቤት ሰ/ሰሚ ችሎት
ታህሳስ 16 1994 ዓ.ም

አመልካች፣ ወ/ሮ አለምአንቺ ....
መልስ ሰጭ፣ እነ አቶ ሙጨ ...

ሁከት ይወገድ የሚል ክስ፣ ፍ/ብ/ሕግ ቁ. 1149(1) ፣

የሌላ ሰው ቤት ተጠግቶ የተሠራ ቤት ባለቤት በራሱ በኩል ያለውን ግድግዳ ቀለም ሲያስቀባ መከልከል ሁከት እንደመፍጠር የሚቆጠር ስለመሆን አለመሆኑ፡

አመልካች በደብረታቦር ወረዳ ፍ/ቤት ባቀረበችው ክስ ተከሳሾች ግድግዳ ቀለም እንዳታስቀባ ስለከለከሏት ሁከት እንዲወገድና ካሳ እንዲከፍሏት በፍ/ብ/ ሕግ ቁ. 1149(1) መሠረት ጠየቀች፡፡ ፍ/ቤቱ ግድግዳው የተከሳሹ ንብረት ስለሆነ ሁከት አልተፈጠረም ብሎ ወሰነ፡፡ ከፍተኛው ፍ/ቤት እና ጠ/ፍ/ቤት ውሳኔውን አፀኑት፡፡ ይህ አቤቱታ የቀረበው በነዚህ ውሳኔዎች ነው፡፡

ውሳኔ

1. አንድ ጊዜም ቢሆን የጋራ ግድግዳውን እንዳይቀባ መከልከል ሁከት መፍጠር ነው፡፡
2. ከሳሽ ንብረቱን በሕጋዊ መንገድ መያዟ እስከተረጋገጠ ድረስ የግድግዳው ባለንብረት መሆን እንደመከላከያ ሊቀርብ አይችልም፡፡
3. የሥር ፍ/ቤት ውሳኔዎች ተሽረዋል፡፡

ዳኞች፡- ከማል በድሪ፣ ዓብዱልቃድር መሐመድ፣ ስንዱ ዓለሙ፣ ተገኔ ጌታነህ፣ ወ/ሚካኤል መሸሻ

አመልካች፣ ወ/ሮ አለምአንቺ ....
መልስ ሰጭ፣ እነ አቶ ሙጨ ...

መዝገቡን መርምረን የሚከተለውን ውሳኔ ሰጥተናል፡፡

ው ሳ ኔ

ይህ አቤቱታ የቀረበው የአማራው ክልል ጠቅላይ ፍ/ቤት በፍ/ይ/መ/ቁ 172/91 ሐምሌ 14 ቀን 1991 ዓ.ም የሰጠው ውሳኔ መሠረታዊ የሆነ የሕግ ስህተት አለበት ተብሎ ነው፡፡

አመልካች በደብረታቦር ወረዳ ፍ/ቤት በመልስ ሰጭና በሁለት ተከሳሾች ላይ ያቀረበችው ክስ፣ በደብረታቦር ከተማ ቀበሌ 08 አስተዳደር በምሥራቅ የመልስ ሰጭ ሆቴል፣ በምዕራብ የኢትዮጵያ ንግድ ባንክ፣ በሰሜንና ደቡብ መኪና መንገድ በሚያዋስነው ቦታ ላይ የሆቴል ቤት ድርጅት ያላት መሆኑን፣ በዝናብ ወቅት ፍሳሽ በመኖሩ የሆቴሉ ቤት ቀለም በመላላጡና እድሳት በማስፈለጉ የደቡብ ጎንደር መስተዳድር ዞን ጤና መምሪያ የጽሑፍ ማስጠንቀቂያ ስለሰጠኝ ቤቱን በቀለም ለማደስ ህዳር 1 ቀን 1990 ዓ.ም ባለሙያ ቀጥሬ ለማደስ ሥራ ስጀምር፣ መልስ ሰጭ ያለ ፍ/ቤት ትዕዛዝ በድርጅቱ ቤት ውስጥ በመግባት ቀለሙን አላስቀባም በማለት እኔን በስድብና በኃይል ተጠቅሞ ለመደብደብ ሲሞክር በፖሊስ ኃይልና በአካባቢው ሰዎች ገላጋይነት ድኛለሁ፤ የእድሳቱ ሥራ በመቆሙ ምክንያትም ከብር 5.000/አምስት ሺህ

ብር/ ያላነሰ ጉዳት ደርሶብኛል፡፡ ስለሆነም የተፈጠረው ሁከት ይወገድልኝ፤ የደረሰብኝ ኪሳራ እንዲከፈለኝ ይወሰንልኝ የሚል ነው፡፡

1ኛ. መልስ ሰጭም ቀርቦ፣ አመልካች ክሱን ያቀረበችው በእኔ የድርጅት ቤትና ቦታ ላይ ነው፡፡ በአመልካች ድርጅት ውስጥ ገብቼ ሁከት አልፈጠርኩም፡፡ ድርጅቱን የሠሩት በ1977 ዓ.ም ቀኛዝማች አሻግሬ መራ ሲሆኑ እርሳቸውም እኔ ከሠራሁት ቤት አስጠግቼ ልሥራ ብለው ስለጠየቁ፣ ፈቅጄ ሠርተዋል፡፡ የተከላከልሁትም በፍ/ሕ/ቁ 1148 መሠረት በሠራሁት ቤት ላይ ነው በማለት መልስ ሰጥቷል፡፡

ሌሎቹም ሁለቱ ተከሳሾች ምንም የፈጠርነው ሁከት የለም በማለት መልስ ሰጥተው፣ አመልካችም ለሁሉም የመልስ መልስ ከሰጠች በኋላ ፍ/ቤቱ መዝገቡን መርምሮ የድርጅቱን ቤት የሚለየው ግድግዳ የመልስ ሰጭ ሀብት መሆኑን የአመልካች ባለቤት መተማመኛ የሰጠ በመሆኑ የተሻለ የይዞታ መብት ያለው መልስ ሰጭ ስለሆነ መልስ ሰጭ በአመልካች ላይ የፈጠረው ሁከት የለም በማለት ወሰነ፡፡

በዚህ አመልካች ይግባኝ ለደቡብ ጐንደር ከፍተኛ ፍ/ቤት አቅርባ፣ የግራቀኙን ክርክር ፍ/ቤቱ ከሰማ በኋላ፣ የቀረበው ክስ የሁከት ይወገድልኝ ሆኖ እያለ የወረዳው ፍ/ቤት ስለባለቤትነት መብት አንስቶ ዳኝነት መስጠቱ ተገቢ አይደለም፤ ሆኖም በአንድ በተወሰነ ወቅት ከቤት በመምጣት ቀለም ለመቀባት የተቀጠረን ሠራተኛ ማደናቀፍ ከሁከት ይወገድልኝ ውስጥ የሚያካተት አይደለም፤ መልስ ሰጭ ቤቱን አልያዘም ወይም ለመያዝ ሙከራ አላደረገም በማለት የወረዳውን ፍ/ቤት ውሳኔ በማሻሻል ወሰነ፡፡

አመልካች አሁንም በዚህ ውሳኔ ቅር በመሰኘት ለክልሉ ጠቅላይ ፍ/ቤት ይግባኝ አቅርባ መልስ ሰጭ ቀለም አይቀባም ብሎ የከለከለው አንድ ጊዜ ብቻ ሲሆን፣ ፖሊስ ደርሶ ጠቡን አብርዶአል፡፡ በመሆኑም ይህ በአንድ ጊዜ ለተፈጸመ ጉዳይ የብር 5.000 ጉዳት ደርሷል የሚያሰኝ አይደለም በማለት ይግባኙን በፍ/ሥ/ሥ/ሕ/ቁ. 337 መሠረት ሠርዞታል፡፡

አመልካች መስከረም 12/92 ዓ.ም ጽፋ ያቀረበችው አቤቱታ ይህንኑ በመቃወም ነው፡፡ ይዘቱም በአጭሩ የ1ኛው መልስ ሰጭና የኔ ንግድ ቤት ግድግዳ በአንድ በኩል ስለሚዋሰን በይዞታዬ ሥር ያለውን እንዳላላድስ ሶስቱም መልስ ሰጭዎች ከቤቴ ውስጥ ገብተው ስለከለከሉኝ ዕድሳቱ ተቋርጦአል፤ መልስ ሰጭዎችም የዕድሳቱን ሥራ ከልክለናል፣ ግን ሁከት አልፈጸምንም ብለዋል፤ የተጀመረው ቤት እድሳት ከተቋረጠ ደግሞ በአመልካች ላይ ሁከት ተፈጥሮአል ማለት ነው፤ ይህ በፍ/ሕ/ቁ 1149 ሥር አይወድቅም በፍ/ቤቱቹ መባሉ ለድንጋጌው የተሳሳተ ትርጉም በመስጠት ነው፤ ስለሆነም ይኸው መሠረታዊ የሆነ የሕግ ስህተት መፈጸሙን ስለሚያመለክተ ታርሞ ይወሰንልኝ የሚል ነው፡፡

1ኛ. መልስ ሰጭ ከዚህ ዓለም በሞት በመለየቱ ወራሽ ነኝ በማለት ወ/ሮ ይታክቱ ይማም ቀርባ መልስ ሰጥታለች፡፡ ይዘቱም በአጭሩ የከፍተኛው ፍ/ቤት በሰጠው ውሳኔ ላይ ነበር የሰበር አቤቱታ መቅረብ ያለበት፤ ይህም በሶስት ወር ጊዜ ውስጥ ነው፤ አመልካች የሶስት ወርን ጊዜ አሳልፋ ያቀረበችው አቤቱታ በፍ/ሥ/ሥ/ሕ/ቁ 244/2/ሠ/መሠረት ውድቅ ነው፤ አመልካች ይገፍዋለሁ የምትለው ንብረት የመልስ ሰጭ በመሆኑ የተፈጠረ ሁከት የለም፤ ጠቅላይ ፍ/ቤቱ የሁከቱን ክርክር ማለፉ ስለማይመለከተው ነው፤ ኪሳራውን የወሰነው በከፍተኛው ስለተወሰነ ነው፤ ባአጠቃላይ ፍ/ቤቶቹ የፈጸሙት ስህተት ስለሌለ ውሳኔው ይጽናልኝ የሚል ነው፡፡

2ኛ. መልስ ሰጭ ሐምሌ 4/92 ዓ.ም በተጻፈ አመልካች በይዞታችን ሥር ገብታ ሁከት ልትፈጥርብን ስትል መከላከላችን በፍ/ሕ/ቁ 1148 መሠረት ሕጋዊ ነውና በአመልካች ላይ የፈጠርነው ሁከት የለም በማለት መልስ ሰጥቶአል፡፡

3ኛው መልስ ሰጭ መጥሪያ ደርሶት መልሱን ይዞ ስላልቀረበ ጉዳዩ በሌለበት ይታይ ዘንድ ታዟል፡፡

አመልካች 1ኛ እና 2ኛ መልስ ሰጭዎችም ለሰጡት መልስ የመልስ መልስ ሰጥ(ታለች)፡፡

እኛም መዝገቡን ከሕጉ ጋር በማገናዘብ መርምረናል፡፡ በዚህ ጉዳይ ሊወሰኑ የሚገባቸው ጭብጦች መልስ ሰጭዎች በተጠቀሰው የአመልካች ንብረት ላይ ሁከት ፈጥረዋል ወይ? ሁከት ፈጥረዋል ከተባለ በተፈጠረው ሁከት ምክንያት የደረሰ ጉዳት አለ ወይ? የተባሉት ናቸው፡፡

የሁከት መኖሩን በተመለከተ፣ ለዚህ ጉዳይ መነሻው ፣ አመልካች መልስ ሰጭዎች የሆቴል ድርጅቴን ግድግዳ ቀለም ለማስቀባት ስሞክር በሆቴል ቤቴ በመግባት ግድግዳው በቀለሙ እንዳይቀባ በመከልከል ሁከት የፈጠሩብኝ በመሆኑ ይኸው ሁከት እንዲወድ ይወሰንልኝ የሚል ክስ ማቅርቧ ነው፡፡ የ1ኛ መልስ ሰጪዎች አውራሽ ቀርቦ ድርጊቱን መፈጸሙን አምኖ ግን ቀለሙ የሚቀባበት ግድግዳ በአጠቃላይ የራሴ ነው፣ የአመልካች ባለቤት የነበሩት በወቅቱ በነበራቸው ኃይል በእኔ ግደግዳ በሆነው ላይ አስጠግተው ሠርተው ነው፤ በመሆኑም የተከላከልሁት የራሴን ግድግዳ እንጂ የአመልካችን ባለመሆኑ የፈጠርኩት ሁከት የለም በማለት መልስ ሲሰጥ፣ 2ኛ እና 3ኛ መልስ ሰጭዎችም ንብረታችንን ተከላከልን እንጂ በአመልካች ንብረት ላይ የፈጠርነው ሁከት የለም በሚል ተከራክረዋል፡፡

ጉዳዩ የቀረበለትም የደብረታቦር ወረዳ ፍ/ቤት የግድግዳው ባለቤት የ1ኛ መልስ ሰጭዎች አውራሽ በመሆኑ የፈጠረው ሁከት የለም በማለት ሲወስን አመልካች በውሳኔው ቅር በመሰኘት ይግባኝ ለደቡብ ጐንደር ከፍተኛ ፍ/ቤት አቅርቦ ፍ/ቤቱም ግራ ቀኙን ካከራከረ በኋላ የቀረበው ክስ የሁከት ይወገድልኝ ሆኖ ሳለ የወረዳው ፍ/ቤት ወደ አልቀረበ ዳኝነት በመግባት ባለቤትነትን የሚመለከት ውሳኔ መስጠቱ አግባብ ያለመሆኑን በመግለጽ አርሞ መልስ ሰጭዎች ወደ አመልካች ይዞታ ገብተው የፈጠሩት ረብሻ አንድ ጊዜ ሲሆን ይኸው በፖሊስ አማካይነት ቆሞአል የሚል ትችት በመስጠት መልስ ሰጭዎች ሁከት በአመልካች ላይ አልፈጠሩም በማለት ውሳኔውን አሻሽሎ ወስኗል፡፡

አመልካች እንደገና ይግባኝ ለክልሉ ጠቅላይ ፍ/ቤት ብታቀርብም ፍ/ቤቱ መልስ ሰጭዎች ቀለሙ እንዳይቀባ የከለከሉት አንድ ጊዜ ብቻ በመሆኑ የብር 5.000 ጉዳት ደርሶአል ሊባል አይችልም በማለት የሥር ፍ/ቤቶችን ውሳኔ አጽንቶታል፡፡

በመሠረቱ አመልካች አከራካሪ የሆነውን ድርጅት ግድግዳ ቀለም ለመቀባት ስትሞክር መልስ ሰጭዎች በንብረቷ ላይ ገብተው ቀለሙ እንዳይቀባ መከላከላቸውን አልካዱም፡፡ ከላይ እንደተገለጸው ከፍተኛውና ጠቅላይ ፍ/ቤቱ ድርጊቱ በመልስ ሰጭዎች የተፈጸመው አንድ ጊዜ ብቻ ነው በማለት በውሳኔዎቻቸው ውስጥ አስፍረውታል፡፡ ከፍተኛው ፍ/ቤት በውሳኔው ላይ በግልጽ የተፈጠረ ሁከት የለም በማለት ሲወስን፣ ጠቅላይ ፍ/ቤቱ ግን የተፈጸመው ጠብ አንድ ጊዜ ብቻ በመሆኑ የአምስት ሺህ ብር ጉዳት አልደረሰም በማለት በአመልካች ላይ ስለደረሰው ጉዳት ብቻ በግልጽ በመጥቀስ ነው የወሰነው፡፡ በዚህ መሠረትም ጠቅላይ ፍ/ቤቱ ወደ ጉዳቱ መጠን ገብቶ በእንዲህ መወሰኑ የመልስ ሰጭዎች ድርጊት በአመልካች ላይ ሁከት የፈጠረ መሆኑን እያመነና እየተቀበለ መሆኑን የሚያመላክት ነው፡፡

እንግዲህ ከአጠቃላይ ክርክሩ መገንዘብ እንደሚቻለው አንድ ጊዜም ይሁን እንጂ በአመልካች ድርጅት ውስጥ መልስ ሰጭዎች በመግባት አመልካች በርሷ በኩል ያለውን የጋራ ግድግዳ ቀለም እንዳትቀባ አድርገዋል፡፡ በዚህም ምክንያት አመልካች ይህን የተባለውን ግድግዳ ቀለሙን በመቀባት እንዳታድስ ታግዳለች፡፡ ይህ የመልስ ሰጭዎች አድራጐት በፍ/ሕ/ቁ. 1149/1/ ላይ እንደተመለከተው በአመልካች ይዞታ ላይ ሁከት ማንሳታቸውን በሚገባ ያሳያል፡፡

ስለዚህም፣ መልስ ሰጭዎች በእንዲህ በአመልካች ይዞታ ላይ ሁከት መፍጠራቸው ግልጽ ሆኖ እያለ፣ የአማራው ክልል ወረዳና ከፍተኛው ፍ/ቤት የተፈጠረ ሁከት የለም በማለት በአንድ በኩል መወሰናቸው፣ የጠቅላይ ፍ/ቤቱ ደግሞ የተፈጸመው ጠብ አንድ ጊዜ ብቻ በመሆኑ ጉዳቱ አመልካች የጠየቀችውን ያህል አይደርስም በማለት መወሰኑ፣ መሠረታዊ የሆነ የሕግ ስህተት መፈጸሙን ስለሚያመለክት በፍ/ሥ/ሥ/ሕ/ቁ 348/1/ መሠረት ሽረን በአመልካች ላይ የተፈጠረው ሁከት ይወገድ ብለናል፡፡

በሌላ በኩል እንግዲህ መልስ ሰጭዎች ክፍ ብሎ እንደተመለከተው በአመልካች ይዞታ ላይ ሁከት ፈጥረዋል። አመልካች በዚህ ሁከት ምክንያት የአምስት ሺህ ብር ጉዳት ደርሶብኛል እያለች ነው። በፍ/ሕ/ቁ 1149/1 ለደረሰው ጉዳት አመልካች ካሳ የመጠየቅ መብት አላት። ስለሆነም፣ አመልካች በሁከቱ ምክንያት የደረሰባትን ጉዳት በሚመለከት አከራክሮ በጉዳቱ መጠን ካሳ መልስ ሰጭዎችን ያስከፍል ዘንድ የደብረታቦር ወረዳ ፍ/ቤትን በፍ/ሥ/ሥ/ሕ/ቁ 341/1 መሠረት አዘናል። የውሳኔውም ግልባጭ ለሚመለከታቸው ፍ/ቤቶች ይተላለፍ። ...

* * *

የሰበር መዝገብ ቁጥር 4723

የሰበር መ/ቁ. 4723
የፌ.ጠ.ፍ/ቤት ሰ/ሰሚ ችሎት
ሐምሌ 11 1994 ዓ.ም.

አመልካች፤ አቶ መኩሪያ ...
መልስ ሰጭ፣ አቶ ሙሳ ...

የሁከት ይወገድ ክስ ይርጋ ዘመን የሚታሰበው አከራካሪ የሆነው ቤት ከተያዘ ጀምሮ ነው ወይስ በቦታው ላይ ያለመልስ ሰጭ ፈቃድ ግንባታ ከተጀመረ በኋላ፣ ፍ/ብ/ሕግ ቁ. 1149(2)።

በፍርድ አፈጻጸም የተደረገ የንግድ መደብር ዝውውር በግልፅ ካልተመለከተ በስተቀር ንግዱ ያለበትን ቤት ጭ ሽያጭ አይጨምርም።

መልስ ሰጭ በአመልካች ላይ ያቀረበው ክስ ይዘት አመልካች በቤት እና ቦታዬ ላይ ቤት በመሥራት ሁከት ስለፈጠረብኝ ሁከቱ ተወግዶ ቦታውን ያስረክበኝ የሚል ሲሆን አመልካች ክሱ በይርጋ ይታገዳል ቤትና ቦታውንም ያገኘሁት ለ3ኛ ወገን ገንዘብ አበድሬ ብድሩ ስላልተመለሰልኝ ፍርድ አስፈርጀ የዚህን የ3ኛ ወገን የንግድ መደብር ለኔ እንዲዛወር በማድረጌ ነው በማለት ተከራክሯል። ፍርድ ቤቱ ይህ ሶስተኛ ወገን በአከራካሪው ቤት ሲነግድ እንደነበረ ቢታወቅም የቤቱ ባለቤት መሆኑን የሚያሳይ ማስረጃ ግን ስለሌለውና ቤቱን ለአመልካች ያላዛወረ ስለሆነ ለመልስ ሰጭ እንዲመልስ፣ ይርጋውን በተመለከተ ይርጋው የሚታሰበው ቤቱ ከተያዘበት ቀን ጀምሮ ሳይሆን በቦታው ላይ ያለመልስ ሰጭ ፈቃድ ግንባታ ከተጀመረበት ጊዜ ጀምሮ ስለሆነ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 1149(2) በተመለከተው የሁለት ዓመት የይርጋ ጊዜ ክሱ አይታገድም ሲል ወሰነ። ይግባኝ የተባለባቸው ፍርድ ቤቶች ውሳኔውን ስላፀኑት ይህ አቤቱታ ለፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት ቀርቧል።

ው ሳ ኔ

1. በፍ/ብ/ሕግ ቁ. 1149(2) የተደነገገው የሁለት ዓመት ይርጋ ሊቆጠር የሚገባው አመልካች ቤቱን ከያዘበት ጊዜ ጀምሮ ሳይሆን በቦታው ላይ ያለመልስ ሰጭ ፈቃድ ግንባታ ከጀመረበት ጊዜ ነው። በዚህ መሠረት ክስ የቀረበው የይርጋ ጊዜ ሳያልፍ ነው።
2. አመልካች ቦታውና ቤቱ ለእርሱ የተሰጠ መሆኑን የሚያረጋግጥ ካርታ እና ኘላን የለውም። በሌላ መዝገብ በአፈጻጸም ያስፈረደበት ሰው እነዚህ ሰነዶች እንዳሉት አልተረጋገጠም።
3. አመልካች በአፈጻጸም ያስወሰነው የንግድ መደብር ዝውውር እንጂ የቤት ዝውውር አይደለም።
4. መልስ ሰጭ ካርታው የጠፋበት መሆኑን የገለፀ ሲሆን፣ ይህን በፍርድ ቤት ያረጋገጠ ስለሆነ ከአመልካቹ የተሻለ ማስረጃ አቅርቧል።
5. የሥር ፍ/ቤቶች ውሳኔዎች ፀንተዋል። አመልካች ቤቱን ለመልስ ሰጭ እንዲያስረክብ ተወስኗል።

ዳኞች፡- ከማል በድሪ፣ ዓብዱልቃድር መሐመድ፣ ስንዱ ዓለሙ፣ አሰግድ ጋሻው፣ ደስታ ገብሩ

አመልካች፤ አቶ መኩሪያ ...

መልስ ሰጭ፣ አቶ ሙሳ ...

መዝገቡ ተመርምሮ የሚከተለው ውሳኔ ተሰጥቷል፡፡

<u>ው ሳ ኔ</u>

ይህ አቤቱታ የቀረበው የሱማሌ ብሔራዊ ክልል መንግሥት ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ/ቁ ኤም/08/92 በ18/6/92 ዓ.ም ከሰጠው ውሳኔ ላይ ነው፡፡

ጉዳዩ በተጀመረበት የጅጅጋ ወረዳ ፍ/ቤት የአሁን መልስ ሰጭ ከሳሽ የአሁን አመልካች ደግሞ ተከሳሽ ነበሩ፡፡ በመልስ ሰጭ የቀረበው ክስ በአጭሩ በ04 ቀበሌ ውስጥ የነበረኝ ቦታ ካርታ በሶማሌ ጦርነት ምክንያት ተሰድጄ ሳለ ከሌላው ንብረቴ ጋር ወድሞብኛል፡፡ በምትኩ ሌላ ካርታ ለማውጣት በሂደት ላይ ሳለሁ ተከሳሽ በቦታው ላይ ቤት በመስራት ሁከት ፈጥሮብኛል፡፡ ስለሆነም ሁከቱ ተወግዶ ቦታዬን እንዲለቅ እንዲወሰንልኝ እጠይቃለሁ የሚል ነው፡፡ አመልካችም ቀርቦ ክሱ በይርጋ ሊታገድ ይገባዋል፤ ክስ የቀረበበት ቤትና ቦታም በአዋጅ የተወረሰ ነው የሚል መልስ አቅርቦ ከተከራከረ በኋላ ፍ/ቤቱ ክርክር የተነሳበት ቦታና ቤት የከሳሹ በመሆኑ ተከሳሹ ሊያስረክበው ይገባል፤ ተከሳሽ ከአቶ ግርማ በርከፈት ከተሰጠው የንግድ ፈቃድና ድርጅት በስተቀር የቤቱ ባለቤት አይደለም በማለት ወስኗል፡፡

ከዚህ ውሳኔ ላይ ይግባኝ የቀረበለት የጅጅጋ ዞን ከፍተኛ ፍ/ቤትም አቶ ግርማ በርከፈት ለአከራካሪው ቦታ ካርታ ይሰጠው ዘንድ ጅጅጋ ከተማ ማዘጋጃ ቤትን ጠይቆ ግምት የከፈለ ቢሆንም ካርታውን ግን አላገኘም፤ ይግባኝ ባይ በፍ/ብ/መ/ቁ 490/84 ባለመብት የሆነበትን ውሳኔም ተመልክተናል፤ ነገር ግን የቦታው ባለመብት መልስ ሰጭ እንዲሆን ወስነናል በማለት ውሳኔውን አጽንቶታል፡፡

በመቀጠልም አመልካች አቤቱታውን ለሱማሌ ብሔራዊ ክልል መንግስት ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት ያቀረበ ሲሆን ይህም ችሎት አቤቱታውን ውድቅ በማድረግ ውሳኔ በመሰጠቱ ምክንያት አመልካች ውሳኔው መሠረታዊ የሆነ የሕግ ስህተት የተፈፀመበት ነው ሲል አቤቱታውን ለዚህ ችሎት አቅርቧል፡፡

የአቤቱታው ይዘት በአጭሩ፣ አመልካች ለአቶ ግርማ በርከፈት ብር 5000.00 (አምስት ሺህ) በብድር ሰጥቼ ባለመመለሳቸው ምክንያት ክስ መስርቼ ፍ/ቤቱ 04 ቀበሌ የሚገኘውንና ቁ. 057 የሆነውን የተበዳሪውን ቤትና የንግድ ድርጅት እንድረከብ ወስኖልኛል፤ በዚህ ውሳኔ መሠረት የቤቱ እና የድርጅቱ ስም በስሜ ተዛውሮ ቦታውን ተረክቤ ከፍተኛ ገንዘብ አውጥቼ ንብረት በማስፈር ከ10 ዓመት በላይ በእጄ ይገኙዋለሁ፤ አቶ ግርማ በርከፈት የንግድ ድርጅቱ ካርታና ኘላን ተሰጥቶት እኔ በ1982 ዓ.ም. ከመረከቤ በፊት ለ11 ዓመት ይዞት የነበረ ነው፤ ከሳሽ ጅጅጋን የለቀቀው በ1969 ዓ.ም ሆኖ ሳለ በ1987 ዓ.ም ያቀረበው ክስ ከሕግ ውጭ ነው፤ መልስ ሰጭ በ1969 ዓ.ም የሄደው ወደ ሶማሌ ሲሆን የዚያድ ባሬን ጦር ሰራዊት ተከትሎ ነው፤ መልስ ሰጭ ከ15 ዓመት በኋላ ተመልሶ ሲመጣ ይህ አከራካሪው ቦታ በአዋጅ ቁ. 47/67 መሠረት ለአቶ ግርማ በርከፈት ተሰጥቷቸው ቤት ሰርተውበት ነበር፤ እኔም ለአቶ ግርማ በአበደርኩት ገንዘብ መነሻ ቤቱን በፍርድ ውሳኔ መሠረት ተረክቤ ከ11 ዓመት በላይ በእጄ አቆይቼዋለሁ፣ መልስ ሰጭ ቦታው እንዲሰጣቸው ጠይቀው የጅጅጋ ከተማ አጠቃላይ ምክር ቤት በ12/12/85 ዓ.ም. በተጻፈ ደብዳቤ ቦታው ለሌላ የተሰጠ በመሆኑ ለእርሳቸው እንደማይቻል ገልጾ የፃፈላቸውን ደብዳቤ እንዲመለከትልኝ እጠይቃለሁ፤ አመልካች በመልስ ሰጭ ይዞታ ላይ የፈፀምኩት ሁከት ሳይኖር የፍ/ብ/ሕ/ቁ 1149/2/ ን ተመስርተው ክስ ማቅረባቸው ሕጋዊ አይደለም፤ መልስ ሰጭ ቦታው ይገባኛል የሚሉ ከሆነ ገምተው ክስ መመስረት እንጂ በእጃቸው በሌለና የቦታ ይዞታ ማረጋገጫ ማስረጃ ባላቀረቡበት ቦታ ሁከት ይወገድልኝ ሲሉ ክስ መመስረታቸውም ተገቢ አይደለም፤ የሥር ፍ/ቤቶች ጉዳዩ በይርጋ ይታገዳል በማለት

የአቀረብነውን ክርክር ማለፋቸውም የፍ/ብ/ሕ/ቁ. 1140 እና 1149/2/ ን የሚተላለፍ ነው። እኔም ንብረቱን ቦታውን ተመርቶ የንግድ ፈቃድ አውጥቶ ሲነግድ ከነበረው ከአቶ ግርማ በርከፊት በፍርድ አፈፃፀም ያገኘሁት ነው። ይህን የጅጅጋ ወረዳ ፍ/ቤት በመ/ቁ 5/81 የሰጠው ውሳኔ፣ ፍ/ቤቱ ለጅጅጋ ከተማ አጠቃላይ ምክር ቤት የፃፈው ደብዳቤ እና መልስ ሰጭ ካርታ እንዲሰጠው ጠይቆ የተከለከለበት ደብዳቤ የሚያረጋግጠው ነው። ስለሆነም የሥር ፍ/ቤቶች ውሳኔ የአዋጅ ቁ. 47/67፣ የፍ/ብ/ሕ/ቁ. 1140 እና 1149/2/ን የሚቃረን ስለሆነ እንዲሻርና ኪሳራም እንዲቆረጥልን እንጠይቃለን የሚል ነው።

የተጠሪ ወራሽም በአቀረበችው መልስ በክልሉ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት የተሰጠው ውሳኔ የመጨረሻና ለዚህ ችሎት አቤቱታ ሊቀርብበት የማይችል ስለሆነ መዝገቡ ተዘግቶ ልንሰናበት ይገባናል። በአመልካች ከቀረበው የውሳኔ ግልባጭ ገጽ ቁጥር አኳያ አቤቱታው የአዋጅ ቁ. 25/88 አንቀጽ 22/3/ በሚያዘው መሠረት የተሟላ ባለመሆኑ ሊሰረዝ የሚገባው ነው። አመልካች በአከራካሪው ቤት ሲነግድበት እንደነበረ እናውቃለን። የንግድ ፈቃድና የድርጅት ባለቤትነቱንም አልተቃወምንም። የምንቃወመው አመልካች የቤቱም ባለቤት ነኝ የሚሉትን ነው። ድርጅትና ቤት የተለያዩ ናቸው። የድርጅት ባለቤትነት ንግዱ የሚካሄድበትን ቤት የሚጨምር አይደለም። የሥር ፍ//ቤቶች ይህን በመረዳት የአቶ ግርማ በርከፊት ንግድ ፈቃድና ድርጀት ብቻ ለአመልካች እንዲዛወር መወሰናቸው የሚነቀፍ አይደለም። አቶ ግርማ ያልነበረውን ንብረት ለአመልካች ሊያስተላልፍ አይችልም። አመልካች የቤቱ ስመ ሀብት በስሜ ተዛውሮ ነበር ያለው ሀሰት ነው። የቤቱ ስመ ሀብት ጥንትም አሁንም በመልስ ሰጭ መሆኑ የሚታወቅ ነው። የቤቱ ካርታና ኘላን ለመልስ ሰጭ የተሰጠ ሲሆን በ1969 ዓ.ም. ወድሟል። አቶ ግርማ በርከፊት ካርታና ኘላን ተሰጥቷቸው ነበር የተባለው ሀሰት ነው። አቶ ግርማ ቤቱን የተከራየን ሰው ነበር። መልስ ሰጭ የሁከት ይወገድልኝን ክሰ የመሠረትኩት አመልካች በቦታው ላይ የግንባታ ሥራ መሥራት ሲጀምር ወዲያውኑ ስለሆነ በይርጋ የሚታገድ አይደለም። የመልስ ሰጭ ቤትና ቦታ የተወረሰ አይደለም። አቶ ግርማ ካርታና ኘላን ተሰጥቷቸዋል የተባለው ሀሰት ከመሆኑም ሌላ ምክር ቤቱ በ23/3/86 በተጻፈ ደብዳቤ አቶ ግርማ በርከፊት ካርታና ኘላን ሳይኖራቸው የቤት ሥራ መጀመራቸውን በመግለጽ ደብዳቤ መፃፉ የሚታወቅ ነው። መልስ ሰጭ ለ15 ዓመት ያህል ከጅጅጋ አልራቅኩም። የሄድኩት ወደ ሐረር ነው። ብርቅም እንኳ የተከራይ ተከራይ በሆኑት በአመልካች በኩል ለቤት ቀጥተኛ ያልሆነ ይዞታ የነበረኝ ነኝ። አመልካች የጅጅጋ ከተማ አጠቃላይ ም/ቤት ቦታው ለሌሎች የተሰጠ መሆኑን ገልጾ ለመልስ ሰጭ ካርታው እንደማይሰጣቸው አሳውቋል ያለው እውነት ነው። ነገር ግን ምክር ቤቱ ይህን ያደረገው የፍ/ቤቱን ውሳኔ ላለመፈፀም ሳይሆን አመልካችን ጨምሮ ሌሎች ሰዎች በቦታው ላይ ካርታ አለን በሚል በሕገ ወጥ መንገድ ያገኙትን ካርታ በማየቱ ነው። ሕገ ወጡን ካርታ እንዲመልሱም ምክር ቤቱ ትዕዛዝ ሰጥቷል። አመልካች ቤቱን ከአቶ ግርማ የንግድ ፈቃድና ድርጅት ጋር የተረከቡት በማስመሰል ያቀረብት ክርክር ከእውነት የራቀ ነው። ቤቱ የመልስ ሰጭ መሆኑ ተረጋግጦ የተሰጠው የሥር ፍ/ቤት ውሳኔም የሚነቀፍ አይደለም። ስለሆነም ውሳኔው ፀንቶ ወጭና ኪሳራም ተቆርጦልኝ እንድሰናበት እጠይቃለሁ ብላለች።

አመልካችም የመልስ መልሱን አቅርቧል።

የግራቀኙ ክርክር ከላይ የተመለከተው ሲሆን ከተገቢው ሕግ ጋር ተገናዝቦ ተመርምሯል።

እንደተመረመረው በጉዳዩ ሊታይ የሚገባው ዋና ነጥብ ክርክር ያስነሳውን በጅጅጋ ከተማ ከፍተኛ 2 ቀበሌ 04 ውስጥ የሚገኘውን ቤት አመልካች ለመልስ ሰጭ ያስረክብ በሚል መወሰኑ ተገቢ ነው፣ ወይስ አይደለም የሚለው ሆኖ ተገኝቷል።

ይህ ችሎት በኢ.ፌ.ዲ.ሪ. ሕገ መንግሥት አ/80/3/ መሠረት ጉዳዩን ለማየት ሥልጣን ስላለው በዚህ ረገድም የቀረበውን የመልስ ሰጭን ተቃውሞ አልተቀበልነውም።

መልስ ሰጭ በአመልካች ላይ ያቀረበው ክስ ይዘት በቤትና በቦታዬ ላይ ሁከት ስለፈጠረብኝ ሁከቱ ተወግዶ ቤትና ቦታውን እንዲያስረክበኝ ይወሰንልኝ የሚል ሲሆን፣ ቤትና ቦታው የእርሱ መሆኑን የሚያረጋግጥለት ካርታ እንደነበረው፣ይህ ካርታ በ1969 ዓ.ም ከሶማልያ ጋር በነበረው

ጦርነት ሳቢያ ከሌላው ንብረቱ ጋር እንደወደመበት፤ ይህ እውነት ስለመሆኑ በፍ/ቤት ውሳኔ እንደተረጋገጠለት፤ ይሁን እንጂ በውሳኔው መሠረት አዲስ ካርታ ያላገኘ መሆኑንና ይህም የሆነው በቦታው ላይ በሕገ ወጥ መንገድ የተገኙ ካርታዎች መኖራቸው በመታወቁ ምክንያት [እንደሆነ] በመግለጽ መከራከሩ ይታያል፡፡ አመልካችም አንድም ክሱ በይርጋ ሊታገድ የሚገባው መሆኑን በሌላ በኩል ደግሞ ቤትና ቦታውን ያገኘው በአቶ ግርማ በርከፈት ላይ በአስፈረደው ፍርድ አፈፃፀም መነሻ መሆኑንና አቶ ግርማም ለቤትና ለቦታው ካርታና ኘላን ተሰጥቶት ለረጅም ጊዜ በንግድ ድርጅትነት ሲጠቀምበት እንደነበረ በመግለጽ ተከራክሯል፡

በአመልካች አቤቱታ ላይ እንደተመለከተው ያቀረበው የይርጋ ክርክር በሥር ፍ/ቤቶች በዝምታ መታለፉ ግልጽ ነው፡፡ ነገር ግን መልስ ሰጭ የይርጋ ጊዜው መቆጠር የሚገባው አመልካች ቤቱን ከያዘበት ጊዜ ጀምሮ ሳይሆን በቦታው ላይ ያለእኔ ፈቃድ ግንባታ መገንባት ከጀመረበት ጊዜ አንስቶ ስለሆነና ይህ ደግሞ ክሱ የቀረበው በሕግ የተደነገገው የይርጋ ጊዜ ሳያልፍ መሆኑን ስለሚያሳይ የይርጋ ክርክሩ ተቀባይነት ሊያገኝ አይገባም በማለት መቃወሚያ አቅርቦ መከራከሩ ይታያል፡፡ በመሠረቱ በሁለቱ ተከራካሪዎች መካከል ያለው በውል ላይ የተመሠረተ ሳይሆን ከውል ውጭ የሆነ ግንኙነት ነው፡፡ መልስ ሰጭ ቤትና ቦታውን ያስረክበኝ ሲል ክስ የመሠረተው ባለቤትና ቀጥተኛ ባልሆነም ሁኔታ ባለይዞታ በሆንኩበት ቤትና ቦታ ላይ ሁከት ፈጥሮብኛል በሚል ነው፡፡ እንዲህ በመሆኑም በፍ/ብ/ሕ/ቁ. 1149/2/ ላይ የተመለከተው የሁለት ዓመት የይርጋ ጊዜ መቆጠር የሚጀምረው አመልካች ቤቱን ከያዘበት ጊዜ ጀምሮ ሳይሆን ግንባታው ከተጀመረበት አንስቶ ሊሆን እንደሚገባ ይታመናል፡፡ አመልካች ክሱ የቀረበው ግንቦታው ተጀምሮ ሁለት ዓመት ካለፈው በኋላ ነው አለዚያም በቦታው ላይ ያካሄድኩት ግንባታ የለም በሚል ተጨባጭነት ያለው ክርክር አቅርቦ የመልስ ሰጭውን መልስ አላስተባበለም፡፡ ስለሆነም በአመልካች የተነሳው የይርጋ ክርክር የሕግ ድጋፍ ያለው ሆኖ አላገኘነውም፡፡

በሌላም በኩል አመልካች ቤትና ቦታው ለእኔ የተሰጠ መሆኑን የሚያረጋግጥ ካርታና ኘላን አለኝ የሚል ክርክር የለውም፡፡ ክርክሩ ቤትና ቦታውን ያገኘሁት ካርታና ኘላን በተሰጠው በአቶ ግርማ በርከፈት ላይ በአስፈረድኩት ፍርድ አፈፃፀም ነው የሚል ነው፡፡ በጅጅጋ ዞን ከፍተኛ ፍ/ቤት ውሳኔ ላይ አቶ ግርማ ለቦታው ካርታ እንዲሰጠው ለጅጅጋ ከተማ ማዘጋጃ ቤት አመልክቶ ግምት መክፈሉ እንጂ ካርታውን እንዳላገኘ ተመልክቷል፡፡ ይህ ደግሞ ካርታው ለአቶ ግርማ እንዳልተሰጠው በፍ/ቤቱ መረጋገጡን የሚያሳይ ነውና አመልካቹ አቶ ግርማ ለቤትና ለቦታው ካርታና ኘላን ነበረው በማለት ያቀረበው ክርክር ተቀባይነት ያለው ሆኖ አላገኘነውም፡፡ እንዲሁም አመልካች በአቶ ግርማ በርከፈት ላይ አስወስኛለሁ የሚለው አቶ ግርማ በቤቱ የነበረውን የንግድ ፈቃድና የድርጅቱን ስም በስሙ እንዲያዞርለት በጅጅጋ ወረዳ ፍ/ቤት በሥ/ፋ/መ/ቁ 5/81 የተወሰነውን መሠረት በማድረግ ነው፡፡ ይህ ደግሞ የአቶ ግርማ በርከፈት ባለቤትነት ያልተረጋገጠበትና ንግዱ ይካሄድበት የነበረው ቤት ስመ ሀብት ጭምር ለአመልካች እንዲዛወር መወሰኑን የሚያረጋግጥ አይደለም፡፡ በእርግጥ መልስ ሰጭም በቦታው ላይ ነበረኝ የሚለው ካርታ መውደሙ በፍ/ቤት ውሳኔ መረጋገጡ ቢታይም እንደውሳኔው እንዳልተፈፀመለት በእርሱም የተካሄደ አይደለም፡፡ ይህ ደግሞ ቤትና ቦታው የእርሱ መሆኑን አላስረዳም ወደሚል መደምደሚያ ሊያደርስ እንደሚችል ይታመናል፡፡ ይሁን እንጂ የሥር ፍ/ቤቶች በግራ ቀኙ የቀረበውን ማስረጃ መዝነው፤ በመልስ ሰጭ የቀረበው ማስረጃ በአመልካቹ ከቀረበው የተሻለ መሆኑን ጭምር ግምት ውስጥ በማስገባት ቤቱ የመልስ ሰጭ ነው የሚል ማጠቃለያ ላይ መድረሳቸውና ለመልስ ሰጭው እንዲያስረክበው መወሰናቸው ሲታይ ውሳኔው መሠረታዊ የሆነ የሕግ ስህተት የተፈፀመበት ነው ለማለት የሚያስችል ሆኖ አላገኘነውም፡፡

ስለሆነም ይህ ችሎት አመልካች ክርክር ያስነሳውን በጅጅጋ ከተማ ከፍተኛ 2 ቀበሌ 04 ውስጥ የሚገኘውን ቤትና ቦታ ለመልስ ሰጭ ሊያስረክብ ይገባል በማለት ወስኗል፡፡ በዚህም አቤቱታው የቀረበበትን ውሳኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 348/1/ መሠረት አጽንቶታል፡፡ …

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የሰበር መዝገብ ቁጥር 27506

የሰበር መ/ቁ. 27506
የፌ.ጠ.ፍ/ቤት ሰ/ሰሚ ችሎት
ሐምሌ 19 ቀን 1999 ዓ.ም

አመልካች፤ እነ ሳሙኤል ...
ተጠሪ፤ አቶ ብዙነህ ...

በፍ/ብ/ሕ/ቁ. 1149 መሠረት ሁከት እንዲወገድ በቀረበ ክስ ተከሳሹ የቤቱ ባለቤት መሆኑን እንደመከላከያ ማቅረብ ይችል እንደሆነ ፣ (የፍ/ብ/ሕ/ቁ. 1140፣ 1149)

ከሳሽ በጅጅጋ ዞን ከፍተኛ ፍርድ ቤት በጀመሩት ክስ ቀበሌ የሚያስተዳድረውን ቤት ተከራይተው ሲኖሩ ተከሳሹ ቤት ውስጥ ገብተው እየተገለገሉበት ስለሆነ የተፈጠረው ሁከት እንዲወገድላቸው ጠይቀዋል። ተከሳሽ በሰጡት መልስ ቤቱን በውርስ ያገኙት ስለሆነ ክሱ ተቀባይነት ሊኖረው አይገባም የሚል ክርክር አቅርበዋል። ከቀረበው ማስረጃ ከሳሽ ቤቱን በሕጋዊ መንገድ የተከራዩ መሆናቸውን ስላረጋገጡ ተከሳሽ የፈጠሩት ሁከት እንዲወገድ ሲል ፍርድ ቤቱ ወስነ። ይግባኝ የቀረበለት የክልሉ ጠ/ፍ/ቤት ተከሳሹ ከቤቱ ባለንብረት ቤቱን በወራሽነት ያገኙት ስለሆነ ሁከት የለም በማለት ወስነ። ይህ የሰበር አቤቱታ የቀረበው ከዚህ ውሳኔ ተነስቶ ነው።

ውሳኔ

1. ተጠሪ ያቀረቡት ክርክር ለክሱ ምክንያት የሆነው ቤት የግል ቤታቸው ስለመሆኑ እንጂ ሁከት አልፈጠርኩም የሚል አይደለም።
2. ተጠሪ በባለቤትነት ረገድ የሚያነሱት ክርክር ሁከት ተፈጥሯል ወይም አልተፈጠረም ተብሎ ለሚያዝ ጭብጥ ተገቢነት የለውም።

ዳኞች፡- *መንበረፀሐይ ታደሰ፣ ፍስሐ ወርቅነህ፣ ዓብዱልቃድር መሐመድ፣ አብዱራሂም አህመድ፣ ታፈሰ ይርጋ*

አመልካች፤ እነ ሳሙኤል ...
ተጠሪ፤ አቶ ብዙነህ ...

መዝገቡ ተመርምሮ የሚከተለው ውሳኔ ተሰጥቷል።

ፍ ር ድ

ይህ የሰበር አቤቱታ ሊቀርብ የቻለው አመልካቾች ተጠሪ በይዞታችን ላይ የፈጠረው ሁከት ይወገድልን የሚል አቤቱታ ለጅጅጋ ዞን ከፍተኛ ፍ//በት አቅርበው ፍ/ቤቱም ግራ ቀኙን አከራክሮ ተጠሪ በአመልካቾች ላይ የፈጠረው ሁከት ሊወገድ ይገባል በማለት ውሳኔ ሰጥቶ ጉዳዩን በይግባኝ የተመለከተው የሶማሌ ክልል ጠቅላይ ፍ/ቤት የከፍተኛ ፍ/ቤቱን ውሳኔ 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 የሚያስተዳድረው (ሲሆን) ላለፉት 20 ዓመታት በተከራይነት ኖረንበታል። ይሁን እንጂ ተከሳሽ 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 የላለፈለት ንብረት መሆኑን በመግለጽ አቤቱታው ውድቅ ሊደረግ ይገባል በማለት ተከራክሯል፡፡

የግራ ቀኙ ክርክር በዚህ መልኩ የቀረበለትም የዞኑ ከፍተኛ ፍ/በት ለክርክሩ ምክንያት የሆኑትን ቤቶች የጅጅጋ ከተማ አስተዳደር መሆናቸውን ከማሾችም ከእነዚሁ ቤቶች በሕጋዊ መንገድ እየኖሩ እንደሆነ ከቀረበው ማስረጃ ማረጋገጥ የተቻለ ስለሆነ በተከሣሽ በኩል የተፈጠረው ሁከት በፍ/ብ/ሕ/ቁጥር 1149(3) መሠረት እንዲወገድ በማለት ውሳኔ 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 ውሳኔ ከጭብጡ ያፈነገጠ ነው በማለት ሽሯል፡፡

ይህ ሰበር ሰሚ ችሎትም አቤቱታው ለሰበር ቀርቦ መታየት አለበት በማለት ትእዛዝ የሰጠው ለክርክሩ ምክንያት የሆነውን ቤት የቀበሌው አስተዳደር እያከራየ ገቢ ይሰበስብ ነበር ከተባለ በአዋጅ አልተወረሰም በሚል የተጠሪ የውርስ ሀብት ነው የመባሉን አግባብነት ለማጣራት ሲሆን ከዚሁ አኳያም 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 የሚያቀርብ ወገን በንብረቱ ላይ የይዞታ መብት እንዳለውና በእርግጥም የሚያዝበት መሆኑን ማረጋገጥ እንደሚገባው ከፍ/ብ/ሕ/ቁ/ 1140 ድንጋጌ መገንዘብ ይቻላል፡፡

በተያዘው ጉዳይ አመልካቾች ሁከት ተፈጥሮብናል የሚሉበትን ቤት በኪራይ ውል መሻነት ይዘው እንደሚገኙና የይዞታ መብት እንዳላቸው በጅጅጋ ዞን ከፍተኛ ፍ/ቤት ክርክር ሲደረግ በማስረጃነት 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 ቤቱ ስለሆነ የአመልካቾች አቤቱታ ውድቅ ሊደረግ ይገባል በማለት እንጂ ሁከት አልፈጠርኩም በማለት አይደለም፡፡

ተጠሪ በባለቤትነት ረገድ የሚያነሱት ክርክር ሁከት ተፈጥሯል ወይም 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 ውሳኔ መስጠቱ መሠረታዊ የሕግ ስህተት ሆኖ ተገኝቷል፡፡

ው ሳ ኔ

1. የጅጅጋ ዞን ከፍተኛ ፍ/ቤት በመ/ቁ. 149/97 በየካቲት 16 ቀን 1998 ዓ.ም ተጠሪ በአመልካቾች ላይ የፈፀመው ሁከት ይወገድ በማለት የሰጠውን ውሳኔ በማጽናት፣ የክልሉ ጠቅላይ ፍ/ቤት በመ/ቁ. 05/1/91/99 በጎንዶር 2 ቀን 1999 ዓ.ም የሰጠው ውሳኔ መሠረታዊ የሕግ ስህተት ስላለበት በፍ/ብ/ሕ/ሥ/ሥ/ቁ. 348(1) መሠረት ተሽሯል፡፡ ...

የሰበር መዝገብ ቁጥር 5028

የሰበር መ/ቁ. 5028
የፌዴራል ጠ/ፍ/ቤት ሰ/ሰሚ ችሎት
ጥቅምት 9 1994 ዓ.ም

አመልካች፣ የሁሩሙ ከተማ አስተዳደር ነገረፈጅ
መልስ ሰጭ፣ አቶ ብርሃኑ ...

በሁከት ማስወገድ ክስ (ፍብ/ሕግ ቁ. 1149/1)፣ ክሳሽ ሕጋዊ ባለይዞታ መሆኑን እንጂ ይህን ክስ ለማቅረብ ባለንብረት መሆኑን መሳየት የለበትም።

ከ 500 ካ.ሜ በላይ መያዝ በአዋጅ ቁ. 47/67 የተከለከለ መሆኑ ከአዋጁ በፊት በነበሩ ይዞታዎች ላይ ተፈፃሚ አይደለም።

ክሱ የተጀመረው በሁሩሙ ወረዳ ፍ/ቤት ሲሆን፣ አዋጅ ቁ. 47/67 ከመታወጁ በፊት ጀምሮ ለረጅም ጊዜ የአሁን መልስ ሰጭ ግብር እየከፈለ ከያዘው ቦታ፣ የከተማው አስተዳደር ከ500 ካ.ሜ በላይ ነው ያለውን ለሌሎች ሶስስት ተከሳሾች በመስጠቱ በፍብ/ሕግ ቁ. 1149/1 መሠረት ሁከት እንዲወገድ በሚጠይቅ ነው። የሥር ክሳሽ (የአሁን መልስ ሰጭ) በኦሮሚያ ክልል ሕግ መሠረት የተሰጠ የባለቤትነት ማረጋገጫ ስለሌለው ፍ/ቤቱ የሁከት ይወገድልኝ ክሱን አልተቀበለውም። ለኢሊባቡር ዞን ከፍተኛ ፍ/ቤት ይግባኝ ቢቀርብም ውጤቱ አልተለወጠም። ከኪያም ለኦሮሚያ ጠ/ፍ/ቤት በቀረበው ይግባኝ መነሻ፣ ይዞታው ከአዋጅ ቁ 47/67 በፊት የነበረ ከሆነ ከ500 ካሜ በላይ መያዝ እንደሚቻል እና ክሳሹ በሕጋዊ መንገድ ቦታውን እንደያዘ ያስረዳ በመሆኑ ፍ/ቤቱ የሥር ፍ/ቤት ውሳኔዎችን በመሻር ሁከት እንዲወገድ ትዕዛዝ ሰጥቷል። ይህን ውሳኔ የክልሉ ጠ/ፍ/ቤት ሰበር ችሎትም አጽንቶታል። አቤቱታ ለፌዴራል ጠ/ፍ/ቤት ሰበር ሰሚ ችሎት የቀረበው ይህን ውሳኔ በመቃወም ነው።

ውሳኔ፡-

1. አዋጅ ቁ. 47/67 ከአዋጁ በፊት የተያዙ ቦታዎችን መጠን ለመወሰን መመሪያ እንደሚወጣ ቢገልጽም ይህ መመሪያ አልወጣም። ስለሆነም ከአዋጅ በፊት ለነበረ ይዞታ ከ500 ካሜ በላይ መያዝ አይቻልም የተባለው የሕግ ድጋፍ የለውም።
2. ክሳሽ (የአሁን መልስ ሰጭ) ሁከት እንዲወገድ ያመለከተው ከአዋጁ በፊት በሕጋዊ መንገድ በያዘው ቦታ ላይ ነው።
3. መልስ ሰጭ የጠየቀው ሁከት እንዲወገድ እንጂ የባለቤትነትን ጥያቄ አላነሳም።
4. የኦሮሚያ ጠ/ፍ/ቤት እና ሰበር ሰሚ ውሳኔዎች የፀኑ ስለሆነ በፍብ/ሕግ 1149/1 መሠረት ሁከት አለ ተብሎ ተወስኗል።

ዳኞች፣ ከማል በድሪ፣ መንበረፀሐይ ታደሰ፣ አብዱልቃድር መሐመድ፣ ወ/ሚካኤል መሸሻ፣ አሰግድ ጋሻው

አመልካች፣ የሁሩሙ ከተማ አስተዳደር ነገረፈጅ
መልስ ሰጭ፣ አቶ ብርሃኑ ...

መዝገቡን መርምረን የሚከተለውን ውሳኔ ሰጥተናል።

ው ሳ ኔ

ጉዳዩ የተጀመረው በሁሩሙ ወረዳ ፍ/ቤት ሲሆን፣ አመልካች የሥር ተከሳሽ መልስ ሰጭ ደግሞ ከሳሽ ነበሩ። የመልስ ሰጭ ተወካይ በሥር አቅርቦት የነበረው ክስ ለረጅም ጊዜ የወካይ ሕጋዊ ይዞታው የሆነውን እና ግብር እየገበረበት ያለውን ቦታ በመጀመሪያ ደረጃ ተከሳሽ የሆኑት 4 የማዘጋጃ ቤት ባለሥልጣናት በላዩ ላይ የበቀለውን እና ግምቱ 1000 ብር የሆነውን

ሰብል በማውደም በሁለተኛ ደረጃ ተከሳሽ ለሆኑት 3 ግለሰቦች ቦታውን የሰጡ ሲሆን እነዚህም ሰዎች በመኖሪያ ቤታችን በራፍ ላይ መፀዳጃ ቤት በመሥራት፣ አውድማውን በማረስ ሁከት የፈጠሩብን ስለሆነ የጠፋው ንብረት ግምት ተከፍሎን በፍ/ብ/ሕ/ግ/ቁ 1149 መሠረት በይዞታችን ላይ የተነሳው ሁከት ይወገድልን ብሏል፡፡

በአንደኛ ደረጃ ተከሳሽ የሆኑት ቀርበው መ/ቤቱ የሕግ ጉዳይን የሚከታተል ስላለው እኛ በግል ልንከሰስ አይገባንም፣ ሁለተኛ ደረጃ ተከሳሾች ደግሞ ቤት የሠራነው ማዘጋጃ [ቤቱ] ቦታውን ሰጥቶን ስለሆነ ልንጠየቅ አይገባም ብለው በመቃወማቸው እና የማዘጋጃ ቤቱ ነገረ ፈጅም ጣልቃ እንዲገባ በመጠየቁ የወረዳው ፍ/ቤት ማዘጋጃ ቤቱ ጣልቃ ገብቶ እንዲከራከር ሌሎች ተከሳሰች እንዲሰናበቱ በማለት ብይን ሰጥቷል፡፡

ከዚያም የማዘጋጃ ቤቱ ነገረፈጅ መልሱን ያቀረበ ሲሆን፣ ለክሱ መሠረት የሆነው የባለ ይዞታነት ደብተር ወይንም ካርታ በሚጠይቀው የኦሮሚያ ክልላዊ መንግስት አዋጅ ቁ. 1/87 አንቀጽ 16 /ሀ/ ቢሆንም፣ ይህንን ለማሟላት ካርታም ሆነ የባለይዞታነት ደብተር አላቀረቡም፣ ስለሆነም የመንግሥት በሆነው መሬት ላይ ተቃውሞ ማቅረብ አይችሉም፣ በይዞታው ላይ ኪራይ ቢከፍሉበትም ከአዋጅ ቁ. 47/67 አንቀጽ 2 ቁ. 5 ውጭ ከ500 ካሬ ሜ. በላይ ይዞታ ስለያዙ ባለይዞታ አይሆኑም፣ ቤት ያልተሠራበትን የከተማ ቦታ ለሌላ ግለሰብ ለመስጠት ወይንም ለሌላ ጉዳይ ለማዋል የሚፈቅድ መመሪያ አለ፣ ማስተር ኘላኑን በተግባር ለማዋል በአዋጅ ቁ. 1/87 23/ሀ/ እና /ለ/ መሠረት የሠራን ስለሆነ አያስጠይቀንም፣ መሬቱን በ1964 ሲረከቡ መንግሥት መሬቱን ሲፈልገው ቤቱን አፈርሳለሁ ብለው ቃል የገቡ ስለሆነ መክሰስ አይችሉም፣ የከተማ አስተዳደር ከሕጋዊ ባለይዞታዎችም እንኳን በፍ/ብ/ሕግ/ቁ/1538 መሠረት መሬትን በማስተር ኘላን አቅፎ መውሰድ ይችላል፣ ከ500 ካሬ.ሜ በላይ ለአንድ ሰው መስጠት በሕግ የታገደ ሲሆን የከተማ ቦታ ያለአግባብ የያዙ ሰዎች በ45 ቀናቶች ውስጥ እንዲለቁ የሚጠይቅ መመሪያ አለ፣ በማለት መልስ ሰጥቷል፡፡

የመልስ ሰጭ ወኪልም የመልስ መልስ ያቀረበ ሲሆን፣ ይዞታውን አጥረው ቤት የተሠራበት ስለሆነ ለአዲስ ሰው ሊመራ አይችልም፣ ቦታው የሚወሰድ ከሆነም ካሳ የሚከፈለው በወቅቱ የገበያ ዋጋ ነው፣ የኦሮሚያ ደንብ ቦታውን ለማስፋፋት የሚፈልግ ግለሰብ ግብር እንዲከፍል ከሚል በስተቀር መጀመሪያ ካለበት ይዞታ ተነስቶ ለሌላ ግለሰብ መሰጠት አለበት አይልም በማለት ተከራክሯል፡፡

የወረዳው ፍ/ቤትም ጉዳዩን መርምሮ መልስ ሰጭ ከሕግ ውጭ በያዙት መሬት ላይ የቦታ ካርታ እና ኘላን የሌለውን ቤት በመሥራታቸው የሁሩሙ ከተማ ማዘጋጃ ቤት ለአዲስ ጠያቂዎች በመስጠቱ ቀደሞ ከኘላን ውጭ በተሠራ ቤት አስጠግቶ ወይም አጠገቡ ግንባታ ማካሄድ ማዘጋጃ ቤቱ የፈጠረው ችግር ነው ተብሎ ወይም የአዲስ ቤተሠሪዎች ነው በሚል ኘላን ያላቸው ቤቶችን በፍ/ብ/ሕግ/ቁ. 1149/1/ መፍረስ የለባቸውም፣ ለጠፋው ሰብል ግን የጠየቁት 1000 ብር ይከፈላቸው በማለት ውሳኔ ሰጥቷል፡፡

መልስ ሰጭም ይህንኑ ውሣኔ በመቃወም፣ የግል ተከሳሾች በመሥራት ላይ ያሉትን ቤት እንዲያቆሙና ለወደመው ንብረት ተጠያቂ እንዲሆኑ የጠየኩት የታለፈው አላግባብ ነው፣ በይዞታዬ ላይ መፀዳጃ ቤት በመሥራት መንገድ እየዘጉብኝ ነው የሚሉትን ቅሬታዎች በማንሳት፣ በበታች ፍ/ቤት የተሰጠው ውሳኔ ተሰርዞ በፍ/ብ/ሕግ/ቁ/1149/1/ እና 1178 መሠረት በመሠራት ላይ ያለው ቤት ቆሞ የጠፋው ንብረት ግምት ከወጪና ኪሳራ ጋር ይወሰንልኝ በማለት ይግባኙን ለኢሊባቡር ዞን ከፍተኛ ፍ/ቤት አቅርቧል፡፡ የከፍተኛው ፍ/ቤትም ጉዳዩን መርምሮ፣ መልስ ሰጭ መሬቱ የኔነው ሁከት ይወገድልኝ ከማለት በስተቀር እንደሕጉ ባለይዞታነት የሚገልፅ ደብተር አላቀረበም፣ ለተጨፈጨፈው ንብረት በክሱ ላይ የጠየቀው ገንዘብ ተፈቅዶለታል፣ ስለወጪና ኪሳራ ስለ የመውጫና መግቢያ መንገድ ማጣቱ ይግባኝ ባይ በሥር ስላልጠየቀ በፍ/ብ/ሥ/ሥ/ሕግ/ቁ/329/1/ መሠረት ተቀባይነት የለውም በማለት መዝገቡን በመዝጋት የወረዳው ፍ/ቤትን ውሳኔ አፅንቶታል፡፡

መልስ ሰጭም የሥር ፍ/ቤት ውሳኔን በመቃወም ይግባኙን ለኦሮሚያ ጠቅላይ ፍ/ቤት አቅርቧል። የጠቅላይ ፍ/ቤቱም ጉዳዩን መርምሮ በአዋጅ ቁ. 47/67 አንቀጽ 5/1 መሠረት መልስ ሰጭ ከ500 ካሬ.ሜ በላይ ለመያዝ መብት የለውም የተባለው አዋጁ በሥራ ላይ ከዋለ ወዲህ የሚሰጠውን የከተማ መሬት ብቻ የሚመለከት ስለሆነ ተቀባይነት የለውም፣ ይዞታውም ቤት የተሠራበት ስለሆነ መሬቱ በሥራ ላይ አልዋለም ለማለት አይቻልም፣ መሬቱ ለሕዝባዊ ሥራ መፈለጉ በማስረጃ ያልተረጋገጠ በመሆኑ ተቀባይነት የለውም በማለት የሥር ፍ/ቤቶችን ውሳኔ በመሻር ሁከት እንዲወገድ በማለት ወስኗል።

የአሁን አመልካችም ይህንኑ ውሳኔ በመቃወም የሕግ ስህተት ስላለበት በሰበር ይታይልኝ በማለት የኦሮሚያ ጠቅላይ ፍ/ቤት ሰበር ችሎትን የጠየቀ ሲሆን፣ ፍ/ቤቱ አቤቱታውን መርምሮ ውሳኔው የሕግ ስህተት የለበትም በማለት የጠቅላይ ፍ/ቤትን ውሳኔ አፅንቶታል።

የአሁኑ አቤቱታ ሊቀርብ የቻለውም ይህንኑ ውሳኔ በመቃወም ሲሆን አመልካች ነሐሴ 28 ቀን 1992 ዓ.ም. በተፃፈ አቤቱታ፣ በአዋጅ ቁ. 47/67 አንቀጽ 33 መሠረት የከተማ ይዞታ የመንግሥት እንደሆነ ተደንግጓል፣ በዚሁ አዋጅ አንቀጽ 5 መሠረት አንድ የከተማ ነዋሪ መያዝ የሚችለው የከተማ ቦታ 500 ካሬ ሜ. ብቻ ሆኖ ሳለ መልስ ሰጭ ከ500 ካሬ. ሜ. በላይ በሆነው ይዞታ ላይ ክርክር ሊያቀርቡ አይችሉም፣ አንድን የከተማ ቦታ ለሕዝብ ጥቅም ሲባል ለሌላ አገልግሎት ሊውል እንደሚችል የኦሮሚያ ደንብ ቁ.1/87 አንቀጽ 23/ለ/ ስለሚደነግግ በትርፍነት የተያዘው ቦታ ለግለሰቦች መሰጠቱ በሕግ ይደገፋል ካሉ በኋላ የኦሮሚያ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት ውሳኔ ከአዋጅ ቁ. 47/67 አንቀጽ 3 እና 5 ውጭ በመሆኑ እንዲሻር የከተማን ማስተር ኘላን ለማስፈፀም በአዋጁ ሙሉ ሥልጣን ተሰጥቶን እያለ፣ ከጭብጥ ውጭ በሆነ አካሄድ እና ከተጠሪ በኩልም ተቃውሞ ሳይቀርብበት ቅያሱን ለማስፈፀም ማስረጃ አላቀረቡም የተባለው እንዲሻርልን ብለዋል።

መልስ ሰጭም በ8/5/93 በተጻፈ የሰጠው መልስ በአጭሩ ሲታይ፣ የአንድን ግለሰብ የከተማ ቦታ የይዞታ መጠን በ500 ካሬ ሜትር ብቻ የሚገድበው በአዋጅ ቁጥር 47/67 አንቀጽ 5/1/ መሠረት ከአዋጁ መውጣት በኋላ የተያዘን ቦታ እንጂ ከአዋጁ በፊት የነበረን ቦታ አይደለም። የኔ ቦታ በእጄ ተይዞ የሚገኘው አዋጁ ከመውጣቱ በፊት ነው። በአዋጁ አንቀጽ 5/3/ ላይም ለመሥሪያ ቤት ወይም ለመኖሪያ ቦታ የተያዘ ቦታ መጠን በሚኒስትሩ ይወሰናል ቢባልም ይኸው አልተወሰነም። ስፋቱ 2166 ካሬ ሜትር የሆነው ቦታ ከአዋጁ መውጣት ጀምሮ እስከ 1987 ዓ.ም ድረስ በመልስ ሰጭ እጅ ይገኛል። በኦሮሚያ ክልል አዋጅ ቁ. 80/1986ን ለማስፈጸም በወጣው ደንብ ቁጥር 1/87 ላይ የከተማ ቦታ ይዞታዎች በሚመለከተው አንቀጽ 16/መ/ ላይ የከተማ ቦታንና ትርፍ ቤቶችን የመንግሥት ለማድረግ ከወጣው አዋጅ ቁ. 47/67 በፊት በጭሰኛነት ወይም በጥገኝነት ቦታ ይዘው የግንባታ ሥራ ያካሄዱበት ቦታ እንደነበር የከተማ ቦታ ይዞታ የሚቆጠር መሆኑ ተደንግጐአል። ይህንኑ አልፎ አመልካች ቦታዬን ሸንሽኖ ለግለሰቦች መሰጠቱ ሕገወጥ መሆኑ ታውቆ የኦሮሚያ ጠቅላይ ፍ/ቤትና ሰበር ችሎት የሰጠው ውሳኔ ይጽደቅልኝ የሚል ነው።

በዚህ ላይ አመልካች በ29/6/93 የተመለከተ የመልስ መልስ ሰጥቶ ክርክሩን አጠናክሮታል።

እኛም መዝገቡን መርምረናል። እንደመረመርነውም በዚህ ጉዳይ ውሳኔ ማግኘት ያለበት ነጥብ፣ አመልካች በመልስ ሰጭ ይዞታ ላይ ሁከት ፈጥሮአል ወይ? የሚለው ነው።

ከመዝገቡ መረዳት እንደተቻለው፣ መልስ ሰጭ በኦሮሚያ ክልል በሁሩሙ ወረዳ ፍ/ቤት ላይ በአራት የማዘጋጃ ቤት ሠራተኞች ተከሳሾች ለሶስቱ ተከሳሽ ግለሰቦች በላዩ ላይ የበቀለውን ሰብል በማውደም ከረጅም ጊዜ ጀምሮ የያዝኩት ቦታ ላይ መጸዳጃ ቤት በመሥራት አውድማውን በማረስ የፈጠሩት ሁከት ይወገድልኝ የሚል ክስ አቅርቦ፣ የመጀመሪያ አራቱ ተከሳሽ የነበሩት የአመልካች እንጂ እኛ በግላችን መከሰስ የለብንም ሲሉ፣ በሁለተኛ ደረጃ የተከሰሱትም ቤት የሰራነው ቦታውን አመልካች ሰጥቶን ስለሆነ ልንጠየቅ አይገባንምና አመልካች ጣልቃ እንዲገባ ይታዘዝልን በማለት አመለከቱ። ፍ/ቤቱም አመልካች ጣልቃ እንዲገባ፣ ሌሎች ተከሳሾች ይሰናበቱ ዘንድ አዞአል።

በዚህ መሠረትም አመልካች ቀርቦ፣ በኦሮሚያ ክልል አዋጅ ቁ. 1/87 አንቀጽ 16/ሀ/ መሠረት መልስ ሰጭ የባለይዞታነት ማስረጃ አላቀረበም፣ በአዋጅ ቁ. 47/67 አንቀጽ 2/5 ውጭ ከ500 ካሬ ሜትር በላይ መሬት መልስ ሰጭ ይዞአል፣ ከዚህ 500 ካ.ሜ በላይ የተያዘውን የከተማ መሬት ወይም ቦታ አመልካች ለሌላ ግለሰብ ለመስጠት ወይም ለሌላ ጉዳይ ለማዋል የሚፈቅድ መመሪያ አለ፣ በከተማው ማስተር ፕላን መሠትም ቦታው ለግለሰቦች አመልካች ሊሰጥ ችሎአልና የፈጠርነው ሁከት የለም የሚል መልስ ሰጥቷል፡፡

ፍ/ቤቱም መዝገቡን መርምሮ መልስ ሰጭ ከሕግ ውጭ በያዘው ቦታ ላይ የቦታ ካርታና ፕላን የሌለው ቤት በመሥራቱ ማዘጋጃ ቤቱ ቦታውን ለአዲስ ጠያቂዎች መሰጠቱ ሁከት ፈጥሮአል የሚያሰኝ አይደለም በማለት ወስኖአል፡፡

የክልሉ ከፍተኛ ፍ/ቤት በይግባኝ ውሳኔው ቀርቦለት የወረዳውን ፍ/ቤት ውሳኔ አጽንቶታል፡፡

የአሁኑ መልስ ሰጭም ውሳኔውን በመቃወም እንደገና ለኦሮሚያ ጠቅላይ ፍ/ቤት አቅርቦ መልስ ሰጭው ቦታውን የያዘው ከአዋጅ ቁ. 47/67 በፊት ሲሆን፣ በአዋጁ አንቀጽ 5/1/ መሠረት 500 ካሬ ሜትር በላይ ለመያዝ መብት የማይኖረው ከአዋጁ መውጣት በኋላ ሲሆን ነው፣ በይዞታውም ላይ ቤት የተሠራበት ስለሆነ መሬቱ ሥራ ላይ አልዋለም ለማለት አይቻልም በማለት የሥር ፍ/ቤቶቹን ውሳኔ ሽሮታል፡፡ ይህ ውሳኔ በአቤቱታ ቀርቦለት የክልሉ ሰበር ችሎቱም አጽንቶታል፡፡ አሁን የቀረበው አቤቱታ ይህንኑ ውሳኔ በመቃወም እንደሆነ ከላይ ተመልክተናል፡፡

በመሠረቱ በአዋጅ ቁ. 47/67 አንቀጽ 5 ንዑስ አንቀጽ 1 ላይ ለመኖሪያ ቤት መሥሪያ ጠያቂ ሊሰጥ የሚችለው የቦታ መጠን ከ500 ካሬ ሜትር በላይ እንደማይሆን ሲደነግግ፣ በዚህ አንቀጽ ንዑስ አንቀጽ 3 ላይ ደግሞ ከአዋጁ መውጣት በፊት የመኖሪያ ቤት ለመሥራትና ለመሳሰሉት የከተማ ቦታ ይዘው የሚገኙትን በተመለከተ አዋጁን ለማስፈጸም ሥልጣን የተሰጠው ሚኒስቴር የቦታውን መጠን እንደሚወስን ተደንግጓአል፡፡ ሚኒስቴሩ ግን እስከአሁን ድረስ የመልስ ሰጭን ጨምሮ አልወሰነም፡፡ ለመወሰኑም የቀረበ ማስረጃ የለም፡፡

በመሠረቱ በግራ ቀኙ መካከል የተነሳው ክርክር ወይም መልስ ሰጭው በመጀመሪያ ደረጃ ፍርድ ቤት ላይ ያቀረበው ክስ በእውነት በማዝበት ይዞታዬ ላይ ሁከት ተፈጥሮብኛልና ይገወድልኝ የሚል ነው እንጂ የባለቤትነት ክርክር አይደለም፡፡ ለክርክሩ ምክንያት የሆነውን ቦታ መልስ ሰጭው በይዞታው ሥር አድርጉ በእውነት ማዘዝ የጀመረው የከተማ ቦታና ትርፍ ቤት ለመንግሥት ያደረገው አዋጅ ከመውጣቱ በፊት ለመሆኑ አልተካደም፡፡ የእንዲህ ዓይነት ይዞታዎች መጠን በአስፈጻሚው ሚኒስቴር መ/ቤት አልተወሰነም፡፡ በእንዲህ ባለበት ሁኔታ የመልስ ሰጭን ቦታ አመልካች ነጥቆ ለሌላ ግለሰብ ለመስጠት አይችልም፡፡ ስለሆነም አመልካች የመልስ ሰጭን ይዞታ ነጥቆ ለሌሎች ሰዎች መስጠቱ በፍ/ሕ/ቁ. 1149/1/ መሠረት፣ በመልስ ሰጭ ይዞታ ላይ ሁከት መፍጠሩን ያመለክታል፡፡

ስለዚህም በነዚህ ምክንያቶች የኦሮሚያ ክልል ጠቅላይ ፍርድ ቤትና ሰበር ችሎት አመልካች በመልስ ሰጭ ይዞታ ላይ የፈጠረው ሁከት ይወገድ በማለት የሰጡት ውሳኔ የሚለወጥበት ምክንያት ስለሌለው ውሳኔውን በፍ/ሥ/ሥ/ሕ/ቁ. 348/1/ መሠረት አጽንተነዋል፡፡ ...

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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
   - Among staff members;
   - Between staff and students;
   - 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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