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About the Law School

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I. Background

The Law School commenced its academic work on the 19th of December 2002 as the Faculty of Law of Jimma University. For the first year, it accepted 158 advanced diploma students who graduated three years later. Then, the School has been accepting and teaching students in four first degree programs, namely, in the regular, evening, summer, and distance programs. Thus far, it has graduated thousands of students in the first three programs while the students in the distance program are yet to graduate for the first time.

Moreover, the Law School has commenced an LL.M program in **Commercial and Investment Law** in 2012/2013 (2005 E.C.). At the moment, it has 17 students in the program. This LL.M program is a two years program. Indeed, the School is now conducting a feasibility study to open new postgraduate programs.

In addition to its teaching jobs, the Law School has been publishing its law journal called **Jimma University Journal of Law**. It is a journal published at least once in a year. Besides, there are research works that the academic members of the School conduct although they are usually not published.

Finally, the Law School is making its presence in the community felt by rendering legal services to the indigent and the vulnerable parts of the society (such as children, women, persons with disabilities, persons with HIV/AIDS, and old persons) in Jimma town and Jimma Zone through its

Legal Aid Center. Currently, the Center has six branches and they are all doing great jobs to facilitate the enjoyment of the right of access to justice for the indigent and the vulnerable groups. Of course, the other main aim of the Centre is enabling our students to acquire practical legal skill before they graduate from the School.

II. Law School Academic Staff

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Author's Guide

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1. Contributions must be presented in their final form in English. The editors may consider contributions presented in other languages. They can be submitted to the editor-in-chief at dejulaw@gmail.com.
2. Special attention should be given to quotations, footnotes, and references which should accurate, complete and in accordance with the Journal's style sheet. The style sheet may be obtained from the editor-in-chief upon request.
3. The submission of contributions indicates that the authors consent, in the event of publication, to the automatic transfer of his/her copyright to the publisher Jimma University Journal of Law.

Behind Closed Doors: The Human Rights Conditions of Persons with Mental Disabilities in Ethiopian Psychiatric Facilities

Aytenew Debebe

Abstract

The Mental Disability Advocacy Center (MDAC) headquartered at Central European University has been carrying out a series of studies in Eastern and Central European Countries on the condition of persons with mental disabilities, (hereinafter, PWMDs), in psychiatric facilities titled as "*behind closed doors*". So far, neither the Ethiopian Human Rights Commission nor any other international human rights organization has aired any report from Ethiopian psychiatric facilities. This article is an attempt to unveil the human rights conditions of PWMDs "behind closed doors" in Ethiopia. As a signatory to the Convention on the Rights of Persons with Disabilities (hereinafter, CRPD), Ethiopia has undertaken to take all appropriate measures for the full inclusion and participation of persons with disabilities in the life of the mainstream society. However, the Country has failed to meet its obligations. Among other things, the absence of a special mental health law for the protection of the rights of PWMDs, nor a body that safeguards their condition in psychiatric facilities, the irregularities with the implementation of existing schemes and lack of coordination among responsible government bodies leave many PWMDs without much-needed support. These people are suffering from various forms of human rights violations behind closed doors in addition to lack of access to mental health services. This article has thus an objective of assessing the human rights conditions of PWMDs at the psychiatric settings in two selected facilities: the Amanuel Hospital and the Gefersa Mental Health Rehabilitation Center, which are the only major mental health hospital and a rehabilitation center in the country, respectively. The author believes that the assessment of the two institutions would represent the countrywide perspective.

1. Introduction

Ethiopia has ratified the CRPD in June 2010, which imposes a host of obligations on states towards the realization of the rights of persons with

disabilities on an equal basis with other persons. PWMDs are under the category of these vulnerable groups who require a special consideration by states so that they can be included in the society

However, like any other low-income country, the mental health services of Ethiopia have been proven evidently inadequate to the need.[1] In fact, the WHO described mental health in Ethiopia as "one of the most disadvantaged health programs, both in terms of facilities and trained manpower . . . with estimates of the average prevalence of mental disorders in Ethiopia at 15% for adults and 11% for children."[2] The government has not met its obligations in ensuring a highest standard of health for PWMDs[3] as its access is limited economically, geographically

[1]. Atalay Alem., 'Human Rights and Psychiatric Care in Africa in Particular in Ethiopia', *Acta Psychiatrica, Scandinavica* ISSN 0902-4441, Munksgaard , (2000), pp 93-96; WHO-AIMS Report on The Mental Health System of Ethiopia, (2005); (2012); Welansa Ayele., Interview with Tadias Magazine, August 20, 2012; Yeshashwork Kibour, 'Mind the Gap', Personal Reflections on the Mental Health Infrastructure of Ethiopia, Psychology International, April 2010

[2]. WHO, Regional Office for Africa, Ethiopia, Department of Mental Health and Substance Abuse, available at http://www.afro.who.int/en/ethiopia/country-programmes/mental-health-and-substance-abuse.html, accessed on April 12, 2012; See also in general WHO-AIMS Report on The Mental Health System of Ethiopia, 2005, *supra at note 1*

[3]. There is no rigid definition for mental disabilities due to the general evolving nature of disability as the CRPD has also refrained from defining disability. The CRPD under Article 1 gives a definition for persons with disabilities as 'persons who have long-term physical, mental, intellectual or sensory impairments that, in the face of various negative attitudes or physical obstacles, may prevent those persons from participating fully in society.' But for the purpose of this study, the definition forwarded by Special Rapporteur Erica, I. in the 'Principles, guidelines and guarantees for the protection of persons detained on grounds of mental ill health or suffering from mental disorder', who defined a PWMDs as 'one who in the course of his/her disability is unable to care for his/her own person or affairs, and requires care, treatment or control for his/her own protection or that of others or of the community' will be availed of. This may include disabilities arising from major mental illness and psychiatric disorders, e.g., schizophrenia and bipolar disorder; more minor mental ill health and disorders, often called psychosocial problems, e.g., mild anxiety disorders; Down's syndrome and other

and owing to lack of information. While the paradigm for the care of PWMDs has been shifting from institutional care to community one, it is disheartening in Ethiopia that there are only few institutions to give the necessary care. Hence, it would be an extravagant and untimely claim to advocate deinstitutionalization in the absence of community settings that fit for treatment of mental illness at this point of time.

Be that as it may, having institutions to admit PWMDs and giving the necessary treatment is not a system to be left out of serious scrutiny; there must be protection, respect and fulfillment of the human rights of the inmates all the way through admission, treatment and discharge. The provision of services in a segregated setting that cuts people off from society often for life is one of the concerns that need scrutiny. The arbitrary internment of people to institutions without due process and with no guarantees of a legal counsel to represent them is another practice that requires looking behind the closed doors. Moreover, the denial of appropriate rehabilitation services in psychiatric facilities, the practice of subjecting to unjustified medications without consent and adequate standards and the lack of human rights oversight and enforcement mechanisms to protect them against the broad range of abuses in institutions are all concerns that put the right of PWMDs at stake in psychiatric facilities. This has been attracting the conscious of a number of human rights bodies and advocacy groups as the clamor behind closed doors is increasing.[4]

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chromosomal abnormalities, brain damage before, during or after birth and malnutrition during early childhood.

[4]. Open Society Institute, Mental Health and Human Rights: A Resource Guide, 4th ed., (2009), available at **www.equalpartners.info,** accessed on July 1, 2012**,** pp 32; Theo

Though there is no specific undertaking adopted for the protection of the rights of PWMDs in psychiatric facilities, the Principles for the Protection of Persons with Mental Illness (hereinafter, MI Principles) approved by the UN can serve to complement the interpretation of other international human rights agreements as they apply to PWMDs.[5] In doing so, it is tried to see whether these standards are being met in the way these people live in the institutions and the human rights conditions in their admission, treatment and discharge.

Accordingly, the article unveils the human rights conditions of PWMDs in psychiatric settings, emphasizing the common civil and political rights that are susceptible to violation at psychiatric institutions including the right to liberty, the right to privacy, freedom from torture and all forms of ill treatment, right to legal counsel and the right to rehabilitation and community integration. The choice of these rights is not however arbitrary. The right to liberty is selected because the nature of the

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B., Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, 3 July 2003, pp 12-16; Tina, M., 'The CRPD and the right to be free from nonconsensual psychiatric interventions', Syracuse Journal of International law, Vol. 34, pp 405-428; Mental Disability Advocacy Center (MDAC), 'Human rights in psychiatric hospitals and social care institutions in Croatia', October 2011

[5].The MI Principles have been availed by human rights monitoring bodies. In the case of Victor Rosario Congo, for example, the Inter-American Commission on Human Rights made this finding: "The MI Principles are regarded as the most complete standards for protection of the rights of persons with mental disability at the international level. These principles serve as a guide to states in the design and/or reform of mental health systems and are of utmost utility in evaluating the practices of existing systems"; In the case between *Moore and Purohit Vs The Gambia* too, the African Commission in coming to its conclusion, it draws inspiration from Principle 1(2) of the MI Principles. It specifically submitted that Principle 1(2) requires that 'All persons with mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person'.

admission and treatment in psychiatric facilities is usually assimilated to *de facto* detention, in limiting the right to liberty.[6] This has made the right to liberty at the forefront in the study of the human rights of PWMDs in psychiatric facilities. Moreover, the rights to privacy and freedom from torture and all forms of inhumane treatment are routinely violated as their life behind closed doors and their health conditions readily lends them. The rights to legal counsel, rehabilitation and community integration have also a special importance for PWMDs for the respect and protection of all other rights. The cases presented are not however intended to be exhaustive; they are used as illustrative examples of the most common practices in the facilities.

The virtual absence of a special mental health legislation as a standard on admission of PWMDs and treatment benchmark has obviously made this study difficult. Therefore, the study is conducted based on semi-structured interviews with several stakeholders including the directors and psychiatrists at the respective institutions, patients and their care givers coupled with first-hand accounts by the author and secondary data based on the lens of international and national human right standards. The study has intentionally refrained from highly relying on the information obtained from the patients as it has appeared difficult to get the most reliable information from persons who do not recover from their severe mental illness.

[6] Lance, G. *et al*, 'Mental health and due process in the Americas: Protecting the human rights of persons involuntarily admitted to and detained in psychiatric institutions'. Wayne State University Law School Legal Studies Research Paper Series No. 08-302005, available at http://ssrn.com/ 1247069, accessed on July 12, 2012; See also Héyer, G. 'On the Justification for Civil Commitment', *Acta Psychiatr Scand*, (2000), Vol., 101, pp 65-71

2. The Right to Liberty

The right to liberty is recognized under numerous international and regional human rights instruments as well as in the Constitution of the Federal Democratic Republic of Ethiopia (hereinafter, FDRE).[7] Such incorporation is a guarantee that no one shall be denied of his liberty without due process. All restrictions on the liberty of a person shall be justified and based on fair hearing of the detainee. In psychiatric facilities, the liberty of a patient may be infringed in two cases: through involuntary admission and measures of seclusion and restraint. The history that the disability discourse came from clearly evidence that mental disability was a legitimate ground to deprive the liberty of those persons.[8] In reaction to this legacy, the CRPD emerged totally against the deprivation of liberty based on disability and, disability and legal capacity are totally de-linked.[9] Even though involuntary admissions and measures of restraint and seclusion are not supposed to be wholly excluded, they should be carefully monitored taking into account the due

[7] Article 9(1) of the ICCPR and Article 14(1) of CRPD have similar undertakings on the right of persons to liberty and security the latter specifically on persons with disabilities. Article 6 of the ACHPR further states that no one may be arbitrarily arrested or detained. Prohibition against arbitrariness requires among other things that deprivation of liberty shall be under the authority and supervision of persons procedurally and substantively competent to certify it. This is substantiated by the decision of the African Commission in the case *Moore and purhoit Vs the Gambia*, when it decides, "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained". The FDRE Constitution also guarantees the right to liberty and security of persons under article 17 which is the direct replica of the guarantees of the ICCPR and UDHR.

[8] Eric, R. & Clarence J., Human Rights in National Mental Health Legislation, Department of Mental Health and Substance Dependence, WHO, (2004); Lawrence O., 'International human rights law and mental disability', March-April 2004, Hastings Center Report.

[9] CRPD, United Nations Convention on the Rights of Persons with Disabilities(CRPD), adopted by General Assembly resolution 61/106 of 13 December 2006, article12; Tina M. Supra at note 4

process rights of inmates. These circumstances and their implementation at the selected institutions will be discussed in their order in the following sub-sections.

2.1.Involuntary Admission

As pointed out above, admission to a psychiatric facility is equated with *de facto* detention for all practical purposes as it causes restriction on the liberty of a person. Unless one is released based on the decision of a psychiatrist, an inmate is not allowed to leave at any time. In this regard, the Human Rights Committee recalls that the protection of liberty and security under Article 9 of the ICCPR is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as mental illness.[10] This imports an obligation up on States Parties to ensure that measures depriving an individual of his/her liberty, including for mental health reasons, should comply with Article 9 of the ICCPR. This engenders another important guarantee, i.e., the guarantee of control by a court of the legality of detention to be applicable to all persons deprived of their liberty by arrest or detention.[11] The Committee has submitted its Concluding Observation on the report of Estonia in this respect as:

> '*the State Party should ensure that measures depriving an individual of his or her liberty, including for mental health reasons, comply with Article 9 of the Covenant. The Committee recalls the obligation of the State Party to enable a person detained for mental health reasons to initiate proceedings to review the lawfulness of his/her detention.*'[12]

[10] Human Rights Committee, General Comment No 8, 'Right to liberty and security of persons', (article 9), (16th session), (1982), Para 1
[11]. Ibid. Para 4
[12]. Human Rights Committee, Concluding Observations on the Report of Estonia on article 9 of the ICCPR, 77th session, (2003), Para. 10

This is a reminder to make sure that due process is complied with before a person is committed to a psychiatric facility involuntarily.[13]

In the absence of any normative standards on admission in Ethiopia, Amanuel Hospital admits patients without any regard to their consent. The Gefersa Rehabilitation Center on the other hand has been serving simply as a "dumping ground" for long time since its establishment during the Derg regime for all of persons with disabilities. It is absurd to see persons with different kinds of disabilities living together for long time without any distinction on their treatment and residence facilities. Recently, after the "Brother Charities" took over the Center, it has developed a standard for admission that lists down the conditions to be complied with upon admission complemented with a contract form to be signed by the patient and his/her respective family member with the Center.[14] Despite this, the Center is more concerned if there is a family member to consent on behalf of the patient. What is really required in both facilities is the consent of the family member or any escort coupled with the severity of the condition. This is true especially for persons with

[13] Due process rights traditionally termed as 'fair trial rights', are guaranteed under ICCPR, article 14; The FDRE Constitution under articles 19-23 has guaranteed these fair trial rights.
The African Commission in the case between *Moore and Purhoit vs. The Gambia*, decided that the State should create an expert body to review the cases of all persons detained under the Lunatics Detention Act(LDA) and make appropriate recommendations for their treatment or release.

[14] This standard is a recent development after the Rehabilitation Center is given to a faith-based organization, 'Brothers' Charity'. Before that, the Center has been used simply as a 'dumping zone' for persons with disabilities. It is ironic that persons with physical and mental disabilities are living together in the Center. But, this new standard is not yet tested in practice as the Center does not admit new patients.

psychosis as most of them come to treatment against their will.[15] Families, friends, neighbours, work-mates and the police bring persons with psychosis to the Amanuel Hospital.[16] Especially, the will of this category of persons is usually not taken into consideration because in most cases they are not thought to have insight into their conditions.[17]

This arbitrary and involuntary admission to a psychiatric facility involves a serious deprivation of a person's liberty and a potential source of violation of other human rights, including the right to be free from torture and other forms of ill treatment and the rights to privacy, among others. Indeed, Amanuel Hospital has an in-patient admission procedure based on objectively accepted psychiatric criteria *inter alia*, existence of a severe mental illness, threat of imminent harm or deterioration and necessity of institutional treatment.[18] Nevertheless, these procedures are alien to any legal guarantees for involuntary admission as solely psychiatric professionals make decisions without leaving a room for the patient's view or his/her right to be represented by a legal counsel. There is no indication in the record of the patients whether they are voluntarily or involuntarily admitted. This creates another lacuna on possible review by external bodies about the extent to which coercion is committed at admission and in effect the respect of the fundamental right to liberty of PWMDs is respected.

[15] Psychotic persons have a disorder such as schizophrenia or mania that is marked by distorted perception of reality and paranoia. This leads them to believe people around them are conspiring to harm them and they perceive the attempt for treatment by a close person as threat against them.
[16] Interview with Dr Lulu Bekana, Medical Director, Amanuel Hospital, on July 2, 2012, Addis Ababa , Ethiopia
[17] Atalay Alem., Supra at note 1
[18] Interview with Dr Lulu Bekana, Supra at note 16

The CRPD has altogether rejected coercive mental health care when it provides that care should be provided to persons with disabilities on the basis of free and informed consent, on an equal basis with others. It also requires health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care.[19] However, if we have to be realistic, this undertaking may not take us far as coercion-free psychiatric care may not be to the best interest of the patient as the latter may sometimes lack the insight about his/her conditions and the State may have a duty to take care of them from an imminent danger to themselves and the community. A person who has lost his conscious, or who has a suicidal temptation, unless she/he is watched out seriously, may cause something worse which may amount to violation of right to life for not taking proper care.[20] This gap could be rather rectified by a system of complaint or review body on involuntary admissions so that both interests can be maintained.[21]

The decision as to whether the person should be admitted involuntarily, while initially a medical or psychiatric determination should ultimately

[19] CRPD, Supra at note 9, Article 25

[20] The right to life imposes the positive duty protecting individuals beyond respect of the right on the State. One of this may be to take care of individuals from losing their life out of suicide while it can stop it. The UN Human Rights Committee, states in this respect that "the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures." General Comment on article 6, Report of the Human Right Committee, 37th Session, Para. 93-94

[21] Héyer, G., Supra at note 6, pp 66

be subject to judicial review to ensure that the determination is consistent with legal standards.[22] The MI principles demand that:

> '*PWMDs who are involuntarily admitted to a psychiatric facility must have the right to a fair and timely review of their detention by a judicial or other independent and impartial body established by domestic law and functioning in accordance with procedures laid down by domestic law.'*[23]

Further, the continuing necessity of a person's internment must be reviewed at periodic intervals by an independent tribunal. The review body shall,

> *'in formulating its decisions, have the assistance of one or more qualified and independent mental health practitioners and take their advice into account and issue a decision on the involuntary commitment of a person as soon as and shall periodically review the cases of involuntary patients.'*[24]

These human rights protections provide a procedural check on the admission process and ensure that no one is forced to remain in a psychiatric facility if it no longer meets a health justification as that amounts to deprivation of liberty of a person.

In Ethiopia, where there is no any legislative guarantee on admission proceedings, there are no judicial reviews for involuntarily admitted persons. For what is adding 'an insult to the injury', there is even no review of the decision of a psychiatrist to involuntary admission by another psychiatrist or that of a board of psychiatrists. The decision of a

[22] MI Principles, Supra at note 5, Principle 16, Para. 2

[23] MI Principles, Principle 17, Para.1

[24]Ibid. Under Principle 17, Para 2, Independent review of psychiatric commitment is guaranteed by the MI Principles, Principle 16, and under the ICCPR, article 9. The MI Principles and international conventions protecting arbitrary detention require that states make the minimal investments necessary to ensure adequate, independent review of psychiatric commitments.

psychiatrist to commit a patient serves as a 'rubber stamp' and it is not reviewable. One may wonder here that while there is a clamor about the lack of in-patient facilities, a psychiatrist would not dare to admit a person involuntarily. In fact, it is not news that the availability of in-patient services is seriously inadequate in the country. However, this does not ensure that the human rights of persons to liberty are not endangered. For instance, a psychiatrist does not consider family and professional conflicts with the patient when the latter appear before him involuntarily escorted by a family member or professional associate.[25] This amounts to a violation of the due process that in effect is arbitrarily denying one's liberty against fundamental guarantees.

2.2. Seclusion and Restraint

After being interned to a psychiatric facility, another circumstance that PWMDs would face is solitary confinement and chaining as a form of control and/or medical treatment. These measures are known as seclusion and restraint often practiced in psychiatric facilities based on clinical assumptions. Seclusion and restraint may take different forms including environmental restraints by imposing barriers to free personal movement that confine patients to specific areas in seclusion rooms; physical restraints using appliances, usually chains and cuffs that inhibit free physical movement and cannot be removed by the person to whom they are applied, such as hand restraints and cage beds and finally chemical restraints by pharmaceuticals that are prescribed for the main purpose of

[25] Interview with Dr Lulu Bekana, Supra at note 18.

inhibiting specific behavior, such as aggression.[26] These three kinds of restraints and seclusion may be used either alone or in a combination depending on the clinical objectives aimed to be met. However, although these measures may serve a purpose in the treatment process of the patient and the security of other residents, they have the potential to cause serious violations of the human rights of PWMDs unless they are effectively regulated.

The Special Rapporteur on Torture noted that seclusion and restraint of mental health patients is a method that tends to be avoided by modern psychiatric practice, though this form of restraint is still being used.[27] The Rapporteur recalled that the Basic Principles for the Treatment of Prisoners adopted and proclaimed by General Assembly by Resolution 45/111, in particular Principle seven,[28] shall be applicable to those confined in psychiatric institutions.[29] While it is clear that the restraint of violent and agitated patients may be necessary in some circumstances, the Rapporteur stressed that this should always be conducted in accordance with accepted guiding principles. Therefore, initial attempts to restrain agitated or violent patients should, as far as possible, be non-physical

[26] Gutheil, T. 'Observations on the Theoretical Bases for Seclusion of the Psychiatric Inpatient', American Journal of Psychiatry, Vol. 135, *(*1978), pp 325-328; Moosa, J., 'The Use of Restraints in Psychiatric Patients', South African Journal of Psychiatry, Vol. 15, No. 3, (2009).

[27] Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, in accordance with Assembly resolution 57/200 of 18 December 2002, Para49

[28] General Assembly resolution 45/111, 14 December 1990, Principle 7 reads as: "efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged"

[29] Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, in accordance with Assembly resolution 57/200 of 18 December 2002, Para 50

through verbal instruction and that where physical restraint is necessary, it should in principle be limited to manual control."[30] The MI Principles also corroborates this position when it states that:

> *"physical restraint or involuntary seclusion of a patient shall not be employed except in accordance with the officially approved procedures of the mental health facility and only when it is the only means available to prevent immediate or imminent harm to the patient or others. It shall not be prolonged beyond the period which is strictly necessary for this purpose. A patient who is restrained or secluded shall be kept under humane conditions and be under the care and close and regular supervision of qualified members of the staff."*[31]

Amanuel Hospital does not have any written guidelines in regulating the use of seclusion and restraint on which forms of restraint and seclusion to be used, in regulating when and how to administer restraint and seclusion and the duration of the measure.[32] This lack of standards has a series of implications which directly affects the proper implementation of the measures *per se*. Nor are there registers kept for this purpose which have to be signed and completed by the relevant medical practitioner who follows up the restrained and secluded person. In the absence of any record, it is hardly possible to know if all other means short of seclusion are exhausted and if the less restrictive method is availed of before

[30] Ibid. Para 51

[31] MI Principles, Supra at note 24, Principle 11, Para11

[32] Although, the research is limited to two mental health facilities, we can comfortably say that all other mental health facilities in Ethiopia do not have a guideline on seclusion and restraint as they are often guided by the Amanuel Hospital in many aspects of mental health service.

employing the most restrictive one. Moreover, the lack of the record will complicate monitoring the frequency and duration of seclusion and restraint. This is exacerbated by the lack of consistent communications between the psychiatrist who ordered the seclusion or restraint and the clinical staff who follows it up. So, a nurse or another staff around may restrain the patient or send to a seclusion room out of mere intuition without a written order by the psychiatrist and any guidelines to follow. Moreover, there are no guarantees for timely and comprehensive assessments and reevaluation of patients under restraint and seclusion to identify persons at risk, including complete bio-psychosocial evaluations, detailed past psychiatric history and careful physical examination.

While the seclusion rooms are closed, the Medical Director of Amanuel Hospital mentioned that restraints are practiced only in some situations as a last resort after therapeutic measures are exhausted.[33] Despite this, handcuffed patients are seen here and there together with others wandering in the Hospital's compound and few patients are seen chained with their beds in the wards. The survivors of restraint accuse that any nurse or a person following up a patient may order to be handcuffed without getting a direction from a psychiatrist.[34]

Moreover, Amanuel Hospital is situated next to the Ethiopian Commodity Exchange (ECX), the largest grain market in the country, on a slummy area that is highly trafficked with loaded and unloaded Lorries all through the day and the night. This endangers the life and security of

[33] Interview with Dr Lulu Bekana, Supra at note 25
[34] Interview with Abraham Kassahun, an inmate at Amanuel Hospital, interview held on July 19, 2012.

the inmates of the hospital as there are complaints on the hospital that patients are absconding from the compound. In fact, there is construction underway to shift this hospital to around Kotebe in Addis Ababa. However, it is unlikely to see immediate transfer as the construction is taking longer time than initially imagined. Apart from the access to health point of view, the construction and renovation of institutions for PWMDs partly proves that Ethiopia is yet lingering on the medical model of addressing disability than to work on the social model.

At the Gefersa Rehabilitation Center, the manager divulged that restraining patients with big chains was pervasive when they arrived to take over the Center before six months.[35] What they did immediately was to abandon the system of restraint altogether and collect back all the chains in use believing that they could manage the aggressive patients using medication. While this is commendable, it has however opened for underground restraint without the knowledge of any professional caretaker. The representative of the inmates witnessed that when anyone disturbs his/her ward mates at the nighttime, the mates would chain him to his bed using the bed sheets and they would bring to the nurses in the morning.[36] This clandestine and haphazard restraining of the inmates readily lends a room for serious deprivation of their rights. There are even cases that the inmates drag those who are disturbing out forcing them to spend the whole night wandering in the compound that exposes

[35] Interview with Brother Eric, manager of the Gefersa Rehabilitation Center, interview held on July 10, 2012, Gefersa.
[36] Interview with Shibabaw Workie, a representative for inmates at Gefersa Rehabilitation Center, interview held on July 10, 2012, Gefersa

them to more threats to life and security.[37] These situations really constitute a threat to the life and security of the inmates. Therefore, the move towards total abandonment of restraint at the Gefersa Rehabilitation Center may be counter-productive since it does not salvage the residents from infringement of their liberty and security, unless a follow up mechanism is adopted together with the abandonment of the restraint system.

Finally, the arbitrary internment of PWMDs in to psychiatric facilities may have an effect on the rights of children causing an emotional distress. When we send parents to psychiatric facilities, the right of children to live with their parents and to be intact in family relationships would obviously be affected and come under strain.[38] Especially, children may feel despair and deprivation when their parents are interned to psychiatric facilities involuntarily.

3. Freedom from Torture and all forms of Ill Treatment

The prohibition of torture and cruel, inhuman or degrading treatment or punishment is among the most serious obligations reflected in a host of international instruments, including a specialized convention on the subject.[39] The prohibition of torture in fact has attained the status of a

[37] Ibid.

[38] CRC, adopted by the UN General Assembly in resolution 44/25 of 20 November 1989 at New York, Article 8(1) of the CRC requires States Parties to guarantee children to family relations as one element of recognition and respect of the identity of children be preserved.

[39] The CAT, UDHR, ICCPR, ACHPR have all prescriptions on the prohibition of torture. The FRDE Constitution, too, though it does not indicate torture explicitly, the prohibitions against other forms of ill treatment under article 18 are considered as sufficient guarantees against torture.

peremptory norm under international law that can never be derogated from even in emergency situations. As such, it must be regarded as having attained the status of customary international law and, moreover, there is ample authority for the proposition that the prohibition of torture be assigned *jus cogens* status.[40] While the ICCPR does not contain any definition of torture, the CAT has come up with a definition to be availed of for that Convention only, which is in fact used for further analysis of the concept.[41] There is always an argument over the distinction between torture on the one hand and cruel, inhuman, and degrading treatment or punishment on the other. But the Human Rights Committee has asserted that it does not:

> "*consider it necessary to develop a list of prohibited acts or to establish sharp distinctions between different kinds of punishment or treatment; the distinction depends on the nature, purpose and severity of the treatment applied*".[42]

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[40] The *jus cogens* status of the torture prohibition has been recognized by the Committee against Torture, the treaty body that monitors the Convention against Torture, and provides authoritative interpretations of CAT obligations. See also U.N. Committee Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No. 2: Implementation of article 2 by States Parties, P 1, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008); See also Bassiouni, M. & Daniel, D., An Appraisal of Torture in International Law and Practice: The need for an international convention for the prevention and suppression of torture, (1977), p. 67-88; Rosalyn, H., 'Derogations under human rights treaties', British Year Book of International Law, Vol. 48, (1978), pp 282

[41] CAT, adopted by the UN General Assembly in resolution 39/46 of 10 December 1984 at New York, Article 1

[42] Human Rights Committee, Supra at note 12, General Comment No. 20 on article7 of the ICCPR, Para 4, The common elements pertaining to all acts within the torture and ill-treatment prohibition include: (i) meeting a minimum threshold level of severity; (ii) subjective and objective assessment; (iii) physical and or mental suffering fall within the scope of protection; (iv) the protection is not confined to the criminal investigation and judicial process; See generally Gabrielle, M. & Olivia, S. (eds.), Torture and other offenses involving the violation of physical and mental integrity of the human person, in substantive and procedural aspects of international criminal law, (2000), pp 226-27,

The first instrument that prohibits torture and cruel, inhuman, or degrading treatment or punishment in contemporary human rights law is the UDHR, which states: "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[43] Article 7 of the ICCPR reaffirms this when it clearly sets out that

> "*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation*."

The ICCPR went on to guarantee that all individuals deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.[44] The CRPD on the other hand reaffirming the above prohibitions requires States to take effective measures to prevent persons with disabilities, on an equal basis with others, from being subjected to such treatment.[45] The prohibition set out in Article 15 of the CRPD is reinforced by Article 17 that simply and decidedly guarantees the physical and mental integrity of persons with disabilities.[46] The protection from degrading treatment is reinforced for persons in psychiatric facilities under the MI Principles which states that

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[43] UDHR, adopted and proclaimed by the UN General Assembly in resolution 217 A (III) of 10 December 1948 at Paris, Article 5.

[44] ICCPR, adopted by the UN General Assembly in resolution 2200 A (XXI) of 16 December 1966 at New York, article 10.

[45] CRPD, Supra at note 365, Article 15; Article 1 of the CRPD also provided *inter alia* that the purpose of the Convention is to promote respect for the inherent dignity of persons with disability, (which includes persons with mental disabilities).

[46] Still, Articles 15 and 17 of the CRPD must be understood by reference to the CRPD general principles in Article 3, along with other substantive articles relating to legal capacity, informed consent, and similar topics.

> "every patient shall be protected from harm, including unjustified medication, abuse by other patients, staff or others or other acts causing mental distress or physical discomfort".[47]

All the above guarantees on the freedom from torture and all other forms of ill treatment shall therefore be applicable to persons who are interned at psychiatric facilities who are prone to these sorts of treatments as evidenced in many institutions.[48] As it is pointed out somewhere above, the Human Rights Committee has submitted that "it is appropriate to emphasize that article 7 of the ICCPR protects, in particular […] patients in […] medical institutions".[49] While treatments of PWMDs after admission are issues to be dealt with independently, involuntary admission and lack of a review body shall be scrutinized if they do amount to the violation of the above undertakings by themselves. In this regard, the Special Rapporteur believes that the internment of mentally sane individuals in a psychiatric institution may amount to a form of ill-treatment and in certain circumstances, to torture.[50] In fact, while a person is healthy, it is degrading to be treated like an insane person and to be subjected to unjustified medications and be cared for together with PWMDs. This illusion and confusing treatment may even expose one to a psychiatric disorder.

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[47] MI Principles, Supra at note 31, Principle 8, Para2

[48] See Mental Disability Rights International (MDRI), 'Human rights & mental health': Mexico, (2000), pp 13-41; MDRI, 'Children in Russia's institutions': Human rights and opportunities for reform, (1999), pp 10-23; MDRI, 'Human rights & mental health': Hungary, (1997), available at http://www.mdri.org/PDFs/reports/Hungary.pdf; MDRI, 'Human rights & mental health': Uruguay, (1995), pp 16-48. All these reports corroborate that egregious human rights violations are pervasive in psychiatric facilities.

[49] The Human Rights Committee, Supra at note 42, General Comment 9 on Article 10 of the ICCPR, Para 4

[50] Ibid. Para 48

Another case of torture that is often perpetrated at psychiatric facilities is 'nonconsensual psychiatric and medical interventions' which have been contemplated as torture or cruel, inhuman or degrading treatment and prohibited by all the instruments which deal with torture.[51] On this point, the Special Rapporteur on Torture emphasized that certain practices such as irreversible treatments, including sterilization or psychosurgery, experimental treatment without informed consent which are expressly forbidden by the MI Principles, shall be prohibited, as they may amount to a form of ill-treatment or even, in certain circumstances, to torture. However, the right to informed consent and the right to refuse treatment may be restricted, but only under limited circumstances specified in international standards.[52] As it is described by the Special Rapporteur on the right to highest attainable standard of health, strict protections are needed to protect the right to informed consent for PWMDs. In the Rapporteur's experience, decisions to administer treatment without consent are often driven by inappropriate considerations, in the context of ignorance or stigma surrounding mental disabilities and expediency on the part of staff.[53] This is inherently incompatible with the right to health,

[51] Article 15 of CRPD, in line with the terms of Article 7 of the ICCPR expressly prohibits medical or scientific experimentation on persons with disabilities without their free consent. Moreover, Article 15 of the CRPD, read together with Article 17 (respect for mental and physical integrity), Article 19 (right to independent living in the community), and article 12 (legal capacity), in particular, require the application of a highly robust informed consent regime. Therefore, the right to informed consent to treatment is one of the fundamental tenets of the right to autonomy of an individual.

[52] MI principles, Supra at note 47, Principle 11

[53] Hunt, P., Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest
attainable standard of physical and mental health, Commission on Human Rights, 61st session, Item 10,
E/CN.4/2005/51, Para 89

the prohibition of discrimination on the ground of disability, and other provisions in the MI Principles. In such circumstances, the Rapporteur recommends that it is important that the procedural safeguards protecting the right to informed consent are both watertight and strictly applied.[54] Recently, the European Court of Human Rights issued a strong judgment on the rights of PWMDs to be free from arbitrary interference with their rights to liberty and to self-determination.[55] The Court found a violation of Article 5(1) of the European Convention of Human Rights on the right to liberty, which has a similar content with the protections under Article 9 of ICCPR. In doing so, it articulated principles upholding the rights of PWMDs to make choices about their own treatment and of the need for less restrictive alternatives to detention.[56]

Lack of consent and review on the admission of an involuntary patient will continue all through the treatment process since there is no system to get the consent of the patient as treatments are solely administered based on the discretion of the psychiatrist and sometimes with the consent of a

[54] Ibid. Para 90-91

[55] ECtHR, the judgment in the case of *Plesó v. Hungary,* Application no. 41242/08, 2 October 2012

[56] In particular, the Court upheld the value of autonomy and self-determination, including the right to refuse treatment, for persons with mental disabilities, stating that "it is incumbent on the authorities to strike a fair balance between the competing interests emanating, on the one hand, from society's responsibility to secure the best possible health care for those with diminished faculties. The Court moreover found that the Hungarian courts had perceived the applicant's refusal to undergo hospitalization as proof of his lack of insight, rather than as "the exercise of his right to self-determination. Finally, the Court said that, "compulsory psychiatric treatment often entails a medical intervention in defiance of the subject's will, such as forced administration of medication, which will give rise to an interference with respect for his or her private life, and in particular his or her right to personal integrity", citing this as a reason for States to avoid compulsory hospitalization.

family member.[57] Therefore, psychiatrists are not required to ask for any form of consent to treatment from patients. The latter are not informed about risks or side effects of treatment or any alternatives for treatment that might have been available. At both Amanuel Hospital and Gefersa Center, there are no systems to get the consent of patients in the treatment process even where the latter are able to share their views over the procedure of the treatment and the type of treatment. The testimony of one inmate at Amanuel Hospital goes like this:

> "*I have been here for two months. It is only on the first day that I was asked by the doctor on my diagnosis and treatment. After that time, I have never been consulted about my treatment plan, alternative treatments and the progress I am showing even though I am able to give opinions about my treatment. I am just a passive recipient of what is given here."*[58]

In most cases, psychiatrists are under the impression that obtaining consent from family members is adequate.[59] Of course, patients may sometimes be unable to consent to their treatment depending on the severity of the illness they are suffering from. In these cases, getting the consent of the caregivers may suffice. But neither is there consulting families nor care givers on the treatment plan and the possible repercussions of the treatments administered on a patient.[60] This means

[57] Both of the medical directors of Amanuel Hospital and the Geferssa Rehabilitation Center mentioned that there is no generally accepted practice of informing people about the risks and side effects of treatment in or for providing them an opportunity to refuse or seek alternative forms of treatment.
[58] Interview with Abraham Kassahun, Supra at note 34
[59] Interview with Dr Lulu Bekana, Supra at note 33
[60] Mulu Haile and Nakachew Asmare. whom the author interviewed while caring for their respective families confirm that neither patients nor family members have any say

that inmates are at the mercy of whatever plans the psychiatrist or head nurse happened to consider suitable for them. This lack of consultation and securing the consent of the patients and their family members or care givers gives a 'blank cheque' for the persons following up to administer the treatment they think fit. In such cases, there are no guarantees if sterilization and abortion, which are irreversible forms of treatment, are not administered without the consent of the patient.

The other circumstance that exposes PWMDs to torture and degrading treatments is Electro-Convulsive Therapy (hereinafter, ECT) which is practiced in psychiatric facilities. ECT is a form of treatment widely used to treat depressed patients, which is terrifying, especially if administered without anesthesia or muscle relaxants as the body shakes in a convulsion that can cause fractures. However, use of anesthesia and muscle relaxants in "modified electroshock" necessitates the use of more electricity to achieve a seizure, which can cause increased brain damage and might not be as effective as the treatment in its unmodified form.[61] This has been evidenced when some of the persons against whom ECT is administered have suffered from loss of memories long time after it is administered.[62] This may even cause a permanent loss of memory. Abrams R. has observed that:

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over the treatment plan and progress of the patients. Everything is top down that the psychiatrists order and the nurses administer.

[61] Squire, L. and Slater, P., "Electroconvulsive therapy and complaints of memory dysfunction: A prospective three-year follow-up study", British Journal of Psychiatry, Vol.142, (1983), pp1-8; Zielinski, R., *et al*., "Cardiovascular complications of ECT in depressed patients with cardiac disease", American Journal of Psychiatry, Vol.150, (1993), pp 904-909.

[62] The Royal College of Psychiatrists, 'Information on ECT: pros and cons of ECT treatment', available at www.rcpsych.ac.uk/mentalhealthinfo/**treatments**/**ect**.aspx , accessed on July 13, 2012

> *'... a patient recovering consciousness from ECT might understandably exhibit multiform abnormalities of all aspects of thinking, feeling and behaving, including disturbed memory, impaired comprehension, automatic movements, a dazed facial expression and motor restlessness.'*[63]

Boyle G. on the other hand reviewed the literature on ECT and stated:

> *'there is considerable empirical evidence that ECT induces significant and to some extent lasting brain impairment. The studies … suggest that ECT is potentially a harmful procedure, as indeed are most naturally occurring episodes of brain trauma resulting in concussion, unconsciousness and grand mal-epileptic seizures, Accordingly, the continued use of ECT in psychiatry must be questioned very seriously.'* [64]

So, whether it is modified or not, ECT causes a serious pain and should be regarded as a degrading treatment. At Amanuel Hospital, modified ECT is a common way of treatment as it is taken as an effective way of treatment for the seriously depressed patients.[65]

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[63] Abrams, R., Electro-convulsive therapy, 3rd ed., Oxford University Press, New York, (1997), pp 214.

[64] Boyle, G., 'Concussion of the brain with electroconvulsive shock therapy (ECT)': An appropriate treatment for depression and suicidal ideation, Australian Clinical Psychology, (1986), pp 23

[65] Dr Yonas Bahiretibeb, a practicing psychiatrist considers the move against the ECT as against the effective treatment of persons with mental illness. He is astounded with the change he has observed after he administered ECT for the patients. He thus considers it a 'miraculous diagnosis' and he supports the continuation of it as long as it is administered in a modified form using anesthesia.

Besides the above cases of torture and ill treatment, there are allegations that PWMDs are transported to the Butajira Mental Health Research Center from Amanuel Hospital after the hospital released them. These persons are taken there when their treatment is unsuccessful and where there is no one to take them back home. The allegations submitted that researches and medical experimentations are carried out on these patients against their dignity and physical and mental integrity. Unfortunately, the efforts of the author to verify these allegations were not successful. The Human Rights Committee has a strict proscription on this point when it states that:

> "article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. . . The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health."[66]

The Ethical Principles for Medical Research Involving Human Subjects of the World Medical Association Declaration of Helsinki further addresses the limited conditions under which such research may be conducted. Principle 24 provides that research subjects who are legally incompetent or physically or mentally incapable of giving consent should not be included in research unless the research is necessary to promote

[66] Human Rights Committee, Supra at note 49, General Comment 20, para.7; Ethiopia, a signatory to both the ICCPR and CAT has an obligation to protect individuals from these set of practices which tantamount to torture and other forms of ill treatment.

the health of the population represented and this research cannot instead be performed on legally competent persons.[67] If the above allegations are thus true, it is a clear violation of the guarantees under the ICCPR and the CRPD.

The Human Rights Committee has referenced both forced abortion and involuntary sterilization as violations of article 7 of the ICCPR.[68] These practices would obviously trigger violations of article 15 of the CRPD too, for the latter has imposed similar prohibitions against forced medications and medical experiments. The Special Rapporteur on Torture has also noted that:

> "given the particular vulnerability of women with disabilities, forced abortions and sterilizations of these women if they are the result of a lawful process by which decisions are made by their 'legal guardians' against their will, may constitute torture or ill-treatment."[69]

[67] The World Medical Association, Inc., World Medical Association Declaration of Helsinki: The ethical principles for medical research involving human subjects, available at http://www.wma.net/e/policy/17-c_e.html, accessed on July 15, 2012

[68] Human Rights Committee, Supra at note 66, Concluding observations on the report of Estonia on article 9 of the ICCPR, 77th session, (2003), Para. 10; See also Janet, E., 'Shared Understanding or consensus-masked disagreement? The anti-torture framework in the CRPD', Loyola of Los Angeles International and Comparative Law Review, Vol. 33, No 27, (2010), available at: http://digitalcommons.lmu.edu/ilr/vol33/iss1/3 accessed on ,July 21, 2012

[69] Manfred, N., Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Report on the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development', pp 38, (2008), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/101/61/PDF/G0810161.pdf, accessed on July 17, 2012

The better view, however, and one consistent with article 12 of the CRPD and its framework of supported decision-making is that such practices must be presumed to fall afoul of article 15 in the absence of free and informed consent.

Moreover, the Committee against Torture pointing to overcrowding, inadequate living conditions, and lengthy confinement in Russian psychiatric hospitals considered it as "tantamount to inhuman or degrading treatment."[70] The Human Rights Committee, too, called for the improvement of hygienic conditions and adequate treatment of the mentally ill in detention facilities in Bosnia and Herzegovina both in prisons and in mental health institutions as a protection from ill treatment.[71] Against this, at Amanuel Hospital and Gefersa Rehabilitation Center, there are at average 20 patients in one ward. Even though patients should be provided with a comfortable environment which ought to be safe, clean and attractive, the bad odor especially at the wards of the Gefersa Rehabilitation Center is horrifying even for a short time visit.

At both the Amanuel Hospital and the Gefersa Rehabilitation Center, the inmates spend their day being closed in the hospital's compound with no means of refreshment, or being provided with a television as the only means of entertainment. Most of them are seen smoking cigarettes and wandering here and there, and sometimes engaging in brawls which may be a threat to the life and security of the patients. While this may not constitute degrading treatment *per se*, the cumulative effect may be

[70] Committee against Torture, Conclusions and Recommendations on the Report Submitted by Russian Federation under article 19 of the ICCPR, 37th session, (2007), Para. 18

[71] The Human Rights Committee, Supra at note 68, Concluding comment on the initial report of Bosnia and Herzegovina on the ICCPR, 88th session (2006), Para. 19.

degrading, as the social and other skills of institutionalized individuals deteriorate on this kind of dulling environment. Indeed, the Human Rights Committee has noted that the duration of a practice will be taken into account when determining if it constitutes degrading treatment.[72]

Last but not least, the practice of continuously dressing patients in pyjamas at both Amanuel Hospital and Gefersa Rehabilitation Center is not conducive to strengthening personal identity and self-esteem as individualization of clothing should form part of the therapeutic process.[73] For these inmates who are accommodated in overcrowded conditions with few activities at their disposal, when they are obliged to wear institutionalized clothing throughout the day, 'the cumulative effect of such conditions is profoundly anti-therapeutic and is degrading.'[74]

4. The Right to Legal Counsel

The right of access to legal counsel is traditionally guaranteed in connection with the right to fair trial in the determination of a criminal

[72] Eric, R. & Clarence, J., 'The role of international human rights in national mental health legislation, www.mdri.org/pdf/WHO%20chapter%20in%20English_r1.pdf, pp 56, as cited in Department of Mental Health and Substance Dependence, WHO, (2004).

[73] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) guidelines and recommendations of the 1999 report emphasize that this practice is not conducive to strengthening personal identity and self-esteem, and that the individualisation of clothing should form part of the therapeutic process. Although this standard is not directly applicable to Ethiopia, it serves as a reminder for psychiatric facilities here which are practicing the continuous wearing of pyjamas.

[74] This is confirmed by the CPT in its visit to Turkey as it reported that institutionalized clothing for mental health patients is anti-therapeutic when it is practiced in dulling environments, Ref.: CPT/Inf (99) 2 [EN] - Publication Date: 23 February 1999, Para. 177

charge against a person.[75] As interpretations make clear, however, a legal counsel should be provided for all detained persons, because access to a legal counsel is an important means of ensuring that the rights of detained persons are respected.[76] The Human Rights Committee has recognized that the right to counsel means the right to an effective counsel and that should be provided immediately up on detention.[77]

Under the section on the right to liberty, it is pointed out that admission to psychiatric facilities amounts to detention for all practical purposes. This therefore imports a duty upon States Parties to provide a legal counsel for these persons who may be involuntarily admitted and treated in mental health facilities.[78] This is because, without the involvement of a legal counsel, it will be hard to prove if the PWMDs have consented for admission, especially where they came escorted by a family member or a police. The role of the counsel is not however limited to representation of the persons at admission proceedings. Even after admission, there is a need to provide with legal counsel, because without the availability of such counsel, it is virtually impossible to imagine the existence of valid consent of the patients towards treatment, right to apply against involuntary admission to a review body, right to accept or to refuse

[75] ICCPR, Supra at note 44, Article 14(3)(d)
[76] The Human Rights Committee, Supra at note 71, General Comment No 13, Para 11, The Committee understands the right to legal assistance to be extended for all detained persons who cannot defend themselves and could not afford a private lawyer. As submitted above, the Committee in its General Comment No 8, on the right to liberty and security of persons, it has subscribed admission to psychiatric facilities to detention that amounts to denial of liberty of a person. Thus, a person admitted to a psychiatric facility is entitled to be represented by a legal counsel of his own choice, if he is not in a position to hire his own lawyer.
[77] Ibid.
[78] Ibid.

treatment, or any aspect of forensic mental disability law. Especially where the persons lack capacity, their wishes and feelings should be given a room through the involvement of a legal counsel. In such cases, appointment of a guardian or a tutor may not be sufficient to represent the persons on their rights in their stay in the facilities. In order to fill such gaps, the CRPD requires States Parties to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.[79] One of such supports is to provide a legal counsel to help them effectively exercise their other human rights.

Lack of independent counsel and consistent judicial review mechanisms to PWMDs in psychiatric facilities is therefore another aspect of human rights violation. And the failure by the States Parties to provide a legal counsel is a violation of both the ICCPR, which mandates that they should provide a legal counsel for detained persons, and the CRPD, which requires States Parties to extend all necessary support for persons with disabilities to fully exercise their legal capacity.

In Ethiopia, there is no guarantee for legal counsel both at Amanuel Hospital and Gefersa Rehabilitation Center. There is currently no plan to employ a legal counsel at both institutions to ensure that all inmates who wish to be represented at admission, during treatment and release are put in touch with a legal counsel.[80] This left PWMDs at the psychiatric facilities prone to various forms of human rights violations ranging from

[79]CRPD, Supra at note 51, Article 12(3)

[80] Interview with Dr Lulu Bekana, Supra at note 59 and Brother Erick, Supra at note 35

involuntary admission to involuntary treatment and denial of legal capacity.

5. The Right to Rehabilitation

The other right of PWMDs that is usually infringed at psychiatric facilities is the right to rehabilitation guaranteed under the CRPD.[81] The CRPD specifically requires States Parties

> *"to take effective and appropriate measures including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability and full inclusion and participation in all aspects of life".*[82]

This in turn requires states to train professionals who can work in habilitation and rehabilitation services and making available assistive devices and technologies designed for persons with disabilities.[83] The failure to provide persons with disabilities appropriate services to ensure their integration into community life and enhance their independence runs thus against the commitment of States towards the right to rehabilitation, guaranteed under the CRPD. Especially PWMDs who are

[81] CRPD, Supra at note 79, Article 26; See generally Janardhana, N. & Naidu, D. 'Inclusion of people with mental illness in community based rehabilitation: need of the day'. International Journal of Psychosocial Rehabilitation, Vol. 16 No. 1, (2012), pp 117-124; Corrigan, P. et al, 'Mental illness stigma and the fundamental components of supported employment', Journal of Rehabilitation Psychology, Vol. 52, (2007), pp 451-457.

[82] Ibid. CRPD, Article 26(1)

[83] Ibid. CRPD, Article 26(2); Tsang, H., 'Applying social skills training in the context of vocational rehabilitation for people with schizophrenia', Journal of Nervous and Mental Disease, Vol.189, (2001), pp 90-98; Provencher, H. *et al*, 'The role of work in the recovery of persons with psychiatric disability', Psychiatric Rehabilitation Journal , Vol. 26, (2002), pp132-144

interned in psychiatric facilities are as a matter of fact delineated from the mainstream society and need to be rehabilitated as they lose ties either for short or extended time. This engenders obligations up on states to provide inmates with rehabilitative activities so that they can remain in touch with the community and facilitate easy integration up on discharge from the facilities. This may include providing skill trainings, formal education and leisure time activities in the facilities.

At Amanuel Hospital and Gefersa Rehabilitation Center, a significant number of persons are seen lying in their beds, or on the institution grounds, completely idle. In the absence of any support for rehabilitation, PWMDs lose ties with their families and communities over time and become more dependent on institutions. As a result, the system of indifferent institutionalization diminishes prospects for rehabilitation, contributes to the chronicity of illness and increases disabilities, making it all the more difficult for these individuals to reintegrate into the community. The Gefersa Rehabilitation Center, counter to its name, does not have any leisure time facility for rehabilitation; *inter alia*, with no access to radio, newspapers and any skill trainings. The residents of this Center are often provided with little or no appropriate stimulation, like sporting activities or refreshment services. Moreover, there are no any religious institutions in the compound to help the patients freely practice their religion or belief. Thus, the environment at the facility is dull that it does not help much in rehabilitating PWMDs that were meant to be rehabilitated. While the Center has no proper fencing, the mobility of the inmates is surprisingly *laissez faire* that the inmates do even import *cha*t

in and many of them spend their day chewing *chat*.[84] This is another challenge to rehabilitation since this exposes them to substance abuse. Few of them are seen at the immediate highway wandering and begging for money and food. These persons may abscond altogether and may not come back to the Center in the absence of any organized follow up on their movements outside of the compound. This may ultimately lead them to remain on the streets in the absence of any viable communication between the families and the Center to follow up their whereabouts.

As pointed out above, at Amanuel Hospital, the inmates spend their day being closed in the hospital's compound with no activities, or being provided with a television as the only means of entertainment. In this kind of dull environment, the social and other skills of institutionalized individuals deteriorate. Therefore, a patient who spends longer time at this hospital may finally forget his social and technical skills, which limits his chance of rehabilitation.

Both at Amanuel Hospital and Gefersa Rehabilitation Center, with family visitors being rare, communication with the outside world must be maintained through letters and phone calls. The author did not find any means of phone communications and postal service at Gefersa Rehabilitation Center.[85] Many of the patients at Amanuel Hospital request any passerby a favor to get a phone call to families. All inmates

[84] Interview with Shibabaw Workie, Supra at note 37.

[85] Even though many of the inmates at Gefersa Rehabilitation Center do not afford a family visit, the schedule for family visit, unlike other facilities of public health, is at working days of the week. This will affect the tendency of the families to come to the Center as they would be occupied with their own routine life. This severs the relationship between the inmates and their families, which ultimately affects the right to rehabilitation of the persons with mental disabilities as their familial link is severed.

are permitted to use public-payphones although there is only one to cater for more than 360 residents,[86] and to use mobile phones although this is only feasible for those who can afford to buy a phone and pay the bill. This limitation on the inmates to keep contact with families would obviously affect their rehabilitation process and easy integration in to the community up on release from the institutions.

Here, rehabilitation may suffer from financial arguments as it is a budget intensive project. However, if there is the political will, the budget flowing to other less important administrative works can be diverted to the rehabilitation services that can fill the gaps with fund. For instance, Amanuel Hospital in its 2003 and 2005 E.C budget years, has allocated 90% of its budget to administrative and medical matters, including buying drugs, expanding the in-patient and out-patient services, paying employees, etc. leaving rehabilitation services with less consideration.

6. The Right to Privacy

Privacy is a broad concept ranging from informational and physical to proprietary and decisional circles of a person's life.[87] Apart from the traditional investigative intrusion in crime suspects, it is common in the conduct of clinical research and administrative practices to intrude in one's privacy. There is however wide consensus about the importance of medical confidentiality, modesty and bodily integrity in all health settings; though there is a substantial philosophical disagreement about

[86] A personal observation by the author, July 19, 2012

[87] Allen, A., "Privacy and medicine", The Stanford Encyclopedia of Philosophy, (2011), Edward N. (ed.), available at http://plato.stanford.edu/archives/spr2011/entries/privacy-medicine/, accessed on July 21, 2012.

the limits of personal autonomy or individual choice in fields relating to human reproduction and genetics.[88] Be this as it may, privacy is protected as a right under a host of international, regional and national human rights instruments.[89] The relatively detailed standards on the content of the right are forwarded by the Human Rights Committee commenting on article 17 of the ICCPR.[90] The Committee recognized that the protection of privacy is necessarily relative as all persons live in society but any intrusion to any one's private life should be essential in the interests of society as understood under the Covenant.[91] The Committee therefore requires states to take effective measures:

> *"to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive process and use it, and is never used for purposes incompatible with the Covenant."*[92]

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[88] Ibid.

[89] Article 12 of the UDHR and article 17 of the ICCPR, which state that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...", Very similar wording is used in article 14 CMW protecting migrant workers and their families from arbitrary interference with their family life and privacy and Article 16 CRC protects the right to privacy; Article 22 of the CRPD also imposes a duty on states to respect the privacy of persons with disabilities against arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation, regardless of place of residence or living arrangements. The ACHPR does not explicitly set out the right to privacy, but Article 18 attaches particular importance to the state's duty to protect the family. Finally, the FDRE Constitution has a guarantee for the privacy of individuals under its Article 26

[90] Human Rights Committee, Supra at note 76, General Comment 16, The right to respect of privacy, family, home and correspondence, and protection of honour and reputation, (article 17), 32nd session, 1988, Para 7

[91] Ibid.

[92] Ibid.

Under article 22 of the CRPD, too, there is a guarantee that "no person with disabilities, regardless of place of residence or living arrangements, should be subjected to arbitrary or unlawful interference with his or her privacy". The Convention recognizes that person with disabilities have the right to the protection of the law against such interference or attacks.

PWMDs interned in psychiatric facilities whose liberty is limited as a matter of course are prone to intrusion with their privacy. Therefore, the other most pervasive violation of human rights in psychiatric facilities is the violation of the right to privacy. The inmates may be forced to live for years in common wards where their privacy may be compromised and may not find a moment of a little privacy. They may have no secure place to put their personal possessions and have no privacy when bathing and using toilet. Intimate meetings with friends, family, or even a spouse may be restricted. The MI Principles taking this in to account has set standards of respect of their privacy.[93] The WHO's Guidelines designed to assess the application of the MI Principles recognizes the indicators for respect of the right to privacy in psychiatric facilities *inter alia*, whether toilets and bathrooms can be locked from the inside, whether body inspection and urine screening respect the full privacy of the person.[94] The importance of providing patients with lockable space in which they can keep their belongings should be underlined as the failure to provide such a facility can impinge upon a patient's sense of security and autonomy. All personal data relating to an inmate should be considered confidential. Such data may only be collected, processed and communicated according

[93] MI principles, Supra at note 52, Principle13 (1) protects the right to privacy, freedom of communication, and private visits.

[94] Guidelines for the promotion of the rights of persons with mental disorder , WHO/MNH/MND/95.4, Geneva, (1996) available at www.who.int/mental_health/media/en/74.pdf , accessed on July 6, 2012

to the rules relating to professional confidentiality and personal data collection.

At Amanuel Hospital and Geferssa Rehabilitation Center, there is much evidence that shows violations of the right to privacy. The use of large-capacity dormitories at average 20 persons deprives patients of all privacy. There is no provision of lockers and bedside tables, individualization of clothing. Inmates hide their few personal possessions in their clothing because there is no other safe place to keep them. Diagnoses are routinely discussed in front of other residents. Inmates at Gefersa Rehabilitation Center must use the toilet and take showers supervised by staffs. The Center's workers say this is necessary to prevent patients from harming themselves or others however it may be embarrassing to the inmates.

The inmates at both institutions are discouraged from forming romantic relationships with one another within the institution. Many staff members are adamant that inmates were not interested in forming intimate relationships; perceiving that they are asexual as a matter of fact. As a result of this distorted view, inmates' right to sexual autonomy is extensively prohibited, and there are no efforts to educate them about relationships and healthy sexual behavior.

7. The Right to Community Integration

The other guarantee for PWMDs is the right to live and be treated in the community.[95] This includes the right to participation in political and public life. In the case of PWMDs in psychiatric facilities, this is to mean, at least that they should not live for life in institutions and they should be integrated to the community when they have recovered and promoted to coexist and live independently in the community. This requires creating a concerted effort towards reunion with families and former employers so that they can come back to their previous life. Families and employers due to the deep prejudice and stereotype hardly accept that these persons have recovered and can maintain their normal life.[96] Some families even hesitate to recognize that the person belonged to their family.[97] The recent efforts of the Gefersa Rehabilitation Center to reunite the relatively recovered persons to families have been less successful for the consistent denial and rejection by the families and the

[95] CRPD, Supra at note 83, under article 19 as part of a guarantee to live independently, States Parties have undertaken to 'take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that;
a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
b. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
c. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs'.
The MI principles, Supra at note 93, Principle 3 states that: 'Every person with a mental illness shall have the right to live and work, to the extent possible, in the community.'

[96] Bruce, G. et al, 'The social rejection of former mental patients: Understanding why labels matter', American Journal of Sociology, (1987), Vol. 92, No. 6, pp1461-1500.

[97] Interview with Brother Eric, Supra at note 80

employers.[98] As a result, many inmates in this Center have lived for about 20-30 years with no hope of going back to their families. The recently admitted inmate at the Center has at least lived for two years. Those first inmates interned in the Center at its establishment are found there in not few numbers with about thirty years with no prospect of leaving the Center as they have nobody to welcome them outside. These people are surely fit to live in the community as they personally witness.[99] They tell the stories of their former mates who left the Centre who are now living in the streets completely insane as they have no families to take care of them. This is an alarm for them not to leave the Center. A testimony of one of the inmates goes as follow:

> *"I have stayed for 22 years in this Center. Before ten years, after I recovered somewhat, I left this Center and tried to join with my families at Addis Ababa. I found my father and mother dead. I became a refugee with my aunt, albeit short lived. She finally pushed me out of her home and I returned to this Center. Now, I have adapted myself to this Center as my home, and I have no any hope to leave."*[100]

These persons are still subjected to long-term and even permanent institutionalization in this Center in an isolated environment set apart from established communities. This has placed a formidable obstacle against the right to integration of PWMDs interned in psychiatric facilities in to the community, and the right to be treated in a least

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[98] Ibid.

[99] Interview with Zegeye, Haile., an inmate at Gefersa Rehabilitation Center, interviewed on July 9, 2012, Gefersa.
The interviewee believed that he is healthy enough to live in the community but he is living in the Center for he has nobody to welcome him as a family or employer. This is a manifest lack of a system for community integration for persons with mental disabilities. The greater challenge that has frustrated the manager of the Center is this lack of a system for community integration in which even after the persons have recovered and fit to live and be treated in the community

[100] A personal testimony of a 35 years old inmate at the Center, interviewed on July 9, 2012, Gefersa.

restrictive environment. The newly developed admission standard by the Center sets out that a person will be admitted only if there is a family that pledges that it will take the person back after three months. This limits the access to other persons who cannot afford this family pledge. Moreover, in a center which is understaffed, it does not seem realistic that a person shall be rehabilitated and discharged in three months.[101]

8. Conclusion

The human rights conditions in the psychiatric facilities in Ethiopia under study divulged that, behind the closed doors, PWMDs are languishing under severe human rights conditions. These violations of human rights are committed at the state established institutions which admit persons for treatment. The lack of guarantees against involuntary admission amounts to denial of the liberty and security of persons. This is against the guarantees of due process of law under the host of instruments that Ethiopia has ratified, inter alia, the ICCPR, ACHPR and the CRPD. It is also against the FDRE Constitution. The non-consensual treatments and the continued use of ECT are considered ill treatments or the worst torture. The degrading conditions and ill treatments in the institutions are thus against the prohibition of torture and all other forms of ill treatments. The arbitrary deprivation of privacy coupled with denial of the legal capacity of the inmates is a failure of the State in protecting and respecting the human rights of PWMDs. The lack of rehabilitative services and a system for community integration has destined the life of

[101]This Center has now only two psychiatric nurses and three health assistants. To fill this gap of the human resource, the manager said that the he has asked the Ministry of Health and the Ministry of Civil Service for recruitment of one psychiatrist, 16 psychiatric nurses, a psychologist and an occupational therapist.

these persons at institutions with little or no hope of joining the mainstream society and engage in an independent life. This, too, contravenes the obligations Ethiopia has undertaken towards PWMDs under the CRPD.

And for what is worse, there is a complete lack of any type of human rights oversight and monitoring body in terms of overseeing and reporting these human rights violations in the country. This is an insult to the injury for PWMDs in psychiatric facilities as there is little prospect of airing their sufferings to the international community and the human rights bodies of the UN and the AU. This gives leverage for the institutions to keep on working without considering the human rights of PWMDs they are violating. Most of these violations are committed due to ignorance of the persons on duty.

Change for Aptness: Fighting Flaws in the Federal Supreme Court Cassation Division

Bisrat Teklu[♣] and Markos Debebe[♣]

Abstract

The Federal Supreme Court Cassation Division is established with a view to guarding the legislature's purpose and intent. However, at times, the Division deviates from what the law says and the law-maker intends even to the extent of twisting a clear provision of the law. This can be due to several reasons. This article articulates that in order to fight such flaws in the Cassation Division, it is important to constitute the Division into specialized divisions, employ legal assistants for each specialized Division, appoint an advisory board for specialized divisions, awakening the Judicial Administration Council and conducting detailed studies on the overall performance of the Division.

1. Introduction

History evidenced that cassation courts were established for the first time in the 17thC France with a view to prevent courts from interfering in the acts of the legislature under the guise of interpretation. The first court of cassation was formally named *Cour de Cassation.*[1]As the origin itself dictate, the word "Cassation" is derived from a French word *'cassier'*, which means to quash.[2] It refers to a power given to the highest court of a

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[1]Abebe Mulatu (2011), 'Issues of Constitutional Interpretation under the 1995 Constitution: The Case of Kedija Beshir*et al vs.* Ansha Ahmed *et al'*, in *Wonber Perodical*, Addis Ababa, p. 51.

[2]Bryan A. Garnaer(ed.) (1999), Black's Law Dictionary(7thed) (West Group, USA), p. 363.

state to quash the judgment of lower courts.[3] Traditionally, the function of cassation courts was to examine a case assumed to incorporate a fundamental error of law and quash it if it finds the same and remand it to a court of rendition.[4] The court was not given the jurisdiction to see a case and pass a judgment on its merit. In short, the phrase *'to quash'* was attached to it because its power was simply quashing a judgment and remanding it to a court of rendition. However, through time, the jurisdiction of cassation courts expanded to disposing the quashed judgment and setting an interpretative precedent. Moreover, it is important to note that a cassation court is different from an ordinary court of appeal. A cassation court is not a third level jurisdiction. Strictly speaking, it did not rule on the merits of the case.[5] Rather, cassation courts examine the judgments themselves: the accurate application of the law in the judgments.[6]

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[3]**ቢልልኝ ማንደፍሮ እና ተሰፋ አለም(*1981* ዓ.ም)፣ "የሰበር ስርአት በኢትዮጵያ አጠቃላይ ገጽታ"፣ *ሕጋዊነት የኢሕድሪ ዓቃቤ ሕግ የሙያ መጽሔት*(ቅጽ 1፣ ቁ. 1)ገጽ 38፡፡**

[4]**ታምሩ ወንድምአገኘሁ (1983 ዓ.ም)፣ "ፍትህ ወርትእ"፣ *ሕጋዊነት በኢትዮጵያ የሸግግር መንግስት የዓቃቤ ሕግ መጽሔት* (ቅጽ 3፣ ቁ. 5)ገጽ 81፡፡ (የግርጌ ማስታወሻ ቁ. 37ኑ ይመልከቱ)**

[5]*Cour De Cassation*, The Role of the Court of Cassation, available at, <http://www.courdecassation.fr/about_the_court_9256.html>, visited on June 10, 2013, p. 1.

[6]*Ibid. See also* **ቢልልኝ ማንደፍሮ እና ተሰፋ አለም፣ከላይ በማስታወሻ ቁ. 3 ላይ እንደተቀመጠው፣ ገጽ 46፡፡**History proved that even if judges are presumed competent, it is inevitable for them to commit mistakes while giving judgments. These mistakes could be either incidentals or fundamental. They may relate to either fact or law. If the mistakes are fundamental it is axiomatic that it will affect justice. Especially, when the fundamental mistake relates to the law, in addition to the injustice created on a party to a trial and the government, the judgment will prejudice the law, and the power of the legislature. Due to this reason, in order to bring justice and ensure the authority of the binding effect of the law an additional procedure is constituted. That is review of judgments through the cassation.

In Ethiopian, the word *'cassation'* was used for the first time in the Treaty of Friendship and Commerce signed between Ethiopia and France in 1907 that established consular courts in Ethiopia, and the procedural law enacted to enforce the agreement under the treaty.[7] However, a cassation court that has the jurisdiction to develop an interpretative precedent was established during *Dergue*.[8] The then Supreme Court Establishment Proclamation had given the court a power of cassation establishing a uniform interpretation of law.[9]

Currently, the power of cassation has a constitutional status. The Federal Constitution recognized the existence of such system at both tiers of governments.[10] Cassation currently comes into picture where there is a basic error of law from the final decision of regular and appellate jurisdiction of courts. Moreover, Article 80(3) of the FDRE Constitution stipulates the cassation power of both Federal and State Supreme Courts. The Constitution gives State supreme courts the power of cassation over any final court decision on State matters;[11] furthermore, it gives the

[7] **ታምሩ ወንድምአገኘሁ፣ ከላይ በማስታወሻ ቁ. 4 ላይ እንደተቀመጠው፣ገጽ 78**፡፡ Even before the introduction of cassation in 1907/8 there was a similar institution in Ethiopian history. There were *Zufan Chilots* that resemble cassation in Ethiopia. However, *Zufan Chilots* were different from cassation in many ways. Beyond basic errors of law, any petition was petitioned in the *Chilot* at the discretion of the emperors. Moreover, death sentences were executed after the emperor affirmed it through its judgment in the *Zufan Chilot*. *See* Aberra Jembere (2012), Legal History of Ethiopia 1434-1974: Some Aspects of Substantive and Procedural Laws (Shama Books) p. 218

[8] **አሰፋ ሻመና(2004 ዓ.ም)፣የፍትሕ አሰጣጥና የፍትሕ ስርአት በኢትዮጵያ (ብራና ማተሚያ ቤት፣ አዲስ አበባ) ገጽ 19**፡፡

[9] *See* PDRE Supreme Court Establishment Proclamation No. 9/1980, Cited on Abebe Mulatu, *supra* note 1, pp. 51-52.

[10] Article 80 (3) of the FDRE Constitution recognizes Federal Supreme Court and state supreme courts cassation power. In this regard, the ambit of the former's power is controversial. Especially, on matters whether it has power to revise the decisions of state supreme courts.

[11] FDRE Constitution, Article 80(3)(b).

Federal Supreme Court the power of cassation over any final court decision.[12] The practice also shows cassation over cassation exists in Ethiopia.[13] However, it can be argued that cassation over cassation over matters exclusively given to states emanates from the lax understanding of the Constitution.[14]

This cassation power of the Federal Supreme Court is further prescribed under subsequent legislation.[15] Federal Courts Proclamation reiterates what the Constitution stipulated under Article 80(3), and added details to the power of the Federal Supreme Court Cassation Division. In addition to this, Article 2(4) of Federal Courts Re-amendment Proclamation provides that, *"Interpretation of a law by the Federal Supreme Court Cassation Division in its judgments made with not less than five judges shall be binding on federal and regional [courts] at all levels."* Moreover, the Proclamation gives the Cassation Division the authority to render a different interpretation of law in its decisions another time.[16] Therefore, the latter provisions read the Court has the power of cassation

[12]FDRE Constitution, Article 80(3)(a).

[13]**መሓሪ ረዳኢ (ታህሳስ 2003 ዓ.ም)፣ "የፌደራል የሰበር ሰበር የስልጣን ምንጭ ገልጠን ብናየው! (በሰበር መ.ቁ. 26996 እና 31601 መነሻነት የቀረበ ትችት)"፣ *የኢትዮጵያ ሕግ መጽሔት* (መግቢ 24 ቁ. 2)፣ ገጽ 201።**

[14]*Ibid.* In contemporary Ethiopian legal system, there is cassation over cassation. Even worse, the FSC Cassation Division revises matters that exclusively fall under the jurisdiction of states. However, this should not be the case. Unless the case directly or incidentally, has a contact with federal laws, international instruments or the Constitution itself, the FSC Cassation Division shall not revise the decision of State Supreme Court Cassation Court decisions. Otherwise, it would be against the principles of the Ethiopian co-operative federalism.

[15]*See* Federal Courts Proclamation 25/1996, and Federal Courts Re-amendment Proclamation 454/2005.

[16]Federal Courts Proclamation Re-amendment Proclamation 454/2005, Article 2(4).

[on] final decisions[17] containing basic errors of law, whereby interpretations of laws in its decisions made by five judges shall be binding on both State and Federal Courts. However, the Cassation Division shall exercise this authority in a way the legislative branch of government intended the law to be understood. This is because, unlike courts of the common law legal system, the Cassation Division has no authority to pile an original precedent.[18] Each interpretation shall go hand in hand with the spirit of separation of power.[19] It shall not refute the doctrine of separation of power which is equally recognized under the FDRE Constitution.

In Ethiopia, the role of the judiciary is interpreting laws.[20] Law-making power is exclusively given to the legislative branch of government.[21]For this reason, as one facet of law-making, the judicial branch cannot amend and/or repeal laws.[22] Moreover, if the law is clear, the Cassation Division

[17]There is absence of unanimity about the meaning of final decision. *See* Muradu Abdo (2007), '*Review on decisions of state courts over state matters by the Federal Supreme Court'*, Mizan Law Review (Vol. 1 No. 1), p. 64-66.

[18]Worku Yaze (2010), 'Operation and Effect of Presumptions in Civil Proceedings: An Inquiry into the interpretation of Art 2024 of the Ethiopian Civil Code', *Mizan Law Review* (Vol. 4, No. 2), p. 260.

[19]As it is already discussed one of the aims of establishing cassation court is to demarcate the boundaries of the judiciary, for it is ensured that judges couldn't make a law under the guise of interpretation. *See* Abebe Mulatu *supra* note 1.

[20]FDRE Constitution, Article 79(1).

[21]Unless the judicial branch of government delegated to make a law through parent legislation, it cannot enact law.

[22]Pursuant to Article 6(1) of the FDRE House of Peoples' Representatives Working Procedure and Members Code of Conduct (Amendment) Proclamation No. 470/ 2005, law making includes enacting new laws, amending, and repealing old ones and ratifying international treaties and agreements. Therefore, as one part of law making the judicial branch of government cannot amend any provision of law under the pretext of interpretation.

shall apply it as it is.[23] As the words of the law are presumed to express the intention of the legislator, there is no need for interpretation, unless the interpretation of the law may lead to an absurd conclusion.[24] In short, unless there is strong evidence that shows the intention of the legislator was different, it is not proper to give a different meaning to a clear provision of the law.[25] Consequently, when the decision of the Cassation Division is repugnant to the legislative intent, be it made mistakenly or deliberately, it always costs justice.

This article is written to pave a way for fighting the flaws in the decisions of the Cassation Division of the Federal Supreme Court. The article propounds that the Federal Supreme Court Cassation Division is committing flaws that goes to the extent of deviating from the true meaning of the law and such flaws must be corrected. In this regard, in order to lubricate expeditious reform in the Federal Supreme Court Cassation Division some changes are proposed. To achieve its objective, the article contains three sections. Section I, criticizes selected decisions in the Cassation Division. Section II explicates reasons for such mistakes and proposes a permanent solution for the problems. Lastly, there is a conclusion.

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[23]Bisrat Teklu (2011), 'The Meaning of "Dependents" for the Purpose of Compensation under the Labor Proclamation: Case Comment', *Mizan Law Review* (Vol. 5, No. 2), p.340.

[24]*Ibid*.

[25]*Ibid*. Note that, this restriction is not limited to laws enacted after the coming in to force of the FDRE Constitution. Article 2(3) of Federal Courts Proclamation provided, all laws promulgated before the coming into force of the FDRE Constitution constitute part of the Federal law as long as they are consistent with the Constitution, and the power to enact those laws is in the ambit of the Federal government. Due to this, the FSC Cassation Division is duty bound to interpret pre FDRE laws in accordance to the legislature's intention as long as they are consistent with the constitution.

2. Flaws in The Cassation Division's Decisions

Previously, it is indicated that the power given to the Cassation Division is the jurisdiction to give a binding interpretation. This power is primarily given to the Cassation Division to create a predictable legal system, and make the interpretation and enforcement of laws in line with their legislative purpose.[26] In doing so, the Cassation Division is duty bound to observe what the legislature intended to say. This is because the institution of cassation is established not to make a law; rather, the institution is established to interpret the law.

However, in Ethiopia, there are some decisions criticized for showing the fact that the Cassation Division is evading from the reason why it came into picture. One scholar even went to the extent of writing the FSC Cassation Division amended/changed a law through its interpretation.[27] This scholar is forced to say so for the Cassation Division departed from the law to the extent possible to say it developed a new rule. Moreover, attorneys and scholars complain about lack of uniformity and predictability in the FSC Cassation Division.[28]

It is a known fact that the Cassation Division may not be perfect in interpretations of laws it made. The Court itself admits this.[29] It also

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[26]Worku Yaze, *supra* note 18.

[27]**ፈቃዱ ኧጥሮስ (2004 ዓ.ም)፣ *የኢትዮጵያ የሕብንያ ሕግ* (ፋር ኢስት ትሬዲንግ፣ አዲስ አበባ)፣ ገጽ *196*።**

[28]**ዮሴፍ አዕምሮ (እ.ኤ.አ *2012* ዓ.ም), "የፍትሐብሔር ክርክሮች፡ ፈተናዎች እና ተስፋው"**, 'The Resolution of Commercial/Business Disputes in Ethiopia: Towards Alternative to Adjudication?'*Ethiopian Business Law Series*(School of Law, AAU,Vol. V), p. 18. *See also* the discussion made by the scholar on the article on pp. 15-18.

[29]*See* the prologues of most Cassation Division decision volumes, for instance, see volumes 7 & 8.

makes its judge's lack of expertise and the recentness of the system an excuse for such flaw.[30] However, as the interpretations made by the Division may pile an interpretative precedent, an utmost care should be taken to avoid errors of interpretation as the interpretation made by the Division has a far-reaching implication.[31]Moreover, though the Cassation Division may make flaws on its interpretations; no one would expect it to miss the clear meaning of the law. At times, when the Division departs from the clear meaning of the law, it would be hard to conclude that it is made due to lack of competence. In such instances, it is rather easy to conclude that the Division has developed a new rule through the conscience of its judges: not in a way the legislature articulated it. The problem will be magnified when such deviations are repeated. In short, at times, the Cassation Division disregards the clear meaning of the law; it is snatching the legislature's role. Such interpretations are the reflections of the interests of individual judges who sit in the Cassation Division. Nevertheless, such unsound interpretations of the Cassation Division are being taken as the right versions of the law under the coverage of the Cassation Division's judicial supremacy. Due to this, it is drawing a new track that was not wished by the legislature. Moreover, the problem is aggravated due to lack of an effective response from the side of the other branches of government. At times, the Cassation Division repeatedly gave a decision that totally ignored the legislative intent, none of the other branches of government effectively responded. And, at times, they

[30]*Ibid.*

[31]**ፕሮፌሰር ጥላሁን ተሾመ (እ.ኤ.አ 2012 ዓ.ም)፤"የፌደራል ጠቅላይ ፍ/ቤት ሰበር ችሎት በእነ አስራት ብርኃኑ ላይ በሰጠው ፍርድ ላይ የቀረበ ክሪቲክ"፣*ወንበር ቡለቲን* (አዲስ አበባ) ገጽ *15*።።**

responded, their response was to secure only the interest of the few.[32] Moreover, another prominent step taken by the House of the Federation (hereinafter HoF) in order to re-structure the flaw of the Cassation Division was the case between *Kedija Beshir et. Al. and Ansha Ahmed et. al.*[33] However, the decision of the HoF is criticized to be unconstitutional.[34] In addition to this, the recent move by the Ministry of Justice that attempted to force Kirkos Sub-city Justice Bureau and the Federal First Instance Court of the Sub-City, and was rejected by the Justice Bureau of the sub-city was against the independence of the judiciary and out of the power of the Ministry.[35]

[32]For instance, when the FSC Cassation Division decided on the formality requirement required for the sale of immovable property, the legislative branch took a measure to save those it wanted stabilized. Ignoring private citizens, it only took a measure to save financial institutions, i.e., banks. *See* Civil Code Amendment Proclamation No. 639/2009, Articles 2 and 3.

[33] The House of Federation of Federal Democratic Republic of Ethiopia (May 2008), 'The Decision of the House of Federation on W/ro. Kedija Beshir's petition', Journal *of Constitutional Decisions* (Vol. 1, No. 1) pp. 35-41. In the Case, the House took a bold step to review an evasive unconstitutional decision of the Cassation Division, though its move ignited critiques.

[34] *See* Abebe Mulatu (2011), *supra* note 1, pp. 46-69. The decision of the HoF was criticized to be unconstitutional. Even though, the House brought justice through revision of judgments, the Constitution did not support its power. Among other arguments the author raised, He primarily asserts Proclamation No. 250/02 never allow the House to review court decisions. In addition, he mentioned giving the House the power to review court decisions will endanger the judicial branches independence, and curtail courts under the ambit of a political organ: the legislative branch. Other than this landmark case, yet there is no other critical revision made on the final decision of the Cassation Division.

[35] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010, Article 16; On January 19, 2014 the Ethiopian Reporter Amharic version reported that the Ministry of Justice tried to force Kirkos sub-city Justice Bureau to re-open a case which was heard in the Sub-City's First Instance Court and the Federal Supreme Court Cassation Division before Seven Years. However, the Bureau rejected the claim of the Ministry. *See* ***ሪፖርተር ጋዜጣ (እሁድ ጥር 11/2006 ዓ.ም)*** **ፍትሕ ሚኒስቴር በሰበር ተዘግቶ የነበረ ክስ እንደገና እንዲጀመር አዘዘ፣ *ዜና* (ቅጽ *19* ቁጥር *1432*፣ ክፍል *1*) ገጽ *5* እና *50*።**

This section is devoted to showing certain mistakes made by the Cassation Division while rendering decisions. In this regard, three cases, where the Cassation Division made an unexpected U-turn from the law, are discussed.

2.1. CASSATION MITHRIDATIZATION?[36]

2.1.1. The Sale of Business: The *Law in proper* and the "*Law*" of the Cassation Division

Article 1161 of the Ethiopian Civil Code recognized transfer of ownership of a property in good faith. According to this provision, a person that buys a corporeal chattel in good faith for consideration, and made it in his/her possession can acquire the ownership of the latter. The *a contrario* reading of this provision recalled two important things. First, unless otherwise a special law under express terms cross-referred to this provision, this provision is not applicable to the transfer of special movables. Second, the word "corporeal chattels" excludes "incorporeal chattels". In other words, Article 1161(1) of the Civil Code does not govern special movables, and incorporeal movables.[37]

On the other hand, Article 124 of the Commercial Code provides that a business is an incorporeal movable. An admirable content of the concept of business in this regard is that, it incorporates both tangible and intangible elements.[38] However, though incorporating tangibles, it

[36]Mithridatism is a medical word. It refers to the development of immunity to a poison by taking gradually increasing doses of it.
[37]Muradu Abdo (2012), Ethiopian Property Law (Master Printing Press, Addis Ababa) p. 185.
[38]Commercial Code, Articles 124 cum. 128. Articles 124 of the Commercial Code provides, "A business is an incorporeal movable consisting of all movable property

remains incorporeal under the law.[39] Moreover, a business is a special incorporeal movable.[40]Due to this, any transaction involving business assimilates business more or less to the rules governing an immovable property.[41] The rules applying to the transfer of business are different from those applicable to the transfer of ordinary movable. They even require registration. For this, mere possession of the corporeal elements of a business does not prove ownership.[42]

However, though both Article 1161 of the Civil Code and Article 124 of the Commercial Code are crystal clear, the Cassation Division in the Case between *Ato Yalew Delenesaw vs. W/ro Birkinesh Shewareg et. Al.*[43] made an erroneous interpretation that clearly defeats the purpose of the law. The Court decided that Article 1161 of the Civil Code is applicable to the sale of incorporeal movables/business.[44] The Court in its judgment reasoned:

> *"አመልካች ውሉን በቅን ልቦና ያደረጉት በመሆኑ ሕጉ ለቅን ልቦና ተዋዋዮች ለሰጠው ጥበቃ አኳያ ጉዳዩ የማይታይበት ምክንያት አይኖርም በዚህም መሰረት የቅን ልቦና ባለይዞታነትን አስመልክቶ በፍ/ብ/ሕ/ቁ 1161 ላይ*

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brought together [ ] for the purpose of carrying out [ ] commercial activities…". The phrase "*all movable property"* signifies the term incorporate both tangible and intangible property. Moreover, Article 128 of the Commercial Code cemented this by saying a business may consist corporeal movables.

[39]Article 124 of the Commercial Code is beyond crystal clear in this regard. It provides a business is an incorporeal movable.

[40]Muradu Abdo, *supra* note 37. See also Article 3047 of the Civil Code and Articles 150-205of the Commercial Code.

[41]Yazachew Belew (2010), 'The Sale of Business as a going concern under the Ethiopian Commercial Code: A Commentary' *Journal of Ethiopian Law* (Vol. 24, No. 2) p.93.

[42]*Ibid.*. See also Muradu Abdo, *supra* note 37.

[43]Federal Supreme Court (2010), *Ato Yalew Delenesawvs. W/ro Birkinesh Shewareg et al* Federal Supreme Court Cassation Division Decisions Volumes, Cassation File No. 34586 (Vol. 8, 2003 E.C) pp. 321-323.

[44]*Ibid*, p. 322-323.

ግዙፍነት ያለው ተንቀሳቃሽ ነገር ባለሃብት ለመሆን በቅን ልቦና ዋጋ ሰጥቶ ውል የተዋዋለ ሰው የተባለውን ተንቀሳቃሽ ነገር በእጁ ሲያደርግ በቅን ልቦናው ምክንያት የዚህ ንብረት ባለሃብት እንደሚሆን ...::"

*"The Commercial Code under Article 124 recognized business as an incorporeal movable. On the other hand, the petitioner concluded the contract for the sale of business in good faith. Therefore, there is no reason for not applying Article 1161 of the Civil Code to the sale of business, i.e., the provision applicable to corporeal movables, to incorporeal movables. Therefore, Article 1161 of the Civil Code is applicable to the sale of business." (*Translation, the authors*)*

However, both the Amharic and English versions of the Civil Code restricted the application of the Article 1161 of the Civil Code only to corporeal chattels. Moreover, while making the decision, the Cassation Division did not sufficiently reason out why the legislature's stipulation should not be taken strictly. The fact that business is a special movable also goes beyond what the legislature intended. Due to this, the analogy the court followed while the legislature articulated how the law shall be read was astonishing.

In civil litigations, using the rule of analogy is allowed when the law does not govern the matter. When the law-maker deliberately excludes a certain matter from being governed by a certain provision, one cannot apply the provision to the omitted matter. In this regard, Article 1161 is very much clear. It precisely limited its scope to ordinary corporeal chattels. The legislature's qualification of the provision to ordinary corporeal chattels signifies the lawmaker omitted incorporeal movables, including business deliberately.[45]Moreover, the principle is that no one

[45]The lawmaker excluded special movables from the ambit of Article 1136 for several reasons. Among others, it excluded such properties for reason that the ownership of

can transfer a better right than s/he has. A person cannot transfer a thing that s/he does not own. The Cassation Division itself in *W/rt Tarik Getachew Vs. W/ro Alganesh Tetemke* supported this principle and affirmed it as follows:

> **"በሌላም በኩል አንድ ሰው አንድን ንብረት በሽያጭ ለሌላ ሰው ሊያስተላልፍ የሚችለው በንብረቱ ላይ ትክክለኛ ሕጋዊ ባለመብት ሲሆን ወይም በህጉ አግባብ የንብረቱ ህጋዊ ባለመብት የሆነው ሰው የመሸጥና የመለወጥ ስልጣን ሰጥቶት ሲገኝ ነው፡፡ የሌላውን ሰው ንብረት ንብረቱ ነው ብሎ መሸጥ ከህጉ ጋር የሚቃረን በመሆኑ ሕገ ወጥ ነው፡፡ ሕገወጥ ውል ደግሞ በፍትሃብሔር ሕግ 1716 መሰረት ፈራሽ ነው፡፡ ገዢው ከንብረቱ የሚነቀለው ወይም ለሕጋዊ ባለመብቱ አንዲሰቅ የሚደረገውም በዚህ ምክንያት ነው፡፡"**[46]
>
> *"A person can transfer a property either when s/he is the owner, or when s/he is authorized by the owner to do so. Transferring the property of another person is unlawful as it is against the law. In addition, Article 1716 of the Civil Code stipulates that unlawful contracts have no effect. This is why a person that acquires the property of another is compelled to return it to its lawful owner."(translation, the authors)*

The latter explanation of the Court indicates its decision is nourished by the principle, "no one can transfer a better right than s/he has". However, while it applied Article 1161 of the Civil Code to the sale of business, the Division was broadening the scope of the exception. This implies the decision of the Division was nurtured by the sole interest of the judges; not the legislatures.

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such movables needs additional protection of registration and issuance of title certificates. Moreover, in their nature incorporeal properties can only be claimed through a legal action: not by taking possession. This is the reason the legislature excluded incorporeal movables from Article 1161. *See* Muradu Abdo, *supra* note 37, pp. 89 & 184.

[46]Federal Supreme Court (2011), *W/rt Tarik Getachew vs. w/ro Alganesh Tetemke*, FSC Cassation Division File No. 51034, Federal Supreme Court Cassation Division Decisions (vol. 11, 2004 E.C) p. 313.

2.1.2. The case between Agency for the Administration of Rented Houses *vs.* Mr. Kassa Gezaw:[47]

The case started in the Federal First Instance Court between Agency for the Administration of Rented Houses (hereinafter the Applicant) and Mr. Kassa Gizaw, the then employee (mechanic) of the Applicant (hereinafter the Respondent). The Applicant petitioned that the Respondent, the then employee of the latter, received different automobile spare parts that are worth ETB 1,178.05 (One Thousand One Hundred and Seventy Eight Birr and Five Cents) from the Applicant's store to repair the latter's car. However, the Respondent neither used the spare parts to repair the car nor returned them to the applicant's store. Hence, the Applicant prayed for the court to order the Respondent to return the spare parts in kind or pay the monetary value of it.

The Respondent on his part admitted the fact that he took the spare parts from the Applicant's store but challenged his liability. He argued that, he took the spare parts in order to repair the Applicant's car at the work place. Moreover, he alleged that his duty was simply repairing the Applicant's car during working hours. And, when he left work place, like other employees, the necessary safety searches were undergone on him by the security guards of the Applicant in order to assure that he did not take any property of the latter.[48] Following this, he requested the Court to exonerate him from any liability for the lost spare parts. He further

[47]Federal Supreme Court (2009), *Agency for the Administration of Rented Houses vs. Mr. Kassa Gezaw*, FSC Cassation Division File No. 28865, Federal Supreme Court Cassation Division Decisions (vol. 5, 2001 E.C) pp. 141-144.

[48]From this argument of the Respondent, it is easy to understand that there was no evidence that showed he took the spare parts from work place. In other words, he alleged the safety searches show he did not take anything out from work place.

argued that the cause of the loss is the negligence of the Applicant's security guards.

The Federal First Instance Court reasoned that, no time limit was set by the Applicant on the Respondent to finish his work and return the spare parts to the store. In addition, the Court stressed that since the Respondent is not responsible for spare parts that are lost out of the work hours, whereas the Applicant failed to prove that the spare parts are lost during work hour. Accordingly, the Court released the Respondent from liability.

Following, the Applicant lodged an appeal to the Federal High Court. However, the Court sustained the decision of the lower court. Owing to this, the Applicant petitioned the FSC Cassation Division. The Cassation Division accepted the petition to determine the following issues:

- ✓ Whether the Respondent is liable for the lost spare parts?, and
- ✓ Who has the burden to prove the time when the spare parts were lost?[49]

Finally, the Cassation Division examined the case and decided in favor of the Applicant. The Court reasoned that the spare parts were lost before the Respondent returned them to the Applicant's store and he failed to

[49]From the reading of the case under discussion one may say that the issue which was framed by the FSC Cassation Decision was only the first one. But, if we try to draw the holistic picture of the case and understand the fulcrum of the case, it would not be hard to understand that the other issue was in the mind of the judges to reach on the final binding interpretation. The writers duly understand the question that could be posed at this juncture. Meaning, are we going to say that the interpretation of the bench on these issues is precedent or not? Axiomatically, it could not be a *ratio decidendi*. But, equally it has a paramount role to show flaw of the Cassation Division.

prove they were lost out of working hours. Hence, he is liable pursuant to Article 2027 of the Ethiopian Civil Code for the loss of the spare parts.

The Cassation Divisions problem lies on its legal base and analysis of the trial proceeding of the lower courts. First, Article 2037 of the Civil Code unequivocally provides, if there is contractual relationship between the parties, extra-contractual liability law has no application. To put the issue in nutshell, extra-contractual liability claim cannot emanate from contractual relationship.[50] If there is a breach of contractual term, it should be settled in accordance with the provisions of the law of contract.[51]

However, the Division applied extra-contractual liability law provisions in the presence of contractual relationship. In its analysis of facts, the Cassation Division stated that there exist employee/employer relationship between the Applicant and the Respondent. This relationship on the other hand can only emanate from a contract.[52] Therefore, this analysis of the Division is evidentially circumstantial to show its understanding of the existence of contractual relationship between the latter. The Division in its words analyzed:

> "*Since the Respondent accepted the spare parts based on the employment contract, he is liable for whatever happens against the spare parts until he uses or restores them*." (Translation, the authors)

[50]It is also possible to see art 2088 of the Civil Code. This provision precludes strict liability claims at times there is contractual relationship.
[51]Civil Code, Articles 2037(2) and 2088(2).
[52]Labor Proclamation No. 377/2003, Article 4.

This shows the Division was aware of the existence of a contractual relationship, *i.e.*, an employment contract; nevertheless, it used extra-contractual liability law provisions, specifically Article 2027 of the Civil Code to settle the dispute. Whilst the law should regulate the relationship of the parties through the provisions of contract and labor law, the Division calculatedly settled the dispute using extra-contractual liability provisions. In other words, when the employer claimed the employee is liable/at fault, the employment contract shall come into picture consonant with the governing Labor Proclamation. However, the court did not do so. This, on the other hand, refuted the rule under Article 2037 of the Civil Code.[53]

Second, in principle, the Civil Code holds a person extra-contractually liable when s/he deviates from the required standard of social behavior.[54] In this regard, liability is incurred extra-contractually when a wrong is committed either intentionally or negligently.[55] Moreover, it is only where the law expressly provides that a person could be held extra-contractually liable in the absence of a mental fault.[56] In this regard, the Civil Code enumerated these sources of liability under Article 2027. However, note that Article 2027 of the Ethiopian Civil Code cannot be used to hold a person extra-contractually liable. This provision simply

[53]This flaw of the FSC Cassation Division is not a one-time slip up. The Division also held the same position under *Ethiopian Radiation Protection Authority vs. Ato Tariku Chane*. See Federal Supreme Court (2005 E.C), *Ato Ethiopian Radiation Protection Authority vs. Ato Tariku Chane*, FSC Cassation Division File No. 69179, Federal Supreme Court Cassation Division Decisions (vol. 13, 2005 E.C) p. 52.
[54]Professor Christian von Bar (2004), *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* (European Law Publishers), p. 26.
[55]*Ibid*.
[56]Civil Code, Article 2027(2).

provides for the sources of extra-contractual liability.[57]Therefore, if one needs to hold a person extra-contractually liable based on fault, s/he should rely on Articles 2028.

Nevertheless, in this case, the Cassation Division made the Respondent liable relying on Article 2027 of the Civil Code. Though Article 2027 of the Civil Code is envisaged to bestow the sources of extra-contractual liability, the Division used this provision to hold the Respondent liable through negligence. Therefore, the provision called for to govern the latter issue by the Cassation Division was not appropriate. In addition, the writers believe, the interpretation of the Cassation Division has to be detailed enough to avoid confusion rather than aggravating the same. It is where the Division is able to give an explicit interpretation that we can say the laudable policy behind the system can be achieved. In the case at hand, the Division even failed to single out and show through which source of non-contractual liability the Respondent was held liable. Unfortunately, if the intention of the Division was to show the presence of fault, it was supposed to rely on Articles 2030 and 2031 of the Civil Code as the lower courts did in the case. Moreover, this problem has worsened when the Cassation Division repeated the same mistake in a recent volume.[58]

[57] J. Krzeczunowicz (1970), The Ethiopian Law of Extra-contractual Liability Law, (Faculty of Law, Haile Sillasse I University) p. 64

[58]*Ethiopian Radiation Protection Authority vs. Ato Tariku Chane, supra* note 53.

2.1.3. The *"Columbus"*[59] Cassation: the Discovery of a New Ground for the Dissolution of Marriage

The Federal Revised Family Code is eloquent on specifying the grounds of dissolution of marriage. Article 75 of the Code exhausted the grounds through which marriage ends: death or absence of a spouse, invalidity of marriage and divorce. More surprisingly, the Code requires the interference of a court in all grounds of dissolution of marriage, except one.[60] Other than dissolution of marriage due to the death of a spouse, marriage cannot be dissolved without judgment. Other than the latter, the Code does not recognize any other unilateral or bilateral act to end marriage.[61]

The grounds for dissolution of marriage therefore are sincerely clear. When the reading of the provision nurture that, marriage cannot be dissolved in any way other than the above three, it's a*contrario* reading nourishes marriage cannot be dissolved when spouses started to live their own independent and separate life due to quarrels. Moreover, had this been the intention of the legislature, it could have included it among the grounds for dissolution of marriage.[62]The legislative history of the RFC shows that disuse of marriage was proposed as a ground for dissolution of marriage. However, the legislature struck it out from being a

[59]Christopher Columbus is among renowned discoverers through his sale on the sea. His voyages brought him with endless opportunities. However, not on the "sea"; the FSC Cassation Division voyage on the 'sea' of laws, and fortunately, it discovers new rules.
[60]Dejene Girma (2009), 'Tell me Why I Need to Go to Court: A Devastating Move by the Federal Cassation Division', *Jimma University Journal of Law* (Vol. 2 No. 1) pp. 118 and 119.
[61]*Ibid.*
[62]*Ibid*, p. 124.

mechanism to end a family relationship.[63]This shows the legislature omitted this ground intentionally.

However, abruptly, the Cassation Division made disuse of marriage one ground for dissolution. In a Case between *W/ro Shwaye Tessema vs. W/ro Sara Lingane* the Court decided, disuse of marriage for a long period can be a ground for the dissolution of marriage. Moreover the Cassation Division strengthened this position in the Case between F/Sillase vs. WagayeGayem by stressing that;

> **«በመሰረቱ ጋብቻ በፍርድ ቤት ውሳኔ ወይም በተግባር ተጋቢዎች ተለያይተው በየፊናቸው የራሳቸውን ሕይወት ከቀጠሉ ሊፈርስ እንደሚችል ከተሻሻለው የቤተሰብ ሕግ አንቀጽ 76 ድንጋጌና ይህ ሰበር ሰሚ ችሎት ... በመዝገብ ቁ. 20398 ካስተላለፈው ውሳኔ መንፈስ ይንገነዘበው ነው።»**[64]
>
> *"Marriage can dissolve either when the court decides divorce, or when the parties start a separate life letting behind their marriage. This is underscored both in Article 76 of the RFC and the Cassation bench decision on file No. 20398."*

In fact, the Cassation Division stressed that mere separation will not end marriage;[65] however when the parties start a separate life letting behind their relationship it will end family marriage. Nevertheless, the RFC in nowhere recognizes disuse of marriage as a ground for dissolution of marriage. The position of the Cassation Division in this regard seems searching the *law to what ought to be*. Moreover, even though we duly

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[63]*Ibid.*

[64]Federal Supreme Court (2004 E.C), *Ato F/Sillase Eshete Vs. w/ro Wagaye Gayem*, FSC Cassation Division File No. 61357, Federal Supreme Court Cassation Division Decisions (vol. 13, 2005 E.C) p. 125.

[65]Federal Supreme Court (2004 E.C), *W/ro Menia G/sillase Vs. w/ro Meseret Alemayehu*, FSC Cassation Division File No. 67924, Federal Supreme Court Cassation Division Decisions (vol. 13, 2005 E.C) p. 147.

appreciate that the position of the Division may be sound, such ground should not appear unless the legislature opted to do so. While the express intention of the legislature can be fetched from the law and its legislative history, the Cassation Division's blink that added a new ground for dissolution of marriage is therefore outside its playground. It has even done this in the presence of several criticisms on its position. This has made the Cassation Division's move repugnant to the principle of separation of power; and for this, one could have no words except saying the Cassation Division discovered a new rule: the "Columbus" Cassation.

3. Permanent Solution for the Problems

Under the previous section, though it is not exhaustive, criticisms are made based on few selected decisions of FSC Cassation Division. Hence, this section is devoted to proposing solutions for the problems of the Cassation Division.

3.1. Constituting the Division through specialized Divisions

Nowadays, the Cassation Division has no specialized divisions. A single division decides all criminal, civil, commercial and labor cases. Moreover, the judges in all cases are the same except for the change of one or two judges. This is witnessed in all volumes. A sample survey made on recent reported Cassation Division decisions volumes moreover shows the same. A survey made on cases reported by the Cassation Division shows the following empirical result.

S. N	Name of Judge	Volume 12 in%	Volume 13 in%	Volume 14 in %

o									
		C a	C a	C o	C r	L a	C o	C r	L a
1	Tegene Getaneh	41.02	29.41	17.64	19.35	36.36	----------	----------	8.33
2	Hagos Woldu	89.7	94.1	70.58	64.51	63.63			
3	Almaw Wole	89.74	100	88.23	96.77	95.45	93.33	100	91.66
4	Ali Mohammed	92.3	88.23	88.23	93.54	90.9	86.66	100	91.66
5	Birhanu Amenew	33.3	23.529	----------	----------	----------	----------	----------	----------
6	Teshager G/Sillase	48.7	32.35	41.17	35.48	36.36	86.66	100	100
7	Dagne Melaku	33.3	5.88	----------	----------	----------	----------	----------	----------
8	Tsegaye Assmamaw	5.12	----------	5.88	----------	----------	----------	----------	----------
9	Nega Dufisa	28.2	55.882	94.11	100	90.90	----------	----------	----------
10	Adane Niguse	28.20	61.76	76.47	90.32	86.36	86.66	----------	91.66
11	Abdulqadir Mohammed	5.12	----------	11.76	----------	----------	----------	----------	----------
12	Hirut Melese	2.56	5.88	----------	----------	----------	----------	----------	----------
13	Tafese Yerga	2.56	2.94	5.88	----------	----------	----------	----------	----------

14	Mustefa Ahmed	----------	----------	----------	----------	----------	86.66	85.71	58.33
15	Tehlit Yemsel	----------	----------	----------	----------	----------	6.66	----------	16.66
16	Mekonnen G/Hiwot	----------	----------	----------	----------	----------	20	42.85	33.33
17	Retta Tolosa	----------	----------	----------	----------	----------	26.6	14.28	8.33

Table 1. Judges sitting in reported cases from Volume 12-14.

The table shows that if one judge participates once in the cassation division, it is most probable that he will participate in other cases. For instance, in Volume Twelve among the judges that participated in disposing contractual cases, it is only two which did not participate in the disposition of criminal cases. In addition to this, a judge that participates in greater percentage in deciding civil case also participates in disposing many criminal cases as well. The vice versa is also true. If a judge's participation in the volume is lower in percentage in a certain category, most probably his participation in other types of cases is minimal. The same is observed in volume thirteen and fourteen. Therefore, this indicates that there is no specialization in the Cassation Division among judges. It seems the appointment is random without considering specialization/concentration of a judge in a certain area of law.

To the opposite, an individual cannot specialize in every area of law. This may be taken as against the principle of division of labor and dispensation of quality justice. Therefore, it is important to appoint certain judges that special knowledge in a given area for proper and

expeditious dispensation of cases. Such division would help a judge to master a certain area so that the possibility of making errors would be mitigated. In this regard, the Federal Supreme Court may adopt such precedent as a rule in the present set up simply by instructing who should sit on certain category of cases. On the other hand, in other countries such as France and Italy, it is possible to divide the Cassation Division in to several divisions. Moreover, if such kind of institution is opted for, and a case that has interdisciplinary nature comes before the Cassation Division, the divisions can exchange judges that specialize in certain areas with a view to effectively disposing the case at hand.

In this regard, if a decision to constitute various divisions is reached, it is important to make a need assessment and cluster matters in certain broad categories. In this regard, so far, the Federal Supreme Court reported cases where it passed binding decisions in fourteen volumes. In these volumes 1,265 cases are reported. If we see the share of cases in accordance with the criteria used by the Federal Supreme Court in its reports for classification it looks as follows:

No.	**Category**	**No. of reported cases**	**%**	**Nature of Cases**
1	Employment and Labor Law	210	16.6	100% Civil
2	Civil Procedure	188	14.865	100% Civil
3	Family and succession	165	13.04	100% Civil
4	Contract	163	12.88	100% Civil
5	Criminal	101	7.98	100% Criminal
6	Property	77	6.08	100% Civil
7	Others	66	5.21	95.45% Civil

				4.5% Criminal
8	Jurisdiction	64	5.05	
9	Extra Contractual liability and unjust enrichment	50	3.95	100% Civil
10	Tax and Customs	44	3.47	84.09% civil
				15.9% criminal
11	Execution of judgments	44	3.47	
12	Commercial Law	43	3.39	100% Civil
13	Bank and Insurance	28	2.21	100% Civil
14	Agency	15	1.18	100% Civil
15	Intellectual Property	7	0.55	85.71% civil
				14.28% criminal
Total		1265		

Table 2. Number of reported cases in category

The table shows that the lion's share is taken by labor related cases, followed by cases on civil procedure. Moreover, the classification shows that some group of cases headed in a special heading for readers convenience can be seen by similar specialized divisions. For instance, it is possible to see cases on civil procedure, contracts, extra contractual liability, agency, property and intellectual property in the same category. In addition, most cases categorized as "*Others*" (63 out of 66) and those that relate in the heading "*Jurisdiction*" (62 out of 64) require specialization in civil law, while very rare require specialization on criminal law.

The writers assume that, the numbers reflect the caseload in the Cassation Division. Due to this, they recommend a division that specialized on employment and labor law to be constituted. Moreover, as it is not possible to constitute a division for every category and for justifications associated with their relatedness it is recommended to constitute a division that specialized on *civil law* with judges that specialize on civil law. This is done by clustering group of cases that has a civil law nature. In association with this, in France, one can show a separate division that specialized in *commercial law*. However, the number of cases reported on commercial law, including cases on bank and insurance only constitute 5.6%(71) of the cases reported. This indicates that it is not necessary to establish a special division for commercial matters for the time being. Therefore, having this in mind the writers recommend if a specialized bench on civil law is constituted having the power to see including, but not limited to cases on contract, civil procedure, law of extra-contractual liability law and unjust enrichment, property, intellectual property, family and succession, commercial matters, bank and insurance, and agency. This will constitute more than 60% of the cases reported.

Lastly, by considering the special nature of the law it is important to constitute a division that specializes in criminal law. In fact, the share of cases decided on criminal law, including those with criminal nature of tax and customs (only 7 cases), in the category of "*Others*" (only 3 cases) and on the category nominated "*Intellectual property*" (only 1 case) is not greater that 10% of the cases decided so far. However, the special nature of the law dictates the constitution of a separate division on criminal law.

Furthermore, rather than enforcing recent proposals to adopt the devise of negative screening in the Federal Supreme Court Cassation Division, it is better to divide the Division into specialized divisions and see the possibility of minimizing the burden on the Cassation Division.

3.2. Employing Legal Assistant for each specialized Divisions

A legal assistant is broadly defined as a professional qualified by education, training or experience to do work of a legal nature under the supervision of *a superior (emphasis added)*.[66] In this regard, the term paralegal is mostly attached to assistants that give aid for attorneys.[67] However, this would not mean that legal assistants cannot work in courts by adding judges in researching. They can be employed in courts so that they can aid judges in their function to interpret laws. It is a general knowledge that the main functions of legal assistants include conducting legal researches and proof reading legal documents.[68] First and for most, legal assistants can play an important role in the field of research. They can assist judges in searching for the meaning of the law. These paralegals may devote their time in searching for the meaning by examining legislative history, the experience of other countries, the costs of flaw in the economy, etc.. Judges who are occupied in court routines and case congestion will have additional arm for assistance on researching. This, on the other hand, in addition to helping the proper disposition of a case will widen the scope of research in the field of law

[66]L. L. Edwards and J. S. Edwards (2002), Introduction to paralegal Studies and the Law: A Practical Approach, (West Legal Studies, USA), p. 1.
[67]*Ibid.*
[68]*Ibid*, p 7.

in the Ethiopian legal system. Moreover, slight mistake in citation of laws can be corrected through recommendations made by the legal assistants. This will also aid perfectness. Therefore, by employing legal assistants the Cassation Division can mitigate flaws on its decisions.

Furthermore, appointing paralegals in the FSC Cassation Division can play a greater role in nurturing future judges acquainted in basic knowledge in the area they work on. A legal assistant that work in the Cassation Division would most probably not remain there for life. At some point, s/he could be appointed as a judge in lower courts. S/he may fit the post in the recruitment process. In addition, after acknowledging his/her competence, the Division may recommend him for a post as a judge in lower courts. In such instances, the lower courts may find a professional having broad knowledge in the area s/he specializes. This will in fact help the justice machinery on the other hand. Through this, the proper enforceability of past decisions of the Cassation Division can also be ensured as, probably, s/he has a firsthand knowledge.

3.3. Appointing Advisory Board for Each Specialized Division

As it is indicated in previous discussion, justice in its strict sense can be done only if the Cassation Division avoids flaws. To do this, the Division must be able to see the holistic picture of the case at hand. And, most of the time, the cases may need in-depth investigation and the opinion of other fields of specialization. Hence, this fact instigates the need of an advisory board that could advise and assist the Cassation Division on matters that appear before it for interpretation.

Since the main purpose of constituting an advisory board is to assist the judges to have a holistic picture on a certain matter, the members of the board must be from different sectors. The writers believe that, though members may vary depending on different matters, the board should include as representatives of university professors that specialize in law, a representative from Ministry of Justice, Justice and Legal Reform Institute, lawyers associations and economics professionals associations.[69] The board established in this way must be a permanent advisory board for a specific term which would give the necessary recommendation for the Division on the interpretation of the law. In this regard, the board will give its learned recommendation on the question of interpretation sent for it by the Cassation Division.

At this juncture, it is important to note that this board is not established to dispose of a case, neither its way of looking at the law would bind the Cassation Division. Rather, the board will simply be requested to brief its view on the interpretation of a certain provision of the law when the Cassation division believes that the interpretation of the disputed provision would have a significant impact on the legal system and the economy. Note that the case is not given to the board. Consequently, the board will send its view on the matter, together with its reasoning. The Cassation Division then can see the view of the board, and take its position after seeing what was proposed. Therefore, the role of the board would resemble the role of the Council of Constitutional Inquiry.

[69]Based on this composition, we can understand that the board may have both permanent and temporary members. For examples, those representative of the private sectors and associations who may be lawyers or non-lawyers shall be temporary members. Their membership to the board shall be determined based on the case which needs interpretation.

3.4. Awakening the Judicial Administrative Council

Currently the Federal Government has a Federal Judicial Administration Council which is comprised of personnel from different organs and authorities, including judges.[70] The Council, apart from other functions, has the power and duty to nominate candidates for judgeship, issue of judges' code of conduct, rules of disciplinary procedure and periodically evaluating the judicial activities of the federal courts and judges.[71] Though these power and duties have a paramount rule for aptness they are not yet implemented/exercised to the required level. Even more, there are complaints about the Council's lack of commitment to dispose disciplinary complaints brought against judges.[72] Moreover, there is no recent detail evaluation made on federal courts and judges. Hence, the writers keen to urge the need of awaking the Council to achieve the laudable intention behind its establishment.

3.5. Evaluating the performance of the Cassation Division and Proposing Solutions

Given the current working system of the Federal Supreme Court, there is also a need to establish another ad hoc committee[73] which could be in

[70]Amended Federal Judicial Administration Council Establishment Proclamation No. 684/2010, Article 4(1).

[71] Amended Federal Judicial Administration Council Establishment Proclamation No. 684/2010, Article 4(1), Article 6.

[72] ሪፖርተር ጋዜጣ፣ ከላይ በማስታወሻ ቁ. 35 ላይ እንደተቀመጠው፣ ገጽ 5፡፡ The complaint is that the Council did not dispose a complaint brought before seven years against five Federal Supreme Court Cassation Division judges so far. However, to the writers view the Council was supposed to dispose it expeditiously: in favor or against the judges.

[73] One question that could be posed at this juncture is the necessity of an ad hoc committee in light of the existence of the federal judicial administration council which is in charge to conduct a periodic evaluation of the judicial activities of the federal courts and judges. The writers duly appreciate this fact but we equally believe that since

charge of assessing the management, performance and working system of the court in general and the Cassation Division in particular. Hence, to enhance the efficacy/correctness of the Division, the Court must look back at what the Division has done. To do this, the writers believe that it is necessary to establish an ad hoc committee to evaluate the management and performance of the Federal Supreme Court in general and the Cassation Division in particular.

4. Conclusion

Separation of power is a cardinal rule under the FDRE Constitution. This bedrock principle on the other hand dictates the role of the three organs of government. In providing so, the Constitution does not allow the judicial branch to interfere with the powers of the legislative branch. In other words, the judicial branch is supposed to stick to interpretation of the law. In this regard, the Cassation Division that assumes the highest burden to find the exact intention of the legislature and to create uniformity in the legal system. This shows that the Division must avoid flaws in its decisions. In particular, it is important to avoid mistakes that result in the making new law under the guise of interpretation. In order to do so, it is advisable for the Ethiopian judiciary specifically the Federal Supreme Court to look back once in order to face the challenges of such uncanny routes and flaws. In particularly, the Judicial Administrative Council should awake and respond to such amiss appropriately; nevertheless, without disgracing the independence of the judges. Furthermore, it is better if the Cassation Division is constituted in various

there is no such assessment until now the workload is too burdensome and it would be fine if it is made by a separate organ solely established to get this duty done.

divisions, such as, civil, labor and criminal. Such organization will enable the court to have specialized judges in a specific area. Moreover, as in the case of other countries, it is recommended if an advisory board constituted of different professionals is formally established in order to help the Cassation Division. In addition, by taking into account the caseloads on the judges in the Cassation Division, it is sound to hire legal assistants for judges.

The Impact of Transplanting Environmental Impact Assessment Law into the Ethiopian Legal system

Dejene Girma Janka (PhD)*

Abstract

Legal transplantation is not a recent phenomenon. Besides, legal transplantation happens everywhere. Once transplanted, laws may be implemented effectively or partly, or disregarded altogether. In Ethiopia, the EIA Law is the result of legal transplantation because evidence shows that the government enacted the law due to some external factors. Yet, at the moment, the law is implemented although its implementation is selective. On the other hand, such selective implementation of a transplanted law can eventually lead to the total disregard of the law.

1. Introduction

The practice of *legal transplantation*[1] is a very old one.[2] Moreover, it is an experience of virtually all legal systems since legal systems around the world have developed through legal transfers.[3] In other words, legal

[1] The expression *legal transplantation* is known by different names such as legal transfer, legal borrowing, legal importation, legal reception, etc. In this article, I will use these expressions interchangeably.

[2] See, for example, Alan Watson who says legal transplantation is as old as law itself; Alan Watson mentioned in Daniel Berkowitz, Katharina Pistor, Jean-Francois Richard, *THE TRANSPLANT EFFECT*, American Journal of Comparative Law, Winter, 2003, p 4-5; and Shah who argues that it started, probably, during pre-historic time right up to interactions of the Greeks with the Egyptians, Anatolian, Mesopotamian, Persian, and Indian civilizations; Prakash Shah, *Globalization and the Challenges of Asian Legal Transplants in Europe*, Singapore Journal of Legal Studies, [2005] p 349.

[3] Prakash Shah, supra note 2, p 349; John Stanley Gillespie, *Transplanting Commercial Law Reform: Developing a 'rule of law' in Vietnam*, Ashgate Publishing Ltd, England and USA, 2006, p 3. See also Kingsley who argues that some laws have elements or everything emanating from a borrowed source and most of the transplants stem from lawyers reviewing law from "prestigious" jurisdictions in order to deal with legal issues.

systems around the world have developed because they borrowed (or were made to borrow) rules and institutions from one another. In this regard, the Ethiopian legal system is no exception as it has been transplanting laws from various legal systems. The Environmental Impact Assessment Proclamation (EIA law *hereinafter*) is one of such laws. As far as implementation is concerned, transplanted laws may be implemented fully or partly, or they may be totally ignored thereby producing the desired result fully or partly or just remaining on paper.

In this article, I will look at the success and failure of the transplanted EIA law in our legal system to know what its impact is like in light of the objectives it was meant for. To achieve this objective, this article is divided into five sections. The first section deals with legal transplantation and EIA in general and the transplantation of the EIA law into our legal system. The second section deals with the effectiveness of transplanted laws in general and of the EIA law in Ethiopia in particular. The third section adumbrates the reasons for lack of full success of the EIA law in Ethiopia. The fourth section discusses issues related to prospects, if any, that will make the EIA law more effective. The final section concludes the article with some recommendations.

Jeremy J. Kingsley, *Legal Transplantation: Is This What The Doctor Ordered And Are The Blood Types Compatible? The Application Of Interdisciplinary Research To Law Reform In The Developing World–A Case Study Of Corporate Governance In Indonesia*, Arizona Journal of International & Comparative Law Vol. 21, No. 2, 2004, p 18.

2. Legal Transplantation and Environmental Impact Assessment

2.1. Legal Transplantation

Nowadays, the practice of *legal transplant/transplantation*, either through imposition or voluntary borrowing, is a widespread phenomenon.[4] But, what is *legal transplant/transplantation?* So far, different writers have tried to define the concept somewhat differently. For instance, Watson defines legal transplant as "…the moving of a rule or a system of law from one country to another or from one people to another".[5] In other words, legal transplantation refers to the transfer of a rule or a system of law from one place/people to another place/people. Others define it as "the transfer of laws and institutional structures across geopolitical or cultural borders".[6] In this case, legal transplantation is not

[4] See for example Brian Z. Tamanaha, *A General Jurisprudence of Law and Society*, Oxford University Press, New York, 2001, p xii, 107; and Alan Watson, "Legal Transplants and European Private Law", mentioned in Weiguo He, *Legal Transplantation of "Piercing the Corporate Veil" to China*, (Online article), p 15. Moreover, legal transplantation is now increasing due to various factors. Firstly, globalization is causing legal transplantation to happen because "it brings laws and legal cultures into more, direct, frequent, intimate and often complicated and stressed contacts. It influences what legal professionals want and need to know about foreign law, how they transfer, acquire and process information and how decisions are made". Alan Watson, Legal Transplants, 1974, Edinburgh, Mentioned in Irma Johanna Mosquera Valderrama, Legal Transplant and Comparative Law, International Law: Revista colombiana de derecho internacional, Bogota, Colombia, 2003, p 264. Secondly, large trading nations and international donor agencies are held accountable for the occurrence of legal transplantation because they sponsored international legal harmonization projects. John Stanley Gillespie, supra note 3, p 3.

[5] Alan Watson, *Legal Transplants: an Approach to Comparative Law*, mentioned in Irma Johanna Mosquera Valderrama, supra note 4, p 264; and Weiguo He, supra note 4, p 11.

[6] John Stanley Gillespie, supra note 3, p 3. See also Galinou who defines legal transplant or legal borrowing as copying and applying foreign institutions, regulations, etc; Eirini Elefthenia Galinou, *Legal Borrowing: Why Some Legal Transplants Take Root and Others Fail*, available online (posted on 7/1/2005), p 392; Nicholson who defines transplantation of laws as an attempt to shift laws and institutions across borders including where the politics of the donor and recipient vary; Penelope Nicholson, *Borrowing Court Systems: The Experience if Socialist Vietnam*, the London-Leiden Series On Law, Administration And Development, Netherlands, Martinus Nijhoff

limited to the movement of legal rules alone; rather, it includes the movement of institutions as well. So, seen in light of the second definition, Watson's definition appears narrow as the second definition conceives legal transplantation not only as the transfer of legal framework but also of institutional framework. There are some who argue that the definition for legal transplantation should also include "laws transplanted by a people from a foreign culture".[7] This means, people migrating from one country to another migrate with their laws and they plant these laws into the local legal system of where they migrate to. According to them, thus, such laws should also be taken as transplanted laws. This implies that legal transplantation is not limited to what is allowed or taken or imposed by authorities/institutions but also by people.[8] Further, it is argued that legal transplant can happen even within a state that has parties with divergent legal cultures.[9] This means, for example, legal transplant can happen in a federal state where its

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Publishers, 2007, p 22; and Langer who seems to define, impliedly, legal transplant as the circulation of legal ideas and institutions between legal systems but not in the sense of "cut and paste" but through adaptation or "legal translation". Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, Harvard International Law Journal, Vol. 45, Number 1, Winter 2004, p 5.

[7] Prakash Shah, supra note 2, p 348-349.

[8] Of course, this makes sense only if the rules the migrating people take with them have force of law; that is, if they are felt binding at least by their members since, from anthropological point of view, the meaning of law is not or should not be confined only to rules created by authorities; rather, as inclusive of rules employed by the people to regulate their relationships. This means, although not all rules are rules of law, some rules people use to live by can be taken as legal rules even if they are not set by a definite maker like a king or a parliament. See, for example, Malinowski who seems to define legal rules as those rules which are felt and regarded as the obligations of one person and the rightful claims of another, irrespective of their sources. Note that people may feel certain rules to be binding or obligatory due to factors like psychological motives, reciprocity, social relationships, and other social machinery. Brownislaw Malinowski, Crime and Custom in Savage Society, Littlefied, Adams & Co, 1926, p 22-55

[9] Penelope Nicholson, supra note 6, p 23.

constituent parts may borrow legal ideas and institutions from one another. For example, in Ethiopia, the Harari Regional Family Code, unlike most other Regional Family Codes, recognizes polygamy.[10] If the other regions take this concept and recognize polygamy as an institution, then, we can say legal transplantation has taken place.

In any case, what we can understand from the above endeavors to define the concept is the fact that legal transplantation can occur when there is a movement of rules or institutions from one place/people to another place/people irrespective of why, how, and by whom it happens. Yet, it must be noted that such movement of rules and institutions should not necessarily take the form of "cut and paste". *Langer* argues that there will be legal transplantation if legal ideas and institutions circulate between legal systems in the form of adaptation or "legal translation".[11] This means, taking legal ideas and institutions from other legal systems and changing/translating them in such a way that they become fit into one's own system amounts to legal transplantation. For example, if legal ideas are taken from somewhere but their *modus operandi* in the receiving country is changed, one can still talk of legal transplantation. The best example here is the 1965 Civil Procedure Code of Ethiopia which was taken largely from India-a country with adversarial system-but which is being used in, by and large, an inquisitorial context.

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[10] Article 11(2), Harari Family Code, Proclmation No 80/2000, *Harari People Regional Government Negarit Gazetta*, 13th Year, 2000. Harari recognizes polygamy because of the religion of the people of the region which can be part of their culture.

[11] Máximo Langer, supra note 6, p 5. Nicholson also, too, transplantation of laws and legal institutions should not necessarily be complete and without transformation. This means, part of laws and legal institutions may be transplanted or the transplantation may happen in the form of transformation, as the case may be. Penelope Nicholson, supra note 6, p. 22.

2.1.1. Causes of Legal Transplantation

As stated before, legal transplantation is old but an increasing phenomenon. Then, one may wonder what causes such phenomenon to occur. The occurrence of legal transplantation may be attributed to different factors. The first factor is the urge to develop one's own legal system.[12] Nations borrow rules and/or institutions from one another if they think that such practice would help them improve their systems. For example, during the era of codification in Ethiopia, legal rules and institutions were borrowed from a number of countries such as France, Germany, UK, US, Japan, Switzerland, Brazil, India, Philippines, Israel, Iran, and Italy.[13] Moreover, legal transplantation can happen when it is imposed by super powers (nations or institutions). For instance, colonial laws were transplanted by colonizers into the legal systems of colonized territories through imposition to serve their interests against the wills of the local peoples.[14] In addition, nowadays, powerful countries like the US or the UK or institutions like the WB and the IMF can force the adoption of certain laws or institutions. Further, as indicated before, migration can also cause legal transplantation to occur. Therefore, one can conclude that legal transplantation happens when there is internal motivation/need

[12] For example, Schauer argues that demand for a law is one of the factors on which the transnational and cross-border spread of law substantially depends. See Frederick Schauer, T*he Politics and Incentives of Legal Transplantation*, CID Working Paper No. 44, Center for International Development, Harvard University, April 2000, p. 2.

[13] The 1950s and 1960s are taken as the era of codification in Ethiopian legal history because virtually all its modern codes emerged during these periods. See Aberra Jemebere, *Legal History of Ethiopia 1434-1974: Some Aspects of Substantive and Procedural Laws*, Rotterdam; Erasmus University, 1998, p 196-208.

[14] See Brain Z. Tamanaha, supra note 4, p 112-115.

to import a given law or institution or an external force triggering the importation of a law/an institution.[15]

2.1.2. Factors Determining Laws To Be Transplanted

We have seen that legal transplantation is now on increase. Moreover, we know that legal transplantation, in the absence of force/pressure, involves selection. For example, if Ethiopia wants to import a law regulating the use of evidence, it has to choose from among the available options. The question then is: what are the factors countries usually take into account to choose the laws they transplant?[16] In this regard, Watson lists prestige, chance and necessity, the likelihood of effectiveness, and incentives as some of the factors nations have to take into account to determine the laws they will transplant.[17]

For example, since the end of the Second World War, and particularly following the end of the Cold War, the US legal system is claimed to have become the most influential legal system in the world as its influences on the legal systems of other nations have ranged from general influences on jurisprudential approaches to law to influences on specific legal areas.[18] In other words, because of its prestige, the US laws/legal ideas were capable of influencing the legal systems of other nations.

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[15] It should be noted here that as long as it is not motivated by the local people or their authorities, laws transplanted by migrating people can also be taken as transplantation caused by external pressure. Of course, the transplantation here is spontaneous because it happens incidentally to migration.

[16] Since this article deals with the impact of transplanting the EIA law into the Ethiopian legal system, I will confine myself to the transplantation of laws alone, not of institutions.

[17] For more on this point, see Alan Watson, *Legal Transplants*, 1974, Edinburgh, mentioned in Irma Johanna Mosquera Valderrama, supra note 4, p. 265-269.

[18] Máximo Langer, supra note 6, p. 1-2.

Moreover, some laws are adopted because the receiving country needs a law and no other better option is available to it. This is transplantation by chance and necessity. For example, the reading of Ethiopian legal history reveals that when Emperor *Zara Yacob* wanted to have a codified law to avoid ruling by amorphous customary laws, the *Fetha Negest* was the only codified law he had been able to know of, which he indeed imported.[19] At that time, the Emperor could not have known and imported any other codified law.

Furthermore, laws that are expected to make legal institutions effective are more likely to be accepted than laws that are not. This means, the suitability of a law with national institutional framework can also determine which law to transplant into a given legal system.[20] For example, it is very unlikely that laws requiring the jury system to operate in our courts will be imported because they are not compatible with the existing arrangement in the country.

[19] Emperor Zara Yacob (who ruled the country from 1434-1468) wanted to have a codified law than using these customary laws. As a result, he ordered the Ethiopia Orthodox Church men to prepare a code and they produced a code called *Fewis Menfesawi*. However, this Code was far from meeting the expectations of the Emperor as it failed to comprehensively regulate the existing legal problems of his time. Then, a religious person from Egypt informed him of the existence of a better law book in Alexandria, Egypt. Soon, the Emperor ordered his informant to bring him the law book which was imported later on. That law book is the *Fetha Negest*, the most comprehensive law book (code) of its time. Since then, the *Fetha Negest* was applied to both civil and criminal matters in our legal system until Ethiopia adopted its modern codes in the 20th century. For more on the discussion in this paragraph, see Aberra Jembere, supra note 13, p 183-190. To add one more example, in early 1970s, countries of the world had no choice, although there was a need, but to use at least the ideas of the National Environmental Policy Act (1969) of the US which introduced, for the first time, the idea of prior environmental impact assessment to protect the environment.

[20] For more on this point, see Alan Watson, Legal Transplants, 1974, Edinburgh, Mentioned in Irma Johanna Mosquera Valderrama, supra note 4, p 265-269.

Finally, it is said that the existence of incentives-political, economic and reputational-from the transferring countries and third parties is likely to cause legal transplantation and determine which law to transplant.[21] For example, if Ethiopia thinks that it will get loans from the IMF/WB if it transplants a given law from somewhere, then, it will do so because of the benefits attached thereto. In this regard, one can mention the current EIA law of Ethiopia, to be discussed later, which was made because of the incentives attached to its enactment.

2.2. Environmental Impact Assessment and the EIA Law in Ethiopia

Environmental Impact Assessment is defined as a process of anticipating or establishing the changes in physical, ecological and socio-economic components of the environment before, during and after a proposed action, as well as evaluating the impacts of all reasonable alternatives, so that undesirable effects, if any, can be eliminated or mitigated.[22] In Ethiopia, it is defined as the methodology of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed *project* or *public instrument*.[23] According to both definitions, EIA is conceived as a tool to consider environmental values in the course of making decisions. Incidentally, it is worth noting

[21] Ibid.

[22] See D.K. Asthana and Meera Asthana, *Environment: Problems and Solutions*; S. Chanda and Company LTD, India, 1998, p 336; John Ntambirweki, *Environmental Impact Assessment as a Tool for Industrial Planning, included in Industries and Enforcement of Environmental Law in Africa*, UNEP, 1997, p 75; H.V. Jadhav and S.H. Purohit, *Global Warming and Environmental Laws*, 1st Edition, Himalaya Publishing House, Mumbai, 2007, p 10; and Duard Barnard, *Environmental Law for All: A Practical Guide for the Business Community, The Planning Professions, Environmentalists and Lawyers*, Impact Books Inc, Pretoria, 1999, p. 179.

[23] Article 2(3), EIA law of Ethiopia, No. 299/2002 (emphasis added). *Public instrument* refers to a policy, a strategy, a programme, a law or an international agreement.

that the use of such tool to take environmental issues into account while making decisions was first introduced by sec 102 of the National Environmental Policy Act (NFEPA) of the USA in 1969.[24] Since then, the idea of EIA has been transplanted in numerous legal systems around the world. Hence, today most developed and many developing countries have some form of EIA.[25] This is true for Ethiopia, too.[26] Indeed, Ethiopia's earliest commitment to use EIA came into being when it ratified the Convention on Biodiversity in 1994.[27] Then, in 1995, the FDRE Constitution came up with provisions impliedly requiring the use of EIA.[28] In 1997, Ethiopia took another important step by adopting its

[24] NEPA mandates federal agencies to prepare and consider environmental impact statement (EIS) before undertaking any major federal action likely to have significant effect on the environment Robert V. Percival, *Environmental Law, Statutory Supplement and Internet Guide 2003-2004*, ASPEN Publishers, USA, 2003, p 873. For detailed discussion on the conditions attached to the obligation to undertake EIS under sec 102 of NEPA, see Steven Ferry, *Environmental Law: Examples and Explanations*, 4th Edition, Aspen Publishers, Austin, Boston, Chicago, New York, and The Netherlands, 2007, p 88-96. Of course, the use of EIA as a tool for decision is not recent as, for example, the U.S. Army Corps of Engineers had developed techniques and methodology for impact assessment as early as 1870. See D.K. Asthana and Meera Asthana, supra note 22, p. 336.

[25] Mark Lancelot Bynoe 'Citizen Participation in the Environmental Impact Assessment Process in Guyana: Reality or Fallacy?', 2/1 Law, Environment and Development Journal (2006), p. 34, available at http://www.lead-journal.org/content/06034.pdf. This is why it is being argued that the legal requirement of EIA is now one of the principles of environmental law with universal acceptance. See John Ntambirweki, supra note 22, p 75; the Rio Declaration (1992) and the Convention of Biodiversity (1992) both recognizing EIA.

[26] Actually, being one of the poorest countries in the world, Ethiopia is supposed to make, and is making, a number of decisions to bring about economic betterment. This in turn upgrades the importance of EIA as a tool for throwing environmental values into decision-making processes.

[27] Article 14(1)(2) of the convention requires every contracting party to use EIA to protect and conserve biological diversity

[28] For example, article 92(2) of the FDRE Constitution states that "the design and implementation of programmes and projects of development shall not damage or destroy the environment". Article 92(4) of the Constitution stipulates that "the government and citizens shall have the duty to protect the environment"; Article 43(1) recognizes peoples' right to sustainable development; and Article 44(1) recognizes

National Environmental Policy (EPE) which recognizes the need to use EIA for the attainment of its goals.[29] However, it was only in 2002 that Ethiopia adopted an EIA Proclamation, one of the most important environmental laws ever made in Ethiopia. First, it deals solely with EIA. Second, it makes EIA applicable to projects and public instruments. Third, it imposes on all persons the duty to make prior EIA in relation to any actions for which prior EIA is required. Fourth, it strictly prohibits the commencement of any project requiring EIA before *appropriate assessment* is made. Fifth, it entrusts the power to ensure that EIA is done and evaluate same to the Federal Environmental Protection Authority (FEPA), now Ministry of Environment and Forestry, and regional environmental agencies.[30] That is why the EIA Proclamation could be described as one of the most important environmental laws Ethiopia has ever enacted.

2.2.1. Transplantation of the EIA Law into the Ethiopia Legal System

Although our Constitution, with stipulations on the protection of the environment, was promulgated in 1995 and Environmental Protection Authority was established in 1995 with the view to ensuring environmental protection, Ethiopia did not make an EIA law until 2002.

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everyone's right to live in clean and healthy environment. There is no doubt that the use of EIA is of vital importance to fully enforce these constitutional stipulations. Indeed, the discussion on the draft of the EIA law also reveals this fact.

[29] See the National Policy of FDRE, 1997. According to paragraph 2.1 of the EPE, the overall policy goal of the EPE is realizing the right of Ethiopians to live in clean and healthy environment and to bring about sustainable development.

[30] See articles 3, 7, 11 and 14 of the EIA Proclamation. After this article is written, the FEPA was re-established as a *Ministry of Environmental Protection and Forestry*. However, the Proclamation that establishes this Ministry has not yet been published and put on sale. Hence, I have decided to keep the expression FEPA in this article.

In 2002, however, it enacted the EIA law. One may wonder why the country made this law in 2002 while it did not introduce it soon after the promulgation of the Constitution or at least after the establishment of the Environmental Protection Authority in 1995.

According to two officials at the FEPA, the making of the EIA law was not motivated by internal needs; rather, it was caused and facilitated by external pressure. The officials specifically mentioned financial institutions like the WB as the ones responsible for the enactment of the EIA law. They indicated that these institutions started demanding EIA as a condition for the funds they were to release for government projects which, in turn, made the government to submit to their demand. [31]

On the other hand, doing EIA to submit reports to these institutions requires putting a legal framework in place because without legal framework doing an EIA is very difficult, if not entirely impossible. For example, one must know which actions are subject to EIA and which are not; who a responsible person is for doing EIA; what the role of the public is in the EIA process; who bears the cost of doing EIA; who ensures that EIA is done properly; etc. Surely, entertaining these and other issues requires putting a legal framework in place. Therefore, Ethiopia had no choice but to introduce an EIA law to deal, at least, with some of these issues and ultimately to show to institutions like the WB that it was ready to do EIA to get their supports. This is how the current EIA law came into being.

[31] I made conversations with two officials of the FEPA who demanded anonymity. Although the conversation took place in 2009, I deliberately omitted the exact date of the conversation in accordance with their demands.

With regard to its source, the drafting history of the EIA law does not expressly mention from where it was taken. However, it is clearly mentioned that the practices of different countries and international institutions were used to prepare a draft EIA law and introduce the procedure of EIA into Ethiopia.[32] Thus, there is no doubt that the rules in the EIA law are transplanted rules. For example, although it is not said explicitly, the rules of WB on EIA might have been used because the WB was one of the external forces that caused the government to introduce the system of EIA. This is so because it is mentioned, in the legislative history of the law, that the practices of international institutions were used, whereas the WB is one of such institutions with experience in relation to EIA. For example, the WB has guidelines on EIA. In any case, what we can understand from this is the fact that the EIA law was not prepared based on the existing realities in Ethiopia.

The message from the preceding paragraphs is clear. However relevant it might be, the motive behind the introduction of the EIA law was not to protect the environment as such. Rather, it was made to respond to the demands of external factors/actors. Thus, one may conclude that the transplantation of the EIA law into the Ethiopia legal system is attributable to some influence from the above institutions. The influence may be seen as undue on the government because without EIA they started refusing to fund government projects, whereas the government could not afford to lose their aids because of the size of such aids and its

[32] See the discussion on the draft EIA law on 31 October 2002 by the concerned parliamentary committee and stakeholders. The document containing this discussion is available at the archive/library of the House of Peoples Representatives.

incapacity to fund some of its mega projects from its own treasury. On the other hand, legal transplantations that are motivated by external forces such as international institutions are often understood as impositions than voluntary act.[33]

3. Effectiveness of Transplanted Laws

Generally speaking, a transplanted law either through internal motivation or external pressure may be implemented effectively, or ignored altogether, or formally observed but practically disregarded, or selectively applied.[34] Firstly, the transplanted law may be used and applied indiscriminately in the intended fashion. In this case, the law will be fully effective and it will have the desired impact. This is likely to occur when transplantation is triggered by internal needs. Under such circumstance, transplanted laws will not remain on paper; rather, they will actually be used in practice.[35] For example, in Ethiopia, different legal ideas are being taken from abroad in the field politics (election) from time to time and these ideas are rigorously used because their introduction is motivated by internal needs.

Secondly, transplanted laws may be ignored altogether. According to *Kingsley*, this happens when external forces trigger legal transplantation to occur because they assume, among others, the existence of certain institutional, cultural, or political realities in the receiving country which

[33] Jeremy J. Kingsley, supra note 3, p 516.
[34] For discussion on the impacts of transplanted laws and some of the points raised in this section, see generally KATHARINA PISTOR, *THE STANDARDIZATION OF LAW AND ITS EFFECT ON DEVELOPING ECONOMIES*, American Journal of Comparative Law, Winter 2002, p. 10.
[35] For more on this point, see Daniel Berkowitz and others, supra note 2, p 2-3.

in fact do not exist or are not properly developed.[36] Interestingly, transplanted laws may still be rejected, if they are caused by external factors, even when it happens between nations that are very close politically, culturally, developmentally, and economically, which, in turn, implies that the rejection will be more serious if legal transplantation happens between nations which are not politically, culturally, developmentally, and economically close.[37] This is so because it will be difficult to consume the transplanted laws as they are based, when they were formulated, on different political, cultural, developmental, and economic realities than those existing in a country receiving the transplant.[38] In any case, under such circumstance, the transplanted law brings about no change to the existing realities in the receiving state. This means, the law will be totally ineffective; it will remain on paper and will have no impact at all.

[36] Jeremy J. Kingsley, Supra note 3, p 510-512. According to PISTOR, rules that are imposed may cause domestic resistance thereby leading to ineffectiveness. KATHARINA PISTOR, supra note 34, p 2. According to Watson, a law may be transplanted from a country which has very different political, social, economic, and religious conditions and yet be effective. However, this point presupposes that the transplantation is voluntary. Alan Watson, Legal Transplant: *an Approach to Comparative Law*, mentioned in Weiguo He, supra note 4, p. 11.

[37] Jeremy J. Kingsley, supra note 3, p. 514.

[38] In fact, there are some writers who argue that legal transplant is not possible at all. For example, Legrand says, 'since rules cannot travel, 'legal transplants' are impossible.' Pierre Legrand, "What 'Legal Transplants'?"mentioned in Weiguo He, supra note 4, p 14. Of course, this is an extreme position. Moreover, in this context, the argument is not that legal transplants cannot be successful at all because it is possible. What it means is that if it is to be successful, then it requires more than taking laws. For example, it requires training domestic experts in the field establish the necessary institutional framework for its enforcement, make subsidiary laws to enforce it, have political commitment to use the law, etc. However, if these things are not done, the effective implementation of a transplanted law is unlikely. See generally Jeremy J. Kingsley, supra note 3, p. 516.

Thirdly, and closer to total rejection, transplanted laws may be observed formally but be circumvented in practice. This type of observance of the law is called "creative compliance." For example, transplanted laws may be made in general terms leaving too much latitude for interpretation. This makes the application of the law difficult because its scope will be broad and law enforcer may not know what is include and what is not. Moreover, for "creative compliance", it is possible to exclude important actors/areas from the coverage of the transplanted law to make it ineffective. In both cases, the desired result of the law will not be obtained. This again is likely to happen when transplantation is not based on internal needs/initiatives.

Fourthly, and somewhere in between full implementation and total rejection, transplanted laws may be applied only selectively. This means, while some actors/actions are regulated by the law, others are not. For example, in Ethiopia, while EIA is done for projects, public instruments (laws, policies, programmes, etc.) are not subject to EIA. Similarly, while some project proponents do EIA, there are many project proponents who do not do EIA. These are good examples of selective application of a law. As far as the impact of such law is concerned, there is no doubt that it will affect the behaviour of those who are subject to it. Nevertheless, such application of the law will eventually lead to 'creative compliance' than to true compliance thereby, eventually, denying the law the opportunity to produce full impact.

Now, when we consider the reality of transplanted laws in light of the above discussions, it is argued that, generally, they are quite ineffective

and thus have very limited impact.[39] This means, usually, transplanted laws do not have the impact they are meant for. This is bound to happen because making these laws effective requires a number of things. For example, they must be meaningful in the context in which they are applied so that citizens will have an incentive to use them and also demand institutions to enforce and develop them.[40] If the laws do not make sense to citizens of a given place, then, they will not be effective or may be less effective. For example, in Ethiopia, laws requiring the use of *family name* were imported in 1960 with the introduction of the Civil Code. Yet, more than half a century later, these laws are not in use because they are totally at odds with the prevailing realities in the country. Moreover, there should be preparedness by the receiving country to use and develop transplanted laws. For example, one of the problems in Ethiopia in relation to the EIA law is the fact that few people understand environmental law in general and EIA law in particular. If this is the case, then, it is easily discernible how difficult developing and effectively implementing the law would be. Therefore, importation of a law, however good it might be, does not necessarily guarantee effective implementation. If there is no conducive environment for its implementation (such as citizens' demand and legal intermediaries that can understand, apply and develop the law), its ineffectiveness will be inevitable.

With the preceding discussions in mind, it would be appropriate to consider the fate/impact of the EIA law of Ethiopia. In which of the

[39] Daniel Berkowitz and others, supra note 2, p. 1.
[40] Id., p. 2-3.

above categories does it fall? Is it totally ignored and, hence, producing no impact at all? Is it observed constructively? Is it applied selectively? Or, has it been used fully and thus been producing the desired results? The following section will answer this question.

3.1. Implementation of EIA law in Ethiopia

A cursory look at our system of EIA or the impact of the EIA law, in light of the previous points, forces one to make a quick conclusion that the law is neither totally ignored nor fully implemented. As a result, its impact is somewhere between the impact of total rejection (that is, no impact at all) and full implementation (that is, having the desired impact/effect). In the following paragraphs, I will make clear what the impact of this law is like in a situation where it is neither totally rejected nor fully enforced.

To begin with, the system of EIA is working in Ethiopia at least for some projects.[41] Of course, some officials at the FEPA may be tempted to argue that all projects that are subject to EIA are passing through EIA.[42] While this may be an exaggeration, one cannot deny that there are

[41] Interviews with Ato Solomon Kebede, Head of the EIA Department, FEPA, on 7 and 8 September 2009, Ato Abraham Hailemelekot, EIA Expert, FEPA, on 24 August 2009; and Ato Wondosen Sintayehu, Acting Head, Environmental Policies and Legislation Department, FEPA, on 24 August 2009. I have checked the currency of this information from the legal department of the Ministry of Environment and Forestry on 04 February 2014 and I have been informed that there has not been any appreciable change in this regard.

[42] Tewolde Berhan Gebre Egziabher, Director General, Ethiopian Environmental Protection Authority, Public Lecture on 7 May 2009. However, some people at the FEPA agree with what the director said only in part. For a more detailed discussion on the practice of EIA in Ethiopia, see generally, Dejene Girma Janka, Environmental Impact Assessment in Ethiopia: Laws and Practices, University of Alabama, (PhD Dissertation), p. 153-190.

proponents who are willing to do EIA for their projects in accordance with the EIA law.[43] Moreover, there are times when non-observance of the EIA law leads to stoppage of a project. In this regard, mentioning one example seems relevant. Some time ago, a certain investor wanted to establish oil planet to produce bio-fuel in *Babille*, a protected area for its biodiversity richness.[44] In accordance with the EIA law, therefore, he wanted to do an EIA before he commenced implementing his project. Then, he approached the Ethiopian Institute of Biodiversity Conservation (IBC) to help him in this regard. However, the IBC informed him that the area was already studied and no development activity could be undertaken in *Babille* unless it would be for the good of the area itself. But disregarding the advice of the IBC, the investor conducted an EIA and submitted his report to the FEPA for evaluation. The FEPA also looked at the report in accordance with the existing legal framework and ordered the investor to make some modifications before he was issued environmental clearance. However, the investor never reappeared before the FEPA again with the required modifications. Instead, he went ahead with his project and started removing the forests in the area.[45] This led to a dispute between environmental groups-the IBC, FEPA, Ethiopian Wildlife Development and Conservation Authority (EWDCA), and some

[43] Moreover, Ato Solomon Kebede, Head of the EIA Department, FEPA, indicated that some investors are willing to do (and they actually do) EIA before beginning to implement their projects because they want to discharge their obligations under the EIA law. Indeed, he indicated that these investors could refuse to do EIA with almost no consequence; yet, they do it because they want to respect the law. Incidentally, according to article 3(1) of the EIA law, no person can commence the implementation of any project that requires EIA, in accordance with the directives to be issued by the FEPA, before obtaining authorization from the FEPA or the relevant regional environmental agency.

[44] Babille is a sanctuary of many endemic animals particularly elephants.

[45] It was said that thousands of hectares of forests were cleared before the matter was stopped.

NGOs like Forum for Environment, on the one hand, and the investor on the other. The dispute was very serious and it went all the way long to the Office of the Prime Minister. After a year and half, it was resolved in favour of the environmental groups although the investor fled the country before such resolution was made.[46]

What we can understand from the above story is the fact that there are times when the EIA law is in fact made to work. It is the non-observance of the EIA law that made some of the environmental groups like the FEPA to join the dispute and challenge the measures taken by the investor. Knowing that he would lose the case, seen in light of the EIA law, the investor also eventually abandoned his project and fled the country. This means, the desired result; that is, stopping the project under such circumstance, was obtained.

In the case of willing actors, that is, those persons who do EIA willingly, it is the mere existence of the EIA law that makes them do EIA before they start implementing their projects. Obviously, if the law did not exist, they would not do EIA because they would not have any obligation to discharge.

Therefore, although no one can say that the EIA law is having all the desired impacts it was meant to have when its transplantation was triggered; that is, avoiding or minimizing actions that have adverse

[46]The information in this paragraph was obtained through interview from Ato Solomon Kebede, supra note 41, Ato Fanuel Kebede, Senor Wildlife Expert, Ethiopian Wildlife Development and Protection Authority, 31 August 2009, and some people at the IBC who demanded anonymity, 1 September 2009.

impacts on the environment, equally no one denies that it is having certain positive impacts. It is producing some changes in behaviour of persons although that is, as we will see below, only under limited circumstances. This goes in line with what was mentioned before; that is, the effectiveness of transplanted laws is very limited.

On the other side of the fence, however, there are times when the EIA law is not used in practice.[47] In fact, the ineffectiveness of the EIA law is more glaring than its effectiveness (implementation) because most of the purposes it was enacted for have not been served.[48] This means, actions (projects and public instruments) that may have adverse impacts on the environment are not being avoided or minimized as they should be. The major factors contributing to the failure of the EIA law include the absence of subsidiary laws to implement the EIA law, lack of EIA for government funded projects unless some kind of external aid is required, the performance of EIA for some projects after the commencement of their implementation, the absence of EIA for public instruments, and the government's lack of adequate political commitment to fully implement the EIA law.[49] Some of these factors will be discussed below.

First, the EIA law is a very general law. For example, it provides for *public participation* in the EIA process. However, from the general stipulations of the law, it is difficult to know what the term *public* refers to, whether or not the *public* can participate in the EIA process at every stage, the mode of involving the *public* in the EIA process, etc.

[47] Interviews with Ato Solomon Kebede et. al., supra note 41.
[48] Ibid.
[49] Ibid.

Therefore, even a modest (putting aside effective) implementation of the EIA law imperatively requires the issuance of implementing laws casting light on such issues. Cognizant of this fact, the legislature authorized the Council of Ministers to issue regulations and the FEPA to issue directives to implement the law. Nonetheless, more than a decade later, we still do not have Council of Ministers' Regulations to implement the EIA law. Likewise, the FEPA did not issue the necessary directives to implement the EIA law for six years after the enactment of the EIA law. However, in 2008, it came up with directives providing for the list of projects (not public instruments, though) which are subject to EIA. Despite this, the directives still have legal and substantive problems. To begin with the legal problem, in our system law-making passes through five stages: initiation, discussion, approval, signature, and publication. When we come to the directives, first, they have not been signed by the Chairperson of the Council whose signature is necessary for the directives the FEPA issues. Second, and consequently, the directives have not been published in the official newspaper for the publication of federal laws; that is, the Federal *Negarit Gazeta*.[50] This means, the making process of the directives is two steps short of consummation. As a result, legally speaking, the directives are not yet a law. Of course, in practice, directives are not published in this newspaper although they are applied as laws. But, signature is indispensable. Thus, the FEPA directives could be treated as a law if they were signed by the chairperson

[50] Article 2(2) of the Federal Negarit Establishment Proclamation of 1995 states that *[a]ll Laws of the Federal Government shall be published in the Federal Negarit Gazeta*. Then, under article 2(3), it adds; *All Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of Laws published in the Federal Negarit Gazeta.* If federal laws are not published in this newspaper, then no one is supposed to take judicial notice of their existence. See Federal Negarit Gazeta Establishment, Proclamation No. 3/1995.

of the Council.[51] In default of signature, project owners can legitimately claim that there is no law that, as envisaged by the EIA law, provides for list of projects that are subject to prior EIA but a draft law and, hence, refuse to do EIA.

The substantive problem of the FEPA directives pertains to its scope. They are not comprehensive for two reasons. First, the directives do not provide for list of public instruments that should pass through EIA. However, the EIA law requires the FEPA to issue directives specifying public instruments that should pass through EIA. It is, therefore, unfortunate that, more than a decade later, there are no such directives put in place. Moreover, this is a big below to the effectiveness of the EIA law because EIA for public instrument is, as some convincingly argue, very important to ensure environmental protection.[52] What this means is that the making of public instruments is not required to be preceded by EIA. Second, the 2008 directives deal with projects that are subject to EIA only selectively. There are projects that can be properly subjected to EIA but which are left out. For example, while housing development

[51] In fact, the FEPA claims that it can use these directives as law despite the fact that the requirement of signature is not yet met. Of course, this makes sense because the Prime Minister was part of the approving body (the Council) when they were approved. So, to fail to use them as if they were not laws because they are not signed by the person who participated in their approval may not make sense.

[52] There is an argument that since project-based EIA tends to occur after broader social and economic policy decisions have been made and these prior policy decisions may constrain the ability of project-based EIA to ensure environmental protection, there should be a Strategic Environmental Assessment (SEA) for greater integration of EIA processes with top level decision-making. SEA makes decision-makers consider environmental values not only at project level but also at programmatic/strategic levels. Indeed, SEA has now emerged as an important element in domestic environmental decision-making processes. See Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration,* Cambridge University Press, Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, 2008, p. 155-156.

projects by private investors, which are now expanding, are not subject to EIA, similar projects are subject to EIA when government organs undertake them.

Therefore, in the absence of specific laws to implement the general stipulations in the EIA law, to think of the law to produce the desired result to the full extent is not possible. The government could make such laws to implement the EIA law if it wanted to. However, it does not seem that there is adequate commitment to do so. In this regard, perhaps making a comparison between two peer laws, yet in different fields, seems appropriate. In 2002, Investment Proclamation No. 280/2002 was enacted. Later on, Proclamation No.373/2003 amended it. To facilitate the implementation of the Investment Proclamation, as amended, the Council of Ministers issued Regulations No. 84/2003. To further facilitate the effectiveness of the Investment Proclamation, the Council amended these regulations by another regulation, Regulation No. 146/2008.[53] Finally, to enhance investment activities further, the 2002 Investment Proclamation and its amending Proclamation were repealed and replaced by a new Investment Proclamation, Proclamation 769/2012, which is supported by a new Council of Ministers' regulations. Now, the amendment of the Investment Proclamation No. 280/2002 by another proclamation and the issuance of two regulations to enforce its provisions, as amended, and the eventual replacement of this Proclamation by a new proclamation and supporting it by regulations

[53] Investment Proclamation, Proclamation No. 280/2002, Investment Proclamation 280/280 Amendment Proclamation, Proclamation No.373/2003, Council of Ministers Regulations, Regulations No. 84/2003, Council of Ministers Regulations, Regulations No. 146/2008.

show how committed the government is to boost investment activities in the country. On the contrary, when we see the EIA law which was made in the same year (2002) with the Investment Proclamation 280/2002, it has never been amended or replaced; nor it has ever been supported by implementing regulations. This is not because the EIA law does not need amendment. Indeed, there are problems which could only be rectified by amending the law. For instance, the extension of the time within which EIAs should be reviewed, imposing the duty to require an environmental clearance certificate on the authorities that approve public instruments, granting express power to environmental protection organs to monitor the implementation of projects and take appropriate measures, if need be, recognizing the right to standing of everyone to take action against any person including environmental protection agencies for failing to discharge their EIA related duties require, removing regressive measures that have been introduced by subsequent proclamations, etc. require the amendment of the EIA Proclamation.[54] Such changes cannot be introduced by implementing regulations for doing so in regulations would amount to going beyond the powers of the Council of Ministers. This is why one can safely say the non-amendment of the EIA law can imply lack of the necessary commitment to fully implement it or use it in practice to ensure environmental protection.

The second reason contributing to the failure (ineffectiveness) of the EIA law is lack of EIA for government projects unless some kind of external aid is required to finance them. This means, it is not only when a government formulates strategies (which require Strategic Environment

[54] For more on this point, see Dejene Girma, Supra note 42, p. 241-242.

Assessment (SEA) and which have not been subject to EIA hitherto) but also when it executes its strategies that the EIA law is put aside. Therefore, one can speak of the rejection of the EIA law at two levels; at strategic level and project level, both of which are contrary to the spirit and express stipulations of the EIA law.

However, when government projects require external funding to which EIA is attached as a condition, then, EIA will be done by the concerned government agency. Even so, the performance of EIA is not really to observe the EIA law but to observe the conditions attached to funding a project. Here, we can consider the case of *Gilgel Gibe* III. At the moment, *Gilgel Gibe* III is the second biggest (second only to the Grand Ethiopian Renaissance Dam) hydroelectric power generation project in the county. It is expected to produce more than 1800 MW upon its completion. When the project was designed, no SEA was made. Similarly, the commencement of its implementation was not preceded by EIA. All these happened because initially the designers and implementers of the project thought that it would be fully funded from government treasury. Unfortunately, however, in the course of implementing the project, the government faced financial constraints which forced it to look for external funding from the WB. The WB agreed to fund the project but required the production of prior EIA as a condition. Thinking that it would not be realized, the government then rushed to doing a post implementation EIA, which is contrary to the EIA law that requires prior EIA. Then, the EIA was done and its report submitted to the FEPA for evaluation and approval. Yet, a little bird told the WB that the EIA was

not done prior to the commencement of the implementation of the project. As a result, it withdrew its promise to fund the project.[55]

By the way, more examples could be mentioned with regard to the absence of prior and full scale EIA for government projects. This includes the Grand Ethiopian Renaissance Dam which was not preceded by full scale EIA.[56] Anyway, what one can understand from this is the fact that projects funded by the government do not have to pass through EIA rendering the EIA law expendable. This is another major blow to the effectiveness of the EIA law because, in Ethiopia, most major developmental projects such as irrigations, dam and road constructions are carried out by the government. An excellent case in point is the construction of the Grand Ethiopian Renaissance Dam.

To sum up, there are indeed times, though limited, when the EIA law is observed. Thus, regardless of the motive behind such observance, the impact of the law under such (limited) circumstance is positive. Hence, our transplanted EIA law is not totally devoid of impacts. Nevertheless, often, the law is not being used in practice. While there are times when it is totally disregarded in practice, there also times when it is used only selectively (which will, of course, finally lead to constructive observance of the law where the law will have no impact at all). The underlying reason for the absence of effective implementation of the law is the

[55] For the story in this paragraph, I made discussions with two officials at the FEPA who preferred to remain anonymous. Also see Dr. Tewolde Berihan, supra note 42.
[56] See Dejene Girma, supra note 42, p. 86-87.

absence of adequate political willingness backing its effective implementation.[57]

4. Major Causes for Lack of Adequate Commitment to Fully Implement the EIA Law

Since it is not fully implemented, the impact of the EIA law on proponents hitherto is insignificant. The major reasons for its failure have already been discussed. But all the reasons mentioned before seem to have a common cause; that is, lack of adequate willingness on the side of the government to effectively implement the law with the view to achieving its objectives. It is known that politics is a very important factor for the success of a legal transplant.[58] In our case, adequate political commitment does not seem to exist due to following major reasons.

4.1. Lack of Sincere Internal Needs to Have the EIA Law

It is repeatedly said that the absence of adequate political will is a major cause for the lack of full implementation of the EIA law. For example, the least that the government can do, if there were sufficient will, to effectively implement the EIA law so that it can have the intended impact, is issuing regulations and directives which specify actions (projects and public instruments) that should be subject to EIA. Without such laws, it is crystal clear that the EIA law will not be implemented fully/effectively.[59] However, the government has not issued regulations

[57] Id., p. 153-187.
[58] Otto Kahn-Freund mentioned in Penelope Nicholson, supra note 6, p. 25-27.
[59] Of course, to overcome the effect of not having these laws, the FEPA issued procedural guidelines which list projects which are and are not subject to EIA.

that are necessary to enforce the law. Besides, as discussed before, the 2008 directives do have their own problems. And this is happening because the importation of the EIA law was not triggered by internal governmental needs. As the previous discussions have shown, the law was imported because there was some sort of undue influence from external bodies like the WB. The law is, therefore, as good as an imposed law. Under such circumstance, to think of the existence of adequate political commitment to enforce the law is very difficult except where similar circumstance under which the law was imported exists such as condition to obey the law to get fund for a project. In fact, the easiest measure the government has taken not to fully implement the EIA law is denying it secondary laws destined to implement its general stipulations, which is the usual fate of laws whose transplantations are motivated by external forces.[60]

4.2. Internal priority

The other cause for the absence of adequate political commitment to fully implement the EIA law may be attributed to the place given to environmental protection vis-à-vis the other national interests. Admitting that Ethiopia is one of the poorest countries, the effort of the current

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Nevertheless, these guidelines are not laws/binding; rather, they are like codes of conducts those concerned persons should follow. Hence, other authorities, as it is the case, can refuse to take them into account. For example, our investment commission issues investment permit even when the project to be implemented is subject to prior EIA in accordance with these guidelines and the proponent has not secured authorization from the FEPA.

[60] Of course, this does not mean that legal transplantation cannot be effective because it can be. For example, according to Watson successful legal borrowing could be made from a very different legal system, even from one at a much higher level of development and of a different political complexion. Alan Watson mentioned in Penelope Nicholson, supra note 6, p. 22. However, Watson's argument presupposes that the borrowing is motivated by internal initiative.

government is to change this reality and make the country among middle-income countries by 2020-2023.[61] Therefore, no one should wonder if the government makes economic development, not environmental protection, its priority area. Of course, it is obvious that the use of EIA would contribute to the sustainability of development. In this regard, the legislative history of the EIA law shows that the drafters did not want to make the EIA law an obstacle to development but to make development sustainable.[62] Yet, there is equally no question that EIA may sometimes suggest the abandonment of certain projects because the harm their implementation would cause to the environment may be greater than the benefits they would produce. This may be seen as detrimental to the countries development plans. For example, in the case of *Gilgel Gibe* III, some environmental groups were arguing that the harm to the environment will be enormous. However, the project will produce more than 1800 MW of hydroelectric power which may enable the country to export power to obtain foreign currency. As a result, the government proceeded with the project despite the criticisms from different 'stakeholders'. Indeed, as discussed before, the government did not mind to do prior EIA for the implementation for the project. The same applies to the Grand Ethiopian Renaissance Dam which was not preceded by full scale EIA. This implies that the priority of the government right now does not seem environmental protection (hence, the full implementation of the EIA law) but bringing about fast-tracked economic development.[63]

[61] See the FDRE Ministry of Finance and Economic Development, FDRE Growth and Transformation Plan 2010/11-2014/15.

[62] See the discussion on the draft EIA Proclamation as mentioned before, supra note 32.

[63] Of course, this is not unique to Ethiopia. For example, the US NEPA requires EIA as long as it is consistent with other national interests. This means, if doing EIA is

If this is so, then, the government will do everything to bring about economic development. For example, one of the top policies of the government is encouraging investment activities (foreign and domestic), whereas the achievement of this objective, in turn, requires easing the requirements investors are expected to meet. Demanding strict compliance with the EIA law is obviously a pushing factor for investors because it is both time taking and costly. That is why both the past and the present investment laws do not expressly require EIA as one of the conditions to get investment permit although the current investment law, Investment Proclamation No. 769/2009, requires environmental protection in a vague way.

Generally, the present political backing for the full implementation of the EIA law is not adequate. On the other hand, the fact that the introduction of the law was triggered by external pressure, and not internal initiatives of the government as such, and the tendency to give priority to economic development than environmental protection have contributed to the absence of the necessary support for the law's full implementation.

5. Prospects of the EIA Law in Ethiopia

Although the effectiveness of the EIA law is low, there are now glimmers of hope that it may be more effective. First, sectoral agencies' attitudes towards EIA are changing as they have started appreciating the purpose of EIA. This means, they may take and do EIA seriously. Second, civic societies such as NGOs are taking EIA seriously. As a result, they are

detrimental to other national interests, then NEPA can be put aside. See sec 102, NEPA (1969).

participating in the EIA process and demanding that it should be done when so required. Others have even gone too far to propose changes to the existing EIA law. Third, the public is gaining awareness about the environment in general and EIA in particular. Fourth, some local financial institutions like the Ethiopian Development Bank have shown interest to use EIA as a requirement for the relation they establish with investors. Therefore, if these and other prospects come true, the transplanted EIA law will have more positive impacts.[64]

Another enormous leap forward relates to the measures the government itself has been taking. It is clear that one of the ways of making the system of EIA effective is mainstreaming the requirement of EIA into sectoral laws. In this regard, although they are limited, there are some sectoral laws which require the use of EIA or taking the needs of the environment into account before projects are implemented. In this regard, mentioning two examples would suffice. First, the Mining Operations Proclamation No. 678/2010 provides, under article 60(1), for the following stipulations.

> Except for reconnaissance license, retention license or artisanal mining license, *any applicant for a license shall submit an environmental impact assessment and obtain all the necessary approvals from the competent authority required by the relevant environmental laws of the country*.[65]

This implies that anyone, save for artisan miners, who intends to carry out *exploration* or *mining* activity must conduct an EIA and obtain an

[64] The information in this paragraph was obtained through interview with Ato Solomon Kebede et al, supra note 41.
[65] Emphasis added.

environmental permit from the relevant federal or regional body before he/it is issued a license. In fact, this Proclamation contains other provisions which attempt to ensure the protection of the environment in the course of undertaking mining activities.[66]

Another example is the current investment proclamation, Investment Proclamation No. 769/2012. This Proclamation contains some provisions which are pertinent to environmental protection. For example, under article 38, it requires investors to observe the laws of the country in general and environmental protection laws in particular while carrying out investment activities. This shows that investors or project owners should comply with the requirements of the EIA law. Indeed, the Proclamation contains other provisions which have bearing on environmental protection as well.[67] But the bottom-line is, although it is not as explicit as the Mining Proclamation is with regard to the requirement of EIA, the inclusion of provisions that could be used to ensure environmental protection in the new Investment Proclamation shows that there is a beacon of hope for the effective implementation for the EIA law.

Generally, as there are challenges to the full implementation of the transplanted EIA law, there are also prospects that the record of its implementation could be improved in the future.

[66] See, for example, articles 34(1)(b), 44(1), (2)(3), and 61(4).
[67] See, for example, article 19(1), (2)(a) and (6) and article 30(4)(d).

6. Conclusion and recommendations

Legal transplantation happens everywhere. Sometimes it is effective, sometime it is not. But, generally, it is agreed that transplanted laws have limited impacts. In Ethiopia, the EIA law was transplanted and its transplantation was motivated by external pressure. As such, its effectiveness is very limited because mostly, not solely, it is respected only when there is a willing proponent or when funders require EIA. Thus, the law has not been able to have the impacts it could have. On the other hand, the government has contributed to the limited success of the EIA law in two ways; first, by denying it implementing laws; and, second, by not subjecting at least some of its projects to EIA. This has been happening because the importation of the law was not motivated by the government's needs and the government has a priority area to pay serious attention to as compared to environmental protection. Thus, although there are glimmers of hope, one cannot deny that the fate of the EIA law may be the same as transplanted laws in general; that is, little effectiveness with limited impact on the behaviours of proponents.

From the discussions made before, the most important factor that has contributed to the non-effectiveness of the EIA law is the lack of adequate political commitment backing the law. However, it was noted that even if the importation of the law was caused by external pressure, the law is still beneficial because it make development, one of the top priorities of the government, sustainable. Thus, the government has to have the necessary political commitment and this should be reflected, among others things, by making the necessary laws facilitating the implementation of the EIA law and subjecting its actions (strategies and

projects) to EIA when so required. Moreover, investment authorities should use the new Investment Proclamation to require environmental permits as one of the conditions to issue investment permits when a proposed project is subject to EIA. Finally, the substitute for the FEPA, that is, the Ministry of Environmental Protection and Forestry, should work closely with investment authorities to ensure the use of environmental permit to license projects and also lobby the government to issue subordinate laws to effectively implement the EIA law. Besides, the Ministry should issue the necessary EIA directives as this is within its exclusive jurisdiction.

Rethinking Justiciability and Enforcement of Socio-Economic Rights in Ethiopia: International Context and Comparative Perspective

Esmael Ali Baye[♣]

Abstract

The Constitution of the Federal Democratic Republic of Ethiopia has incorporated civil and political rights and economic, social and cultural rights in the Fundamental Rights and Freedoms (the Bill of Rights) part. The Constitution ensures the indivisibility, interdependent and interrelatedness of human rights. Furthermore, it directs the state to ensure its policies aiming at realizing the rights under the National Policy Principles and Objectives-the Directive Principles of State Policy section of the Constitution. The inclusion of socio-economic rights in the directive principles are most of the time, presumed to make them beyond the reach of the courts. However, the justiciability and enforcement of socio-economic rights are guaranteed under the United Nations Human Rights System, the African Human Rights system and domestically-in the courts of some countries. The changes on socio-economic landscapes in the international arena have necessitated the rethinking of justiciability and enforcement of socio-economic rights in Ethiopia. This article endeavors to analyze the justiciability and enforcement of socio-economic rights under the 1995 Constitution of Ethiopia. It argues that the model of adjudicating socio-economic rights in India and South Africa should be imported to Ethiopia for the better achievement of socio-economic justice throughout the country. It, *inter alia*, reviews the jurisprudence and practices of enforcing socio-economic rights under the Committee on ICESCR, the African Commission on Human

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and Peoples' Rights, and the experiences and jurisprudence of the Constitutional Court of the Republic of South Africa and the Supreme Court of India.

1. Introduction

> *"…may you live, and all your people. I too will live with all my people. But life alone is not enough. May we have the things with which to live it well; for there is a kind of slow and weary life which is worse than death."*
>
> Chinua Achebe[1]

The adoption of the Universal Declaration of Human Rights (UDHR) in 1948 is a cornerstone for the promotion and protection of human dignity in the history of human rights. It recognizes the indivisibility, interrelatedness and interdependence of economic, social and cultural rights, and civil and political rights.[2] Though it is not binding on states, the UDHR is considered to be a common standard to be achieved by all states and 'continues to be a source of inspiration to national and international efforts to promote and protect human rights and fundamental freedoms'.[3]

[1] Quoted in C. Achebe, 'Arrow of God', (Heinemann Ltd, 1989), at 95.

[2] It comprises almost all catalogues of human rights and fundamental freedoms in a single document. The International Bill of Rights is the UDHR and the two covenants were adopted on the basis of the Declaration-International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).

[3] L. Chenwi, *"Correcting the Historical Asymmetry between Rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights"*, 9(1) African Human Rights Law Journal (2009), at 24.

After completing the adoption of UDHR, the United Nations Commission on Human Rights started its work to come up with a binding international human rights instrument on ratifying states.[4] At the time when the UDHR was drafted and adopted, 'there was not much doubt that economic and social rights had to be included'.[5] However, at the time when the Commission started to draft a binding international human rights instrument, there was no consensus among the members of the Commission and then:

> … *The Commission was split on the question of whether there should be one or two covenants. The question was turned over to the General Assembly, which, in a resolution (General Assembly Resolution 421 (V) of 4 December 1950) adopted in 1950, emphasized the interdependence of all categories of human rights and called up on the Commission to adopt a single convention. The next year, however, the western states were able to reverse the decision, asking the Commission to divide the rights contained in the UDHR into two separate international covenants, one on civil and political rights (CCPR) and the other on economic, social*

[4] At the time when the General Assembly adopted the UDHR, it instructed the Commission to draft a single binding international human rights instrument by the General Assembly Resolution No. 217 E(III) (10 December 1948).

[5] A. Eide, *'Economic, Social and Cultural Rights as Human Rights'*, in A. Eide et al (eds.), 'Economic, Social and Cultural Rights', (2nd ed., (2001), Kluwer Law International, The Netherlands) at. 14. Eide further noted that the UDHR's great contribution is that it extended the human rights platform to embrace the whole field-civil, political, economic, social and cultural, and made the different rights interrelated and mutually reinforcing.

and cultural rights (CESCR) (General Assembly Resolution 543 (VI) of 5 February 1952).[6]

As a result, it has become common to consider the International Bill of Rights to consist of two distinct categories of human rights. In the years that have since gone by, civil and political rights have attracted much attention in theory and practice, while economic, social and cultural rights have often been neglected.[7]

As a result, in 1966, the General Assembly adopted civil and political rights in one covenant and economic, social and cultural rights in another covenant and both of them come in to force in 1976.[8]

The indivisibility and interrelatedness of the two sets of human rights that the General Assembly adopted in its resolution (General Assembly Resolution 421 (V) of 4 December 1950) has been repeated in the 1993

[6] This resolution is separation resolution-that separates the UDHR into two different covenants even though the rights are indivisible, interdependent and interrelated. At the time when the General Assembly passed the resolution that orders the Commission to draft two distinct covenants, it emphasized that the different sets of human rights are inter-related and indivisible. See on this issue, M. Nowak, 'UN Covenant on Civil and Political Rights: CCPR Commentary, ((1993), Kehl am Rhine) p. xx; Eide, supra note 5, at 9-11.

[7] AsbjornEide& Allan Rosas, "*Economic, Social and Cultural Rights: A Universal Challenge*" in A. Eide et al (eds.), 'Economic, Social and Cultural Rights', (2nd ed. (2001), Kluwer Law International, The Netherlands), at 3; for a general discussion on the issue, see also M. Craven, 'The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development', ((1995), Oxford: Oxford University Press), at. 9.

[8] ICCPR, adopted and opened for signature, ratification and accession by GA res. 2200A (XXI), of 16 December 1966 and entered in to force on 23 March 1976; ICESCR, adopted and opened for signature, ratification and accession by GA res. 2200A (XXI), of 16 December 1966 and entered in to force on 3 January 1976.

Vienna World Conference on Human Rights.[9] However, states have neglected economic, social and cultural rights and have given less attention in the protection and enforcement of the rights domestically than civil and political rights. Moreover, there was no international enforcement mechanism of economic, social and cultural rights until 2008.[10] The availability of individual complaints mechanism for civil and political rights at the international level 'has helped victims of human rights violations and resulted in the clarification of the rights in CCPR'.[11]Chenwi further pointed out that 'victims of economic, social and cultural rights violations, on the other hand, have not had this benefit at the international level. This neglect of economic, social and cultural rights has observably been due to the general perception of these rights as programmatic, having to be realized gradually, and of a more political nature and not capable of judicial enforcement'.[12]

[9] Under Part 1, Paragraph 5, the Vienna Declaration and Programme of Action states that 'all human rights are universal, indivisible, and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis…'

[10] The year 2008 was the 60th Anniversary of the Universal Declaration, when the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights- an international complaints mechanism for claiming socio-economic rights-was adopted. Before the coming in to force of the Optional Protocol, the implementation mechanism of the ICESCR was state reporting. Under article 16 of the ICESCR, states parties are duty bound to submit periodic reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized in the covenant.

[11]Chenwi, supra note 3, at 24.

[12] Id, at 24-25; see generally, ; Eide, supra note 5, at 14; M. Craven, '*The Committee on Economic, Social and Cultural Rights'* in A. Eide et al (eds.), 'Economic, Social and Cultural Rights', (2nd ed., (2001), Kluwer Law International, The Netherlands) at 470; Henry J. Steiner & Philip Alston "International Human Rights in Context: Law, Politics and Morals, ((2007), Oxford University Press, New York) at 263-4.

Though the two sets of rights are inter-related and indivisible, it is undeniable fact that 'there are some significant differences of emphasis between the typical civil rights on the one hand and some of the economic, social and cultural rights on the other' by the states.[13] The constitutions (comparable legislation or court judgments) of some countries states socio-economic rights as fundamental rights and directive principles for the state. The inclusion of the socio-economic rights in the part of the Directive Principles of State Policy (DPSP) creates confusion on the enforcement and justiciability of the rights.[14] This does not mean that socio-economic rights are not considered legal rights and enforced before courts of law. The jurisprudence of some countries demonstrate that socio-economic rights are applied and enforced before judicial organs even if the rights are vaguely worded and stated as premier goals in the Directive Principles of State Policies.[15]

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) has incorporated socio-economic rights in chapter three-the Bill of

[13]Eide& Rosas, supra note 7, at 5. They further noted that socio-economic rights are surrounded by controversies both an ideological and technical nature. And thus, some perceived socio-economic rights as not true rights at all, while others accord priority to civil and political rights than socio-economic rights due to political sloganism and shallow understanding of the nature of the rights.

[14] See generally DM Davis, *'The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directives Principles'*, 8 S. Afr. J. Hum. Rts.(1992).

[15] See generally, R. Gargarella*et al (eds.)*, 'Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor? (Ashgate 2006); Y. Ghai*et al* (eds.) 'Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights' (London: Interights) (2004),; J. Squires *et al* (eds.) 'The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights'(2005),; S. Liebenberg, *'The Protection of Economic and Social Rights in Domestic Legal Systems'*, in A. Eide, C. Krause & A. Rosas (eds.), 'Economic, Social and CulturalRights: A Textbook', (2nd ed., 2001)

Rights.[16] The socio-economic provisions in the Constitution provide 'entitlements to Ethiopian nationals' and 'obligations of the state'. The rights guaranteed to the citizens are 'the right to freely engage in economic activity and to pursue a livelihood of his choice', 'the right to choose his/her means of livelihood, occupation and profession', 'the right to equal access to publicly funded social services', the rights in work and 'the right to improved living standards'.[17] These rights are worded in vague and unclear terms. The vagueness and openness of the rights is a bone of contention in enforcing the rights. The rights should be interpreted in line with the provisions of international human rights instruments.[18] The General Comments of the Committee on ESCR will help elaborate the unclear socio-economic provisions of the Constitution.

The obligations of the state under Article 41 include 'the allocation of ever increasing resources to provide to the public health, education and other social services', 'within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children who are left without parents or guardian', 'to pursue policies which aim to expand job opportunities for

[16] See FDRE Constitution, article 41 which is entitled as 'Economic, Social and Cultural Rights', and articles 42.

[17] See FDRE Constitution, arts 41, 42 & 43(1). Eide notes that the enjoyment of adequate standard of living 'requires, at a minimum, that everyone shall enjoy the necessary subsistence rights-adequate food and nutrition rights, clothing, housing, and the necessary conditions of care. Eide, supra note 5, at 17-18;

[18] Article 13 (2) of the FDRE Constitution states that chapter three of the constitution-the Bill of Rights part-shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia. For a general discussion on the issue of interpretation of the fundamental rights and freedoms specified in chapter three of the constitution in light of international human rights treaties ratified by Ethiopia, GebreamlakGebregiorgis, '*The Incorporation and Status of International Human Rights under the FDRE Constitution'* in GirmachewAlemu&SisayAlemahu "The Constitutional Protection of Human Rights in Ethiopia: Challenges and Prospects" , Vol. 2 Ethiopian Human Rights Law Series, (2008), at 37.

the unemployed and the poor', 'to take all measures necessary to increase opportunities for citizens to find gainful employment' and 'to protect and preserve historical and cultural legacies, and to contribute to the promotion of the arts and sports'.

Furthermore, the Constitution incorporates the 'National Policy Principles and Objectives' (NPPO) under Chapter Ten.[19] The NPPO are used as directive principles to the state. These provisions suggest a more active role on the part of the government to realize the basic needs of its citizens. The provisions in NPPO will help one in interpreting socio-economic rights that are vaguely worded in the Bill of Rights part of the Constitution. The NPPO explicitly provides that 'to the extent the country's resources permit, policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security'.[20]

Regarding the justiciability of the socio-economic rights incorporated in the bill of rights part of the Constitution, there is no clear rule that either prohibits or allows the justiciability of the rights before the domestic courts. Very little is known concerning the legal nature of socio-economic rights in Ethiopia. And a great deal remains to be studied on the issue. Thus, this article will endeavor to discuss the issue of rethinking justiciability of socio-economic rights incorporated in the Ethiopian Constitution in a comparative constitutional context. It, *inter alia*, examines the implementation of socio-economic rights by the

[19] See FDRE Constitution, articles 85-92.
[20] FDRE Constitution, article 90(1).

Human Rights Committee of ICESCR and the integrated human rights approach undertaken by the African Commission on Human and Peoples' Rights in attempting to decide on complaints. It attempts to assess the jurisprudence of the Republic of South Africa and India on justiciability of socio-economic rights in their respective domestic fora. Finally, I will conclude with comments on the challenges of enforcing socio-economic rights before domestic courts for the better advancement of socio-economic rights in Ethiopia in light of the experiences and jurisprudence of the Constitutional Court of South Africa and the Supreme Court of India.

2. The Justiciability of Socio-Economic Rights in the ICESCR

The indivisibility, interdependent and interrelatedness of all human rights raises the issue of justiciability of socio-economic rights before domestic and international fora. It is well-known that the violations of civil and political rights are rectified either at domestic judicial organs or at international judicial or quasi-judicial bodies. However, the violations of socio-economic rights are not given due attention in many countries, particularly in third world states. Koch pointed out that:

> *while it is generally taken for granted that judicial remedies for violations of civil and political rights are essential, the justiciability of the other half of the indivisible rights, namely economic, social and economic rights, is usually questioned and sometimes even denied.*[21]

[21]IE Koch "*The Justiciability of Indivisible Rights*" 72 Nordic Journal of International law (2003), 3-39, at 3-4.

Economic, social and cultural rights have been marginalized due to the fact that until the adoption of the optional protocol to the ICESCR (which allows the complaints of violations of socio-economic rights before the Committee on ESCR);[22] there was no strong enforcement mechanism in the ICESCR.[23] The only available means of enforcing the covenant before the coming into force of the Optional Protocol was state reporting[24] which is a difficult means to rectify the violations of the rights. States may submit their due reports in accordance with the reporting guidelines of the committee. But the committee could not go beyond making the state accountable at the international level through examination of the reports.

The adoption of the Optional Protocol, just like the Optional Protocol of ICCPR, ensures access to remedies to the victims for the violations of socio-economic rights at least at the international level. The Optional protocol establishes a procedure for individual or group of individuals' complaints for victims of economic, social and cultural rights violations. Thus, victims of violations of economic, social and cultural rights will

[22] The adoption of the Optional Protocol, in the words of Arbour, is ''a milestone in the history of the universal human rights system', one which 'will mark a high point of the gradual trend towards a greater recognition of the indivisibility and interrelatedness of all human rights'. Statement by Ms Louise Arbour, High Commissioner for Human Rights to the Open-Ended Working Group on OP-ICESCR, Fifth session, on 31 March 2008.

[23] Though the covenant obliges states parties to submit periodic reports to the Secretary-General of the United Nations, the Covenant even did not establish a treaty body until the establishment of the Committee on ESCR by the ECOSOC in 1985. ECOSOC Res. 1985/17. The committee was established for the reason that the earlier monitoring arrangements are failed. It first met in 1987, after two years of its creation.

[24] States are obliged under the covenant to submit the initial report within two years after ratification, accession or signing the covenant and subsequent reports will be due in a five-year interval. See Henry J. Steiner, Philip Alston & Ryan Goodman "International Human Rights in Context: Law, Politics and Morals, 3rd ed. (2008), (Oxford University Press, New York) at 277.

have the opportunity to lodge complaints before the Committee on ESCR.[25] In addition to allowing victims of violations of economic, social and cultural rights to submit a communication to the committee, the Optional Protocol provides for the committee's power to adjudicate these complaints and issue views and recommendations for remedy and redress.[26] Thus, in examining the evidence produced by the parties (both by the complainants and the information forwarded by the state), the Committee may request interim measures, declare the presence of violations of the alleged rights, and recommend appropriate compensation to individual victims.

Furthermore, the Committee strives to avoid the questions on the vagueness and openness of the rights through its General Comments. The complaints mechanism will also create suitable condition for clarification of the rights and the jurisprudential development on economic, social and cultural rights.

3. The African Charter and the Jurisprudence of the African Commission on Justiciability of Socio-Economic Rights

The African Charter on Human and Peoples' Rights (simply, the African Charter or the Charter) which is the heart of the African Human Rights System comprehensively incorporates all generations of human rights in a single document. The African Charter enshrines economic, social and cultural rights under articles 14-18 and articles 21-22. However, the

[25] One must note that the complaints procedure is open for individuals as long as the alleged state is a party to the covenant and the Optional Protocol.

[26] For the general discussion on the optional Protocol to ICESCR, see C. Mahon, *"Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*", 8(4), HRLR, (2008), 617-646, at 618.

Charter does not encompass all the rights provided in the 1966 UN Covenants such as the right to privacy,[27] the right to form trade unions,[28]the right to free, fair and periodic elections,[29]freedom from forced labor,[30]and rights related to housing, food and social security.[31] However, the combined interpretation of articles 5 (the right to inherent dignity), 15 (the right to work), 16 (the right to health) and 17 (the right to education) will cover the above missing rights.[32] Furthermore, the African Commission on Human and Peoples' Rights adopted the 'Pretoria Declaration on Economic, Social and Cultural Rights in Africa' in 2004. Article 10 of the Declaration states that:

> *The social, economic and cultural rights explicitly provided for under the African Charter, read together with other rights in the Charter, such as the right to life and respect for inherent human dignity, imply the recognition of other economic and social rights,*

[27] See article 17 of the Covenant on Civil and Political Rights of 1966.
[28]Article 8 of the Covenant on Economic, Social and Cultural Rights of 1966.
[29]Article 25 of the Covenant on Civil and Political Rights of 1966.
[30]Id, article 8(2) and (3).
[31]Article 11 of the Covenant on Economic, Social and Cultural Rights of 1966.
[32] The combined reading of articles 60 and 61 of the African Charter enables the Commission to draw inspiration from international law on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of the African Unity, and also to take in to consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules recognized by member states of the Organization of the African Unity, general principles recognized by African states as well as legal precedents and doctrines. Furthermore, the Reporting Guidelines of the African Commission, which is adopted in 1989, interprets the Economic, Social and Cultural Rights of the Charter in a way that includes the right to form and belong to free and independent trade unions, social security and social insurance, rest, leisure, and holiday with pay, and an adequate standard of living. See 'The African Charter on Human and Peoples' Rights', (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

including the right to shelter, the right to basic nutrition and the right to social security.

Article 6 of the Declaration also stipulates that the right to work in article 15 of the Charter entails… among others things 'the right to freedom of association, including the rights to collective bargaining, strike and other related trade union rights' and 'prohibition against forced labor'.

The unique features of the Charter are the recognition of the indivisibility and interdependence of all generations of rights;[33] the recognition of individual duties;[34]inclusion of peoples' rights;[35] and the use of claw-back clauses to civil and political rights[36] as opposed to the traditional derogation clauses. Therefore, limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. Socio-economic clauses are free of neither claw-back clauses nor limitations. The Charter also makes reference to individual and state duties.[37]

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[33] The 8th paragraph of the preamble of the African Charter states that 'it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'.

[34] See articles 27-29 of the African charter.

[35] Id, articles 19-24.

[36] Id, articles 9,10,12,13 and 14.

[37] The unique features of the Charter, such as immediate implementation and claw-back clauses, are somehow modified by the jurisprudences of the African Commission on Human and Peoples' Rights. For better analysis of the developments of the jurisprudences of the Commission, see Heyns, C. and Magnus Killander (eds.), Compendium of Key Human Rights Documents of the African Union, (3rd ed., University of Pretoria, Pretoria University Law Press, 2007); see also Viljoen, F., International Human Rights Law in Africa, (New York, Oxford University Press, 2007); Odinkalu A.C., "Analysis of Paralysis or paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and

Unlike the ICESCR, the African Charter obliges member states to realize the rights enshrined in the charter immediately. Likewise, civil and political rights, economic, social and cultural rights require the immediate application except article16 (1) the right to health which states 'the best attainable state of physical and mental health' which requires the fulfillment of minimum core obligations and implies the gradual realization of the rights.

The African human rights system has developed various human rights norms and jurisprudence. For the effective implementation of these human rights instruments, different organs have been established. The African Commission on Human and Peoples' Rights (The African Commission) is one of the most important organs for the effective implementation of human rights in general and the African Charter in particular in the continent.[38]

It should be noted that the African Commission on Human and Peoples' Rights (here after 'the African Commission' or simply the Commission') is a monitoring body of the African Charter established under article 30 of the Charter. The Commission is empowered to receive individual complaints on violations of the rights provided in the Charter, in addition to reviewing state reports, and conducting investigations when it believes that there is serious violation of human rights.

Peoples' Rights," Human Rights Quarterly, Vol. 23, (The Johns Hopkins University Press, 2001).

[38]To complement the protective mandate of the Commission, the African Court on Human and Peoples' Rights is established.

State parties to the Charter are duty bound to submit reports every two years on 'the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognized and guaranteed by the Charter' on the basis of the form and contents of the General Guidelines for periodic Reports which is prepared and adopted by the Commission.[39] In reviewing periodic reports, the Commission interprets the scope and content of economic, social and cultural rights in a way that comprehends all the rights which are not mentioned by name in the Charter and gives priority to socio-economic rights. Odinkalu pointed out that:

> *The Commission has interpreted the Charter obligation to protect economic, social and cultural rights as requiring the inclusion of these rights in the national constitutions… Through this process it has also addressed the protection of the right to work, and trade union rights, including the right to strike… The Commission considers that states have a responsibility to bridge the rural/urban divide, declaring in one case [Examination of the initial report of Namibia in 1998] that "we cannot talk about human rights without insisting on the need to emphasis on social, economic and cultural rights and to allow a major portion of our population to have minimum living standards". This extends to a commitment to eliminate poverty and provide access to basic utilities, health and access to electricity. Recognizing the permeability of the rights, the Commission has shown a*

[39]Article 62 of the African Charter.

particular interest in access to justice and legal aid as an issue of economic, social and cultural rights.[40]

The Commission also receives inter-state[41] and non-state complaints on the violations of the rights enshrined in the Charter. The communications include the violations of economic, social and cultural rights by states parties in addition to the traditional civil and political rights. In deciding on the communications, the Commission either directly deals with the violations of socio-economic rights-using the violations approach-or deals with the violations of socio-economic rights on the basis of the indivisibility and interdependence and interrelatedness nature of all human rights-the integrated approach.

Violations approach advocates the violations of socio-economic rights resulting from either actions or policies of the government, or violations related to discrimination, or violations taking place due to the failure of the state to fulfill minimum core obligations.[42] In the case of Purohit and Another v the Gambia,[43] the African Commission found the violation of the right to enjoy the best attainable state of physical and mental health.

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[40] CA. Odinkalu*'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights'*, 23 Hum. Rts. Q. (2001), 327, at 356-357.

[41] The only inter-state complaints submitted to the Commission is the case of Democratic Republic of the Congo v Burundi, Rwanda and Uganda, Communication 227/99, (2004) AHRLR 19 (ACHPR 2003). In its first inter-state communication, the Commission finds that the respondent states have violated a number of human and peoples' rights, including the right to self-determination, the right to development and the right to peace and security. See Haynes &Killander (eds.), 'Compendium of Key Human Rights Documents of the African Union', (2007), PULP, at 190.

[42] AR. Chapman, *'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights'*, 18 Hum. Rts. Q. (1996), 23, at 24.

[43]Purohit and Another v the Gambia, (2003) AHRLR 96 (ACHPR 2003).

The Commission noted that enjoyment of the human right to health is not only vital to all aspects of a person's life and well-being but also crucial to the realization of all the other fundamental human rights and freedoms.[44] Furthermore, mental health patients should be accorded special treatment which would enable them not only attain but also sustain their optimum level of independence and performance in keeping with Article 18(4) of the African Charter and the standards applicable to the treatment of mentally ill persons as defined in the Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care.[45] Mental health care, under the Principles, includes analysis and diagnosis of person's mental condition and treatment, care and rehabilitation for a mental illness or suspected mental illness. The Principles envisage not just 'attainable standards', but the highest attainable standards of health care for the mentally ill at three levels; first, in the analysis and diagnosis of a person's mental condition; second, in the treatment of that mental condition; and thirdly, during the rehabilitation of a suspected or diagnosed person with mental health problems.[46]Holding that the acts of the government violated, among others, article 16 of the African Charter, the Commission declared that 'persons with mental illness should never be denied their right to proper health care, which is crucial for their survival and their assimilation into and acceptance by the wider society.[47]

[44]Id, Para 80.
[45]Id, para 80-82.
[46]Id, para 80-82.
[47]Id, Para 85.

In some other cases, the Commission adopted the integrated approach so as to protect the violations of economic, social and cultural rights. The best known case of the African Commission is the case of Social and Economic Rights Action Centre (SERAC) and Another v Nigeria.[48] In this case, the Commission asserted that:

> *Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian government has apparently violated.*[49]

The Commission also notes that 'the right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment

[48] Social and Economic Rights Action Centre (SERAC) and Another v Nigeria, (2001) AHRLR 60 (ACHPR 2001). The decision of the Commission deals with socio-economic rights provided in the African Charter on Human and Peoples' Rights, including the implicit socio-economic rights.

[49] Id., Para 60. The Commission, under paragraph 61 further argues that 'at a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The state's obligation to respect housing rights requires it… to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing up on his or her in a way he or she finds most appropriate to satisfy individual, family household or community housing needs'.

and fulfillment of such other rights as health, education, work and political participation'.[50] The Commission, in its decision, concluded that the treatment of the Ogonis [people who live in the Niger Delta of Nigeria] by the Nigerian government has violated article 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter and hence appealed to the government of Nigeria to ensure the protection of the rights of the people of Ogoniland.

To sum up, the jurisprudence of the African Commission affirms the indivisibility,and interdependence of all human rights, and the justiciability and enforcement of socio-economic rights. The violation of socio-economic rights means the indication for endangering the situation of the traditional civil and political rights. Thus, the Commission endeavors to ensure the realization of all human rights in the continent.

4. The South African Constitution and the Jurisprudence of the Constitutional Court on Socio-Economic Rights

After the end of the apartheid rule, the 1996 South African Constitution was adopted which is a symbol of democratic South Africa. The Constitution enshrined, among others things, the comprehensive set of economic, social and cultural rights among the fundamental rights (Bill of Rights-the traditional civil and political rights) guaranteed to its

[50]Id. Para. 65. The Commission, under paragraph 66, states that 'the government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and state oil company; has allowed private oil companies to destroy food sources; and through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian government has again fallen short of what is expected of it as under the provisions of the African Charter and international human rights standards, and hence, is in violation of the right to food of the Ogonis.

citizens. These rights are, as expressly provided under the Constitution, fully justiciable rights and enforceable before the courts and thus the courts are empowered to remedy the violations of the rights.[51] Likethe UDHR and the African Charter on Human and Peoples' Rights, the Constitution of South Africa affirmed the indivisibility and interrelatedness of human rights. This is due to the fact that the Constitution is adopted after the universality, indivisibility and interrelatedness and interdependent of human rights is reiterated at the Vienna World Conference of 1993.

Socio-economic rights are predominantly entrenched under sections 26 and 27. These rights include housing, health care services, including reproductive health care, food, water, social security and social assistance. These rights require the state to take reasonable legislative and other measures for the realization of the rights within its available resources. The measures taken by the state must be reasonable to eliminate or at least reduce the severe deprivation of the society. Furthermore, Section 7(2) of the Constitution imposes obligation on the state to 'respect, protect, promote and fulfill the rights in the Bill of Rights' which includes socio-economic rights[52] and 'the Bill of Rights

[51] The Constitution of the Republic of South Africa Act, 108, 1996, section 38.

[52] In the case of Grootboom, under paragraph 42, the Constitutional Court stresses that ''The State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the Executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the State's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the

applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'[53] The Constitutional Court concludes that the rights enshrined in the Constitution 'does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations' of the obligations of the state under the constitution so as to define the scope of the positive rights.[54]

The Constitutional Court of South Africa plays a great role for both making justiciable the socio-economic rights entrenched in the Constitution[55] and adjudicating the rights and awarding remedies to victims in South Africa. The Court argues that it is empowered not only to enforce the rights provided in the Bill of Rights of the Constitution but also to examine the reasonableness of the measures taken by the government and to challenge the government policies.[56]

State's obligations." See Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

[53] The Constitution of the Republic of South Africa Act, 108, 1996, Section 8(1).

[54]The Minister of Health and Others v Treatment Action Campaign and Others 2002 (10) BCLR 1033(CC) (SA) 29.

[55] At the time of crafting the constitution, the Constitutional Assembly incorporated socio-economic rights in the Bill of Rights, and propose them to be fully justiciable before the courts of law. However, the justiciability of socio-economic rights was faced with strong opposition by different groups until the opposition was dismissed by the Constitutional Court. This contributes a lot to inquire the realization of the rights and rectifying the damage. See 'Ex parte Chairperson of the Constitutional Assembly: In *re Certification of the Constitution of the Republic of South Africa'*, 1996 (4) SA744 (CC) Para. 77-8.

[56] See, the cases of Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC); and August and Another v Electoral Commission and Others 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC).

The first socio-economic case presented before the Constitutional Court was the case of Soobramoney v. Minister of Health, Kwa-Zulu-Natal,[57] where Mr. Soobramoney-an unemployed and diabetic with chronic renal failure-pleaded the court for regular kidney dialysis at the state hospital in Durban, invoking the violations of the rights to life, health and emergency medical treatment that are enshrined in the 1996 Constitution. The court affirmed that socio-economic rights are integral part of human rights particularly in connection to the rights of human dignity, equality and freedom. However, the court interpreted the obligation of the state provided under section 27(2)[58] and (3) narrowly. The court also failed to give serious consideration to the rights that the plaintiff invoked. Then it rejected the claim and missed the opportunity to interpret the constitutional rights invoked by the plaintiff in light of socio-economic rights.

In the subsequent claims on socio-economic cases, the jurisprudence of the Constitutional Court demonstrated that 'violations of these rights can be judicially remedied without intruding unduly on legislative discretion'.[59] In the case of Grootboom,[60] where groups of families (comprising 390 adults and 510 children, out of this 276 of them are under the age of 8) living in appalling conditions and evicted from where

[57]Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

[58] Section 27 (1) states that 'Everyone has the right to have access to (a) health care services... (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the rights. (3) No one may be refused emergency medical treatment'.

[59]J.M. Woods, *'EMERGING PARADIGMS OF PROTECTION FOR "SECOND-GENERATION" HUMAN RIGHTS'*, 6 Loy. J. Pub. Int. L. 103 (Spring, 2005), at 115.

[60] Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC).

they lived, claim the right to access to adequate housing, the Constitutional Court applied the standard of 'minimum core obligations': "Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question."[61] However, the court stressed that 'minimum core obligation' does not accord the right to housing on demand but the people in desperate need should not at least be evicted from where they live. The Court stressed that the housing program of the government shall be expeditious and effective in realizing the rights. The judgment of the Court reveals that the failure of the government to meet even the core minimum shelter needs of the applicants was a violations of sections 26 (the right to housing) and 28 (children's right to shelter). Finally the court ordered the government program to include 'reasonable measures… that provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'.[62] The interpretation of the Court in relation to the concept of progressive realization has showed advancement when it is compared with what it

[61]Grootboom, 2000 (11) BCLR at 1187 In applying the minimum core obligations of the state, the Court gave emphasis on the reasonableness standard in terms of the state's duty enshrined in the constitution to address the most basic needs of human needs. The nationwide housing program is not affordable to desperately poor black majority in the Republic of South Africa. The People in question were extremely poor and had no income at all. Forcible evicting those people amounts violations of their rights enshrined in the 1996 constitution. Thus, after examining the ambitious and comprehensive housing program developed by the government, the Constitutional Court declared that the government's program lacked the requisite expeditious and effective realization socio-economic rights; and the court ordered the government to plan in a way that "reasonable measures... to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations."

[62]Grootboom, 2000 (11) BCLR, at 1209.

interpreted the concept in the case of Soobramoney. However, the declaratory order of the Court fell short of remedying the defects.[63]

In other subsequent complaints, the Constitutional Court revisited the scope of the rights and the duty of the state. The duty of the state extends to realizing the rights within reasonable period of time. The jurisprudence of the Court clearly puts the nature and scope of the rights and the reasonableness of the measures taken by the state to realize the socio-economic rights. The Constitutional Court declared that Socio-economic rights are clearly justiciable and made declaratory orders to the government to take actions and award relief to the victims. The Constitutional Court, for instance, made declaratory and mandatory orders against the government in one case[64] for the failure of the state's programme to prevent Mother-to-Child transmission of HIV and for not complying with its obligations provided under section 27 (1) and (2) of the Constitution (which deals with access to qualified health care services). However, more is expected from the Constitutional Court in protecting the economic, social and cultural rights of persons who are in desperate situations.

[63] For the criticism on the judgment of the Constitutional Court on the case of Grootboom, see T. Roux *'Understanding Grootboom – A Response to Cass R Sunstein'* (2002) 12(2) Constitutional Forum 41, 51; and
D. Bilchitz*'Giving Socio-economic Rights Teeth: The Minimum Core and its Importance'* (2002) 119 SALJ 484, 500-501.

[64] Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC).

5. The Indian Constitution and the Jurisprudence of the Supreme Court on Socio-Economic Rights

In the 1950 Indian Constitution, socio-economic rights are not part and parcel of fundamental rights (Part III of the Constitution) but they are listed under the Directive Principles of State Policies (DPSP)-Part IV of the Constitution. The Bill of Rights part constitutes the traditional civil and political rights. Economic, social and cultural rights are listed to guide state policies. Furthermore, the Constitution clearly states that socio-economic rights are not enforceable before courts.[65]

Article 39 of the Indian Constitution provides that, "the state shall direct its policy towards securing that the citizens, men and women equally, have the right of adequate means of livelihood". It imposes obligation on the state that its policy shall direct towards that goal-assuring the right to adequate means of livelihood. 'Adequate means of livelihood' includes, among others, the rights to access to sufficient food, water, clothing, housing, work, health care services, social security and education. Article 41 of the Constitution also states that "the State shall, within its limits of economic capacity and development make effective provisions for the rights to work, to education, and to public assistance...." This provision explicitly imposed obligation on the state to take reasonable measures for the progressive realization of the socio-economic rights of the citizens. However, the measures taken by the state shall be reasonable, expeditious and effective in ensuring the rights.

[65] S. Muralidhar '*Judicial Enforcement of Economic and Social Rights: the Indian Scenario'*, 237 in F. Coomans. (ed.), 'Justiciability of Economic and Social Rights: Experiences from Domestic Systems', ((2006), Intersentia, Antwerp-Oxford) at 240.

As it is expressly provided under the Indian Constitution, socio-economic rights are not justiciable before courts of law.[66] This is due to the fact that during the crafting of the Constitution, though socio-economic rights are part of human rights (as it is provided under the UDHR), there were contentions on the justiciability and enforcement of the rights before the courts of law. As a result, socio-economic rights were considered non-justiciable rights before courts until the 1980's 'when a group of judges on the Indian Supreme Court declared that the judiciary had a responsibility to address the vast poverty and misery in India'.[67]

During the beginning of 1980's, the judiciary initiated the public interest litigation movement which was considered to be 'judge-led' and 'judge-dominated' movement.[68] Public interest litigation, which provides for the right to free legal aid, has contributed a lot in litigating destitute living

[66] Article 37 of the Indian Constitution stipulates that socio-economic rights 'shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.' According to Muralidhar, at the time of drafting of the Constitution, it was initially felt that socio-economic rights should be made justiciable. However, a compromise had to be struck between those who felt that the DPSPs could not possibly be enforced as rights and those who insisted that the Constitution should reflect a strong social justice. As a result, socio-economic rights are made non-justiciable before any court. See S. *Muralidhar 'The Expectations and Challenges of Judicial Enforcement of Social Rights'*, 102, in M. Langford (ed.), 'SOCIAL RIGHTS JURISPRUDENCE: Emerging Trends in International and Comparative Law, ((2008), Cambridge University Press) at 103-104.

[67] See VijayashriSripati, *'Human Rights in India - Fifty Years after Independence'*, 26 Denv. J. Int'l L. &
Pol'y 93, 107 (1997) (discussing the role created by the Supreme Court after the Court's decision in Maneka
Gandhi v. Union of India, A.I.R. 1978 S.C. 597).The creative interpretation of the right to life by the Supreme Court during the 1970's significantly contributes for the expansion of the contents of the dignified life and the development of judicial activism.

[68] S. Muralidhar '*Judicial Enforcement of Economic and Social Rights: the Indian Scenario'*, 237 in F. Coomans (ed.), 'Justiciability of Economic and Social Rights: Experiences from Domestic Systems', ((2006), Intersentia, Antwerp-Oxford) at 240.

and working situations of the mass of the people. The judiciary played a decisive role in enforcing the directive principles using the public interest litigation in which any public spirited person could bring the matter to the attention of the courts.

The Supreme Court, through expansive interpretation of the right to life, enforced socio-economic rights. The Court applied socio-economic rights listed under the Directive Principles of State Policies (DPSP) in interpreting the content of fundamental rights of the constitution. The Supreme Court in interpreting the right to life held that it is not only mere animal existence but also includes, among others, the rights to shelter,[69] livelihood and right to work,[70] education,[71] health,[72] right to live with

[69] The right to shelter was for the first time accepted as part of the right to life in the case of Francis Coralie Mullin v Union Territory of Delhi, AIR 1981 (SC) 746. In one case, the Supreme Court stated that 'Basic needs of man have traditionally been accepted to the three-food, clothing, and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to descent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal, it is the bare protection of the body; for a human being, it has to be a suitable accommodation which would allow him to grow in every aspect-physical, mental and intellectual." See Shantistar Builders v Narayan KhimalalTotame (AIR 1990 SC 630).

[70] Olga Tellis v Bombay Municipal Corporation (AIR 1986 SC 180), in which the Supreme Court made the following observations: "It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because no person can live without the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood. In view of the fact that article 39(a) and article 41 require the state to secure to the citizen an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life." Similarly in a judgment, the Court reasoned that the expression 'life' assured in section 21 of the constitution does not connote mere animal existence but has a much wider meaning that includes right to livelihood, better standard of life, hygienic conditions in work-place and leisure facilities. See Consumer Education and Research Centre v Union

human dignity,[73] and right to social security.[74] In general, the right to life,-for the Indian Supreme Court- means the right to live with human dignity with minimum sustenance and all those rights are aspects of life that would go to make life complete and worth living.[75]

To sum up, the innovative efforts of the Supreme Court of India have contributed to the application of the integrated approach to enforce socio-economic rights. The Court has recognized socio-economic dimensions of the right to life-with a colorful and liberal interpretation of the right. Thus, the judiciary has given teeth to socio-economic rights listed under the directive principles of state policy.[76]

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of India, (1995, 3 SCC 42) For further discussion on the issue, see S. Deshata& K. Deshata, 'Fundamental Human Rights: The Right to Life and Personal Liberty', (2007) Deep & Deep Publications, at 68-73.

[71]Mohini Jain v State of Karnataka and ORS (AIR 1992 SC 1858),in which the Indian Supreme Court found a Constitutional Protected right to education in the right to life and held that the right to life is the compendious expression for all those rights which the courts must enforce because they were basic to the dignified enjoyment of life. It held that the right to education flows directly from the right to life. The dignity of an individual cannot be assured unless it is accompanied by the right to education. See Deshata&Deshata, supra note 70, at 73-76.

[72] Vincent v Union of India (AIR 1987 SC 990), in which the Supreme Court held that the right to health is a fundamental right and thus' it is the obligation of the state to ensure the creation and the sustaining of conditions congenial to good health'. In one case, the Supreme Court held that failure on the part of government hospital to provide timely medical treatment to a person in need of such treatment results in the violation of his right to life guaranteed under section 21 of the constitution. See Paschim Bang KhetMazdoorSamiti v State of West Bengal, (1996 4 SCC 37).

[73] Francis Coralie Mullin v Union Territory of Delhi, AIR 1981 (SC) 746 in which the Supreme Court held that 'the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing, and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.'

[74]Regional Directors ESI Corporation v Francis de Costa (1993, Supp. 4 SCC 100).

[75]Deshata&Deshata, supra note 70, at 67.

[76] M. Pieterse, *"A Different Shade of Red: Socio-Economic Dimensions of the Right to Life in South Africa"*, 15 S. Afr. J. on Hum. Rts. (1999), 372, at 375.

6. Socio-Economic Rights under the FDRE Constitution

Ethiopia is one of the poorest countries in the world and the third most populous country in Africa with a total population of 74 in 2007 and is estimated to be more than 84 million in 2012.[77] In Ethiopia, millions of people are living in deplorable conditions and in great poverty. Poverty is widespread, with slightly less than half the population living below the poverty line. There is a high level of unemployment, inadequate social security, and many do not have access to adequate housing, clean water, and sufficient food and adequate health care services. Although the government announces that poverty level is coming down, when examined from the point of capabilities approach, large numbers of Ethiopians are still unable to afford basic needs like shelter, clothing, food, and health. Every year millions are in need of basic needs-food, clean water, shelter, clothing and health care services. The health care system is wholly inadequate though there are promising efforts undertaken by the government and domestic and international organs.[78]

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[77] *2007 Population and Housing Census of Ethiopia, CSA*,13 July 2010, retrieved 30 May, 2013.

[78] See R. Wamai, "Reviewing Ethiopia's Health System Development", JMAJ 52(4): 279–286, 2009. The UN-Habitat report states that most of the country's urban centres are currently suffering from a host of problems, including rising unemployment, deepening poverty, severe housing shortage and lack of good governance. The government's efforts to improve the living conditions of the rural population have begun to bear fruit, whereas the incidence and severity of poverty have intensified in the urban areas in the recent past. The incidence of poverty dropped from 47 percent in 1995/1996 to 45 percent in 1999/2000 in rural Ethiopia. Comparatively, the same indicator rose from 33.3 percent to 37 percent in urban Ethiopia during the same period. More recent research also suggests that the income gap between the wealthy and the poor has been widening in urban centres. This appears to be particularly the case in Addis Ababa, which currently has an estimated population of no less than four million. See Situation Analysis of Informal Settlements in Addis Ababa, UN-Habitat. United Nations, Human Settlements Programme, 2007. See generally**,** Ethiopia: A Country Status Report on Health and Poverty, June 2004**,** The World Bank Africa Region Human Development & Ministry of Health Ethiopia; see generally, Bertelsmann Stiftung, BTI 2012 — Ethiopia Country Report, Gütersloh: Bertelsmann Stiftung, 2012; see generally, Rural poverty in

Moreover, the state violates the housing rights of large sections of the people in major cities and towns across the country due to (illegal) evictions from land where they are (in some occasions, illegally) residing. Although there is a major achievement in addressing the acute shortage of housing problems in major cities of the country, the government housing programme failed to provide in any way for those sections of the peoples in desperate need and cannot be affordable for most of them.[79]

The Constitution of Ethiopia, which became effective when Ethiopia became a federal democratic republic on August 21, 1995, declared that 'human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable'.[80] The rights guaranteed under Chapter Three of the FDRE Constitution comprise of both civil and political rights and economic, social and cultural rights including group rights. The human rights and freedoms guaranteed under the Constitution are inviolable and inalienable. Thus, one can say that the 1995 Constitution of Ethiopia guarantees the indivisibility, interdependent and interrelatedness of all human rights.

The economic, social and cultural rights are crafted in vague and open manner, under chapter III as fundamental rights, in the constitution.

Ethiopia, *IFAD (International Fund for Agricultural Development), available at: http://www.ruralpovertyportal.org/web/guest/country/home/tags/ethiopia.*

[79] See *"The Ethiopian Case of Condominium Housing: The Integrated Housing Development Programme"*, UNHABITAT (2010), United Nations Human Settlements Programme: Nairobi; For the detail analysis on the right to housing in Ethiopia, see DG Janka, "The Realization of The Right to Housing in Ethiopia" (October 2007, LL.M Thesis, unpublished, Faculty of Law, University of Pretoria, South Africa).

[80] FDRE Constitution, 1995, article 10(1).

There are no separate and specific provisions on the rights to health, housing, education, food and clean water; rather these rights are implicitly recognized by the Constitution.[81] Art 41 of the Constitution is the basket upon which most socio-economic rights can be added or impliedly inferred. Janka rightly argues that Art 41(6) and (7) of the Constitution do not give rise to a right based approach rather, they impose duty on the government to ensure the enjoyment of the rights provided for in article 41(1) and (2) recognized in crude terms. Thus, the rights provided in the bill of rights part are crude that it is difficult to identify the rights guaranteed and the extent of protection afforded to them.[82]

The National Policy Principles and Objectives in chapter ten of the Constitution provides several socio-economic rights which guide the government to consider its policies to aim at providing all Ethiopians access to public health, education, clean water, adequate housing, food and social security to the extent of its available resources.[83] The vagueness and openness of the socio-economic rights in the Constitution should be interpreted in a manner conforming to the principles of international human rights instruments. Article 13(2) provides that in interpreting the fundamental rights and freedoms enshrined under the

[81]Dejene Girma Janka, 'Economic, Social and Cultural Rights and their Enforcement under the FDRE Constitution', *Jimma University Law Journal* Vol.1, No. 2, (2008), p.74-75.

[82]SisayAlemahu, 'The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia', *Journal of Ethiopian Law*, Vol. 22, No.2, (2008), p.139.

[83] FDRE Constitution, 1995, article 85 in which any organ of the government, whether federal or state, in the implementation of the Constitution and other laws of the country, be guided by the National Policy Principles and Objectives stated under the constitution. See also SisayAlemahu, supra note 82, p.138.

Constitution, it should be ‘in a manner conforming to the principles of UDHR, International Covenants on Human Rights and international instruments adopted by Ethiopia’. Moreover, the interpretations of the rights should be undertaken in light of the obligation of the Ethiopian state under the ICESCR and the African Charter. Thus, the interpretations applied by the African Commission and the General Comments of the Committee on ICESCR should be taken seriously since Ethiopia is a party to both the African Charter and the ICESCR and they form part of the domestic legal system. Thus, the vagueness and openness of the rights can be solved by applying the General Comments of the Committee on ICESCR and the jurisprudence of the African Commission. Furthermore, the jurisprudence developed by the Indian Supreme Court, which is the integrated approach, similar with the jurisprudences of the African Commission, on the extended interpretation of the right to life and dignity to enforce all socio-economic rights could be used. Thus, the interpretation of the right to dignified life in our Constitution should be supported by such developed jurisprudence.

The Constitution of Ethiopia was adopted prior to (one year before) the adoption of the South African Constitution. Unlike the Constitutions of the Republic of South Africa and India, the Constitution of Ethiopia is silent on the justiciability of socio-economic rights provided under the National Policy Principles and Objectives before the judiciary. Moreover, socio-economic rights are still marginalized rights. The remedy provided

in the Constitution for unlawful legislative and executive decisions contrary to the Constitution is to approach the House of the Federation.[84]

Unlike the 1996 Constitution of South Africa, the 1995 Constitution of Ethiopia does not declare the justiciability of socio-economic rights. There is no clear stand on the justiciability of socio-economic rights provided under the NPPO. The intention of the drafters on the justiciability of socio-economic rights is not clear, and there is no view reflected on the issue in the *trauvaxpreparatories* of the Constitution.[85] The non-justiciability of the rights should not be the rationale for crafting socio-economic rights vaguely in the Bill of Rights part than it is in the NPPO. Socio-economic rights enshrined under Chapter III, though vaguely crafted, should be justiciable rights. The incorporation of the rights in the bill of rights is an implied indication of making them justiciable. Furthermore, the adoption of the Optional Protocol to the ICESCR which ensures access to remedies to the victims for the violations of socio-economic rights has implications on the justiciability issue at domestic level. Yehanew boldly argues that the FDRE Constitution protects economic and social rights by incorporating them in the bill of rights as directly justiciable as well as by making pertinent international treaties ratified by Ethiopia part and parcel of the law of the land.[86] The Committee on Economic, Social and Cultural rights states that:

[84]FDRE Constitution, 1995, article 83 (1) which states that 'all constitutional disputes shall be decided by the House of Federation.'
[85] See generally *Ye Ethiopia HigeMengistGubae Kale Gubae (*Minutes of the Constitutional Assembly), 1994.
[86]SisayAlemahu, supra note 82, at 151.

> *The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.*[87]

Moreover, the adoption of the Optional Protocol to the ICESCR which recognizes complaint procedures for the rights enshrined under the ICESCR creates a persuasive value in understanding the justiciability of socio-economic rights.[88] Thus, the spirit of the Constitution and the notion of socio-economic rights should be interpreted in accordance with the principles (such as the principles of universality, indivisibility, interrelatedness and interdependence of all human rights) and interpretations (General Comments) of ICESCR and the National Policy Principles and Objectives provided under Chapter 10 of the Constitution. Abebe argues that the provisions that deal with the NPPO are directly and indirectly relevant to interpret Chapter 3 of the Constitution and contain provisions germane to human rights particularly to socio-economic rights and environmental rights.[89] Furthermore, as I reiterate in the above discussion, the fundamental rights and freedoms of the Constitution should be interpreted in the manner conforming to the principles and

[87] CESCR General Comment No. 9, (1998) para. 10.
[88] A.K.Abebe, "Human Rights Under the Ethiopian Constitution: A Descriptive Overview" 5(1) *Mizan Law Review* (2011) 41-71, p. 54.
[89] Id, p. 48.

interpretations followed in interpreting the ICESCR, and the African Charter. Meaning, the goals set forth in the ICESCR and African Charter cannot be achieved more effectively only by means of an international adjudicative mechanism for individual complaints. The interpretations applied by the African Commission in its decisions reveals that the indivisibility and interrelatedness of human rights applies across all generations of human rights. In other words, the violations on socio-economic rights are the violation of the right to dignified way of life.

Moreover, the Constitution guarantees the inviolability and inalienability of rights and freedoms. The incorporation of all generations of human rights without any difference in consequence is the implicit recognition of all the traditional classification of rights and freedoms as indivisible, interdependent and interrelated.[90] The basis of the integrated approach is the principles of indivisibility, interdependency and interrelatedness of all generations of human rights and freedoms. The violation on the right to food, clean water, health care, or housing mean violation of the right to life. Thus, the right to dignified way of life does not mean the mere existence of a human being in this world without having adequate housing, food, clean water, health care services and social security. Here, I should recite the words of Achebe quoted above that 'we must have the things (socio-economic rights of the poor) with which to live it well; otherwise we 'live a slow and weary life which is worse than death'. Therefore, one can conclude that socio-economic rights are justiciable by applying the integrated as well as the violation approaches and should not be beyond the reach of the courts of law in Ethiopia.

[90] Id, p. 44.

6.1 Institutional Competencies

Unlike the Constitutions of India and the Republic of South of Africa, the 1995 Constitution of Ethiopia does not give the mandate of reviewing unlawful legislative and executive legislations to the regular judicial organ or a Constitutional Court; rather it mandates a quasi-judicial organ-the House of the Federation-to take care of this business.[91] In other words, the judiciary is limited from reviewing the unlawful legislative and executive actions of the other arms of the government.[92] The mandate of the judiciary is very restrictive in the Constitution. The highest judicial organ in the country is the Federal Supreme Court.[93] However, for different reasons, there has been, to date, no case in court (as per the data available to the author at the time of writing this article) where socio-economic rights-the rights to housing, food, water, health

[91] This is inimical to the development of social justice in Ethiopia. This is due to the fact that the political affiliation of the members of the House complicates the interpretation and enforcement of rights and examining the policies of the executive organ whether they are reasonable in addressing the interests of the poor. For the detail story of empowering the House of the Federation to interpret the Constitution; see A. Fisseha, "A New Perspective on Constitutional Review', 10 *Tilburg Foreign Law Rev*.(2002), p. 237-255; see also A. Fisseha 'Federalism and the Adjudication of Constitutional issues: the Ethiopian Experience', 1 *Netherlands International Law Review*(2005).

[92] Though there is no absolute system of separation of powers, there shall be a strong checks and balances between and among the different arms of the government. The best way to control the legislative and executive organs of the government, the judiciary must be strong enough in power as much as possible. As McMillan notes "The formulation of communal policy is best undertaken in a legislative forum, by elected representatives who participate in public debate, who face periodic re-endorsement by the people, and who embody the widely differing values and aspirations that are intrinsically part of each society. The ongoing application of general legislative rules is best undertaken by the executive arm of government, which is in a position over time to accumulate experience, wisdom, intuition, sagacity and other diverse skills that are essential to good judgment in administering the law. The essence of the judicial function in public law cases is threefold: judges can impartially and skillfully interpret legislative rules; by doing so independently of the other arms of government they can bolster community confidence in the administration of the law; and they can check the misuse of authority by other arms of government." See J. McMillan '*Judicial Restraint and Activism in Administrative Law'* 30 Federal LR (2002) 335, at 337.

[93]FDRE Constitution, 1995, article 78 (2).

care services, and education-had been a subject of contention in Ethiopia that can be exemplary jurisprudence on socio-economic rights.[94]

The House of the Federation is entrusted with the power of interpreting the Constitution.[95] In interpreting the Constitution, the House should make clear the justiciability and enforceability of socio-economic rights before the judiciary. The judiciary cannot examine the constitutionality of public policies of the government. The NPPO –the Directive Principles imposed a duty on the state to achieve certain socio-economic goals. They are intended for guidance of the state in the making of policies to end the deprived and impoverished way of life of the citizens. Thus, the House is obliged to assure whether the policies of the state are comprehensive in realizing the socio-economic interests of the impoverished sections of the people and constitute a reasonable effort in progressively achieving the constitutional rights. Furthermore, the House, taking the approaches followed by the African Commission and the Committee on ICESCR, should pronounce and prove that socio-economic rights are justiciable rights and thus any one whose rights are violated can get remedy from the courts.

It should be borne in mind that in dealing with socio-economic rights, the courts are institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core

[94] The only available case is the APAP's Court Action against the Environmental Protection Authority on environmental pollution invoking the constitutional right to clean and healthy environment which is the first case ever in the history of Ethiopia in the public interest litigation. Ref No AP/3 APN/045/98, (Federal First Instance Court, instituted on March 15/2006).

[95] FDRE Constitution, 1995, article 62(1). For the detail story of empowering the House to interpret the Constitution; see A. Fisseha, (2002), supra note 91, p. 237-255.

standards called for and for deciding how public revenues should most effectively be spent in light of the NPPO. In other words, the courts have residual power of interpreting laws and the Constitution. This power emanates from two points of arguments. One relates to the courts' power of interpreting and enforcing laws. The main task of courts' is to interpret and apply the law. Some scholars argue that the House of the Federation is exclusively empowered to interpret the constitutionality of 'any federal and state laws'-the laws made by the legislative organs and thus, with the constitutional duty of courts to enforce the Constitution every small measure of enforcement unavoidably involves some kind of interpretation.[96]Moreover, Idris argues that 'any petition on the unconstitutionality of an administrative act or a decision or custom is within the judicial jurisdiction of an ordinary court'.[97] Therefore, Article 13(1) of the Constitution states that 'all…judicial organs at all levels shall have the responsibility and duty to respect and enforce' the fundamental rights and freedoms. Enforcing the fundamental rights and freedoms through courts includes its interpretation. Courts enforce laws in the way they interpret it as long as there are no contradictory and they make acceptable interpretations. In interpreting the fundamental rights and freedoms, sub-article 2 of the above provision stipulates that it should be in conformity with the principles of UDHR, International Human Rights

[96] See A. Fisseha, '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* (Ethiopian Civil Service Collage, Addis Ababa, 2001) p. 6-26.

[97] See I. Idris, (2002) 'Constitutional Adjudication under the 1994 FDRE Constitution' 1(1) *Ethiopian Law Review* 63-71; see also T. Regassa, "Courts and the Human Rights Norms in Ethiopia" in A. Fisseha (ed) *proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (Ethiopian Civil Service Collage, Addis Ababa, 2001).

Covenants and other International instruments adopted by Ethiopia. In other words, the way of interpretations of International and Regional Human Rights Instruments adopted by the respective Committees and Commission should be carefully considered by the House of the Federation and the Ethiopian courts in interpreting the human rights and freedoms of individuals which obviously includes socio-economic rights.

The second reason is related to the first. The Constitution under article 9(4) states that international agreements ratified by the House of Peoples' Representatives become part and parcel of the law of the land. In other words, the judiciary is empowered to respect and enforce those international human rights instruments adopted by Ethiopia. In cases of vagueness and openness of such rights, the court has to adopt the interpretations applied by the concerned body. Thus, concerning the vagueness and openness as well as the justiciability matter of socio-economic rights, the Ethiopia judiciary is required to follow the footsteps of the African Commission as well as the Committee on ICESCR.

Furthermore, although there are no sufficient laws adopted for the purpose of better implementation of socio-economic rights, the enforcement of proclamations and regulations is the regular business of courts. Thus, when socio-economic rights are provided in subsequent legislation other than the Constitution, it will be easier for courts to use such legislation and effectively enforce socio-economic rights.

6.2 Lessons for the Ethiopian Judiciary from Foreign Experiences

In the preceding sections, attempt has been made to show the role of judicial activism in the protection and enforcement of socio-economic rights in the Republic of South Africa and India. In both countries, the judiciary meaningfully contributes to the social and economic transformation of their respective societies. The liberal interpretations of the rights by the courts stimulate the legal developments that lead to translate into real changes of the lives of their poor societies. Thus, Ethiopia has a lot to learn from the achievements of South Africa and India in regard for the constitutional protection and enforcement of socio-economic rights.

The Ethiopian judiciary shall take note of the expansive construction of socio-economic rights enshrined in the international human rights instruments and the FDRE Constitution by following the footsteps of the African Commission and the Committee on ICESCR that we have noticed above. Thus, the courts have to be willing to apply the rights so as to protect the violations of socio-economic rights of the long-oppressed people. Though all socio-economic rights could not be won before the courts, the enforcement of the rights before the courts improves the lives of impoverished millions of Ethiopians and contributes to the realization of the dream of full human dignity in the country.

More is expected from all the Federal as well as Regional Courts in general and the Federal Supreme Court, in particular, in addressing the above issues. This is because of the fact that the judicial decisions

rendered by its Cassation Division serves as case law in the country.[98] Article 2(4) of Proclamation 454/2005 provides that, any interpretation of law made by the federal supreme court in its cassation jurisdiction shall be made binding on federal as well as regional councils at all levels keeping intact the instances of a different legal interpretation on the same legal point and article at some other time in the future. Thus, interpretation of any law in a case by the Cassation Division of the Federal Supreme Court amounts to enacting a law. Moreover, in dealing with socio-economic rights, the Court as well as the House of the Federation is required to apply the approaches adopted by the African Commission as well as the Committee on ICESCR. Therefore, having this mandate, the Court can follow the jurisprudence of not only the Indian and South African Courts but also of other courts that have more developed jurisprudence.

Today, the Ethiopian courts may apply the following two approaches in dealing with socio-economic rights.

6.2.1. The Violations Approach

This approach states that socio-economic rights are considered to be violated when the state fails to fulfill the minimum core obligations of the rights. The concept of ‘ minimum core’ was developed by the United Nations Committee on Economic, Social and Cultural Rights which is charged with monitoring the obligations undertaken by state parties to the

[98] The introduction of Proclamation No. 454/2005, which is adopted to amend the Federal Courts Proclamation No. 25/96, has the potential to bring judicial activism in Ethiopia, not only in socio-economic issues but also on human rights issues in general.

International Covenant on Economic, Social and Cultural Rights. According to the Committee:

> *a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligations must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps to the maximum of its available resources. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.*[99]

[99]CESCR General Comment 3 (1990), para 10;See, e.g., Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Annex, U.N. Doc. E/CN.4/1987/17 ("States parties are obligated, regardless of the level of economicdevelopment, to ensure respect for minimum subsistence rights for all."); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2000/13, ("Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.").

The state is required to guarantee the minimum core obligations-the survival needs of its poor people. The State has to manage its limited resources in order to address the interests of the marginalized and disempowered groups of the community. Moreover, its policy should take into consideration the interests of the people who are in need of and take reasonable measures for the realization of the rights in general and to provide relief for the poor people. The court should take into consideration of the 'minimum core obligation' and the 'progressive realization' of the rights in order to judge whether the state fails to meet the affirmative obligations. Furthermore, in the absence of adequate enjoyment of socio-economic rights, civil and political rights may not be effectively protected. Thus, the courts should also give adequate recognition for the realization of the minimum survival needs of the poor Ethiopians.

6.2.2. The Integrated Approach[100]

Articles 83 and 84 of the FDRE Constitution deal with interpreting constitutional disputes and determining the constitutionality of federal or state laws but do not talk about the implementation of the constitutional provisions. Thus, it does not hinder courts from applying constitutional provisions in the adjudication of cases. The court will submit a legal issue to the Council of Constitutional Inquiry only if it believes that there is a

[100] Articles 62 (1), 83 & 84 of the FDRE Constitution stipulates that the power of interpreting the Constitution vested upon the House of Federation. Thus, in interpreting the Constitution, the House and the Council of Constitutional Inquiry should consider the interpretations of the African Charter and ICESCR. Therefore, for the better application and enforcement of socio-economic rights in the Ethiopian context, the House of Federation and the Council of Constitutional Inquiry are recommended to adopt the 'Integral & Violated Approaches'.

need for constitutional interpretation in deciding the case.[101] In the absence of a 'constitutional dispute', the mandate of the Council of Constitutional Inquiry and the House of Federation to interpret the Constitution, does not exclude courts from enforcing constitutional provisions on fundamental rights and freedoms.[102] Therefore, if the court believes that the constitutional provision in question is clear, it can apply it without referral to the Council.[103] Article 13 (1) of the Constitution states the duty of the judiciary to enforce the rights enshrined in the Constitution definitely extends to applying the provisions in specific cases.[104]

In applying the constitutional provisions for a case at hand, courts can apply the integrated approach adopted by the African Commission. In other words, the interpretations of the African Charter on socio-economic rights by the African Commission can be a basis for a full-fledged enforcement of the rights in Ethiopia. In addition, the indivisibility, interdependence and interrelatedness of civil and political rights and economic, social and cultural rights lend a great power to the courts so as to enforce complaints on socio-economic rights. The right to life is not

[101]SisayAlemahuYeshanew, The justiciability of Human Rights in the Federal Democratic Republic of Ethiopia. Available at: http://ssrn.com/abstract=1530825 (accessed on 15 November, 2013), p. 7; for the better analysis on the judicial referral of constitutional disputes, see generally TakeleSoboka, 'Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to theory', *Ethiopian Constitutional Law Series*, Vol.III, Faculty of Law (2010).

[102] Ibid, p. 6-7. Article 3 (1) of the Federal Courts Proclamation which provides that, 'federal courts shall have jurisdiction over cases arising under the Constitution, federal laws and international treaties', shows the possibility of applying constitutional provisions in the adjudication of cases. See Federal Courts Proclamation, 15 February 1996, Article 3 (1), Proclamation 25, Negarit Gazette, 2nd Year, No. 13.

[103]Ibid.

[104] Id., p. 7.

only fundamental right but also basic right of an individual. The right to life which is the most basic human rights of all is a necessary prerequisite for the exercise and enjoyment of all fundamental human rights.[105] Without life, protection of any other right becomes meaningless.[106] The right to life does not only mean imposing an obligation on the state to refrain from arbitrarily depriving it but also imposes an obligation to guarantee the basic prerequisites that make life meaningful. Mengistu on his side pointed out that:

> *if deprivation of the lives of millions of people through lack of access to survival requirements is not a right to life issue, we can only say that the concept and notion of the right to life in its restricted and narrow sense does not apply to more than a billion people around the globe.*[107]

The Indian Supreme Court applied the liberal interpretation of the right to life so as to enforce the rights listed under the directive principles of state policy. The right to life, for the Indian Supreme Court, does not mean the person's mere animal existence but the right to live in a reasonable comfort and decency since it is basic and most fundamental of all the other rights. The right to life means to live with human dignity with minimum sustenance. Socio-economic rights make a man's life complete and worth living and thus form part of the right to life.[108]

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[105] F. Menghistu, *'The Satisfaction of Survival Requirements'* 63-81, in 'THE RIGHT TO LIFE IN INTERNATIONAL LAW', (B. Ramcharan (ed.), (1985), at 63; see also Pieterse, supra note 76, at 372.
[106]Pieterse, supra note 76, at 372.
[107]Mengistu, supra note, at 105, at 63.
[108]seeDeshata&Deshata, supra note 70, at 68-73.

In the Makwanyane case, the Constitutional Court of South Africa illustrates the right to life in the following way:

> *The right to life was included in the constitution not simply to enshrine the right to existence. It is not life as a mere organic matter that the constitution cherishes, but the right to humane life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values.*[109]

This implies that the right to life constitutes living conditions not only that permit for mere physical existence, but also what is needed to make such existence humane and dignified.

When we analyze the above approaches in the Ethiopian context, Article 13(2) of the Constitution requires that, in interpreting the Fundamental Rights and Freedoms specified in the Bill of Rights, the principles of UDHR and international human rights instruments and international instruments adopted by Ethiopia should be taken in to account. The broad interpretation of the right to life under international human rights instruments should be taken in to account when the right to life is interpreted in Ethiopia. The innovative efforts of the Supreme Court of India that have contributed for the application of the integrated approach to enforce socio-economic rights will help our judiciary in recognizing

[109]S v Makwanyane 1995 (3) SA 391 (CC), Para 326.

socio-economic dimensions of the right to life-with a colorful and liberal interpretation of the right.

Moreover, the Government of Ethiopia is required to guarantee the minimum core obligations-the survival needs of its poor people to the extent of its available resources which includes resources from international assistances. Thus, it has to manage its limited resources in order to address the interests of the marginalized and disempowered groups of the community. Moreover, the policy of the state should consider the NPPO and the interests of the people who are in need of and take reasonable measures for the realization of the rights in general and to provide relief for the poor people. In this case, the courts should take into consideration of the policies of the state whether it is guided by the NPPO and realizing the 'minimum core obligations' and the 'progressive realization' of the rights in order to judge whether the state fails to meet the affirmative obligations. Darge argues that the objectives enunciated in chapter ten did not take away the power of the Court, hence, at least some socio-economic rights tacitly guaranteed in the 'National policy principles and objectives' can be made justiciable indirectly.[110] Furthermore, in the absence of adequate enjoyment of socio-economic rights, civil and political rights may not be effectively protected. Thus, our courts can also refer to civil rights that are directly pertaining to socio-economic rights, for example, the right to health, food and clean water may be interlinked with the right to life because they are basic necessities for a life to continue. Therefore, the courts shall apply both

[110]AmsaluDarge, The Integrated Approach: A Quest For Enhancing Justiciability Of Socio-Economic Rights Under The Ethiopian Constitution, (December 2010, Unpublished, LL.M. Thesis, School of Law, AAU).p. 98.

the 'violated approach' and the liberal and expansive interpretation of the right to life for the better protection of socio-economic rights of the marginalized people and for the realization of socio-economic rights in the future Ethiopia.

7. Challenges to and Prospects for Justiciability of Socio-Economic Rights in Ethiopia

The fundamental rights and freedoms enshrined under Chapter III of the Constitution are justiciable rights. Though vaguely crafted as part of the fundamental rights and freedoms, socio-economic rights are presumed to be justiciable rights. However, the listing of the rights in the NPPO-as Directive Principles of State Policy-creates confusion among legal scholars and even among the federal judges as to the justiciability of socio-economic rights enshrined as the fundamental rights in the Constitution.[111] Furthermore, in the current situation, all courts of the country are not equally well-equipped to adjudicate the complaints on the violations of socio-economic rights invoking the rights enshrined in the Constitution. Thus, the limitations in adjudicating socio-economic rights revolve around problems of attitude as well as the institutional legitimacy and normative frameworks of the country.

Socio-economic rights were not considered legal rights in relation to their applicability.[112] They are legally negligible and unenforceable rights

[111] See, AmareTesfaye, "Justiciability of Socio-economic Rights in the Federal Democratic Republic of Ethiopia" (December 2010, Unpublished, LL.M. Thesis, School of Law, AAU).

[112]Interviews with two Federal High Court judges, and one other former Federal High Court Judge, October 3 and 4, 2010.

before the judiciary.[113] The implementation of the rights is considered as by the goodwill of the political institutions rather than by the judiciary.[114] However, the courts should take cognizance of the indivisibility of all human rights and the changing circumstances in adjudicating socio-economic rights in the international arena and in some countries which have strong and developed judiciary and jurisprudence.

The attitude on the inclusion of socio-economic rights in the NPPO is considered to preclude the judiciary from enforcing the rights and the judiciary is not constitutionally empowered to examine the reasonableness of the state's policies.[115] However, it should be changed with the change of laws and practices on socio-economic rights in the international arena. Otherwise, this will continue to be a setback to a full-fledged enforcement of socio-economic rights and examining the state's programs on socio-economic rights; whether the policies are targeted towards the goals stipulated under the NPPO; and whether the measures taken by the government is reasonable in realizing the rights. The

[113]Ibid.
[114]Ibid.
[115] Ibid; see SisayBogaleKibret, Competence and Legitimacy of Ethiopian Courts on the Adjudication of Socio-Economic Rights: Appraisals on Challenges and Prospects, December 2010, Unpublished, LL.M. Thesis, School of Law, AAU), p. 72-73. Kibret further states that according to Ato MenberetsehayTaddesse and few others socio-economic rights are not justiciable and are not appropriate to the judiciary hence are not capable of appearing before courts pursuant to art 37 of the FDRE Constitution. For them the judiciary should not be taken as solution for socio-economic aspects of individuals. On the other side most of the judges (10 out of 13) believe that courts are appropriate fora for the enforcement of socio-economic rights. Judges on this side have the stand that the rights are perfectly justiciable and what lacks according to them is a committed judiciary that can properly apply the rights under consideration. They also noted that the legal environments and practical challenges shall be considered for proper application. However, most of the interviewed judges concluded that socio-economic rights do not actually get the protections they deserve under the constitution and other international human rights instruments which Ethiopia ratifies.

judiciary must strive to do what is expected of it sharing the experiences of its counterpart that have developed jurisprudence.

Furthermore, the judiciary must encourage persons to lodge complaints on socio-economic rights without the need to show vested interest. The FDRE Constitution (art 37) and the Civil Procedure Code (arts 33 and 38) do not really allow the *public interest litigation.* Thus, the courts are strictly applying the stringent rules provided under the civil procedure code of 1965.[116] The FDRE Constitution under article 37 gives the right to an individual or group of persons to bring a justiciable matter to a judicial or quasi-judicial body. However, it requires the person to be a member of the affected group or an association representing the interests of its members. Even where the person is interested in the case, s/he needs to be authorized by the people on whose behalf she takes the case. In the same fashion, the civil procedure code requires the representation in civil cases.[117]

In India, Public Interest Litigation (PIL) was initiated and devised by the judges of the Supreme Court so as to enable any public spirited person to easily access the judiciary representing the vast majority of impoverished, deprived and underprivileged sections of the society to

[116] The Civil Procedure Code of Ethiopia, 1965, articles 33 and 38, both of them requires the complainant to show vested interest in a case. Art 33 (2) of the same code states that 'No person may be a plaintiff unless he has a vested interest in the subject-matter of the suit'. Article 38 (1) states that 'Where several persons have the same interest in a suit, one or more of such persons may sue or be sued or may be authorized by the court to defend on behalf or for the benefit of all persons so interested on satisfying the court that all persons so interested agree to be so represented'.
[117] Ibid.

achieve social justice.[118] In Ethiopia, this kind of trend should be developed by the judiciary, different associations and legal experts. Any Ethiopian who seeks to defend the general interests and rights of the society-including socio-economic rights-and who fulfills the requirements specified under article 10 of the Federal Courts' Advocates Licensing and Registration Proclamation can render advocacy service.[119] However, there is no developed jurisprudence on public interest litigation except the APAP's Court action against the Federal Environmental Protection Authority. This was allowed due to the availability of the public interest litigation under article 11(1) of the Environmental pollution control proclamation No. 300/2002. In other cases, the public spirited persons are required to show vested interest to institute a court case. Therefore, any public spirited person who needs to institute court action for the violations of the socio-economic rights of the vast majority of Ethiopians could not be allowed to do so by the judiciary.

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[118] For general discussion on the PIL in India, see U. Baxi, *'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India'*, in J. Kapur, (ed.) "SUPREME COURT ON PUBLIC INTEREST LITIGATION" Vol. I, (1998), (Delhi); S. Muralidhar, *'Judicial Enforcement of Economic and Social Rights: the Indian Scenario'*, 237 in F. Coomans (ed.), 'Justiciability of Economic and Social Rights: Experiences from Domestic Systems', ((2006), Intersentia, Antwerp-Oxford).

[119] Article 10 of the Federal Courts Advocates Licensing and Registration Proclamation no. 2000 provides that any Ethiopian who defends the general interests and rights of society will be issued with a Federal Court Special Advocacy License, provided that the person should be holder of a degree in law from a legally-recognized educational institution, know the basic Ethiopian laws and have five years working experience. See also The Ethiopian Human Rights Commission Establishing Proclamation, 2000, Proclamation No. 210, NegaritGazeta, 6th Year, No. 40 and the Institution of the Ombudsman Establishing Proclamation, 2000, Proclamation No. 211, NegaritGazeta, 6th Year, No. Article 22 (1); the Environmental Pollution Control Proclamation, 2002, Article 11, Proclamation No. 300, NegaritGazeta, 9th Year, No. 12 (stipulates that, any person, without a need to show a vested interest, can lodge a complaint to the Environmental Authority or the relevant Regional Environmental Agency against any person causing actual or potential damage to the environment. This right is extended up to bringing the case to the relevant court).

Thus, this trend should be changed by the active roles of the judiciary and lawyers who are concerned for the better protection of the rights of marginalized and impoverished groups of the peoples. Furthermore, the vast majority of impoverished and deprived sections of the community have a right to legal aid. This right will at least be guaranteed in our country when the rules and attitudes on public interest litigation is changed and widely practiced equally by the judiciary as well as lawyers of the country. Therefore, in matters of public interest litigation, the court shall not deny standing to genuine and *bond fide* litigant even when s/he has no personal interest in the matter where the judiciary can provide an effective remedy. Thus, this enlightened approach will enable civil society groups to take up the cases of vulnerable and marginalized groups and individuals.

Concerning the institutional legitimacy of judicial review,[120] the judiciary does not have the last word with respect to constitutional matters. This power is vested upon the upper house-the House of the Federation. Thus the judiciary does not have the power to reverse, modify or nullifying legislation. This will hinder the judiciary for the full-fledged enforcement of socio-economic rights. However, courts are not excluded from enforcing constitutional provisions as long as it does not constitute 'constitutional dispute'. Thus, the judiciary, to the maximum of its efforts, must endeavor to enforce the claims on violations of socio-economic rights of the vast majority of impoverished Ethiopians so as to make the lives of these communities meaningful and dignified.

[120] For a detail discussion on the vested rights of courts' judicial review; see T. Regassa, (2001) supra note 97.

The establishment of the Ethiopian Human Rights Commission is a major progress for the protection and promotion of human rights in Ethiopia which is the core mission of the Commission.[121] As a national human rights institution, there is similarity on the mandates of the Commission and the activities that should be undertaken by the National Human Rights Institutions listed under the General Comment of the Committee on ICESCR.[122] The General Comment states that it is essential to give due attention to ESCRs in all of the relevant activities of NHRIs. The major activities include:

> a) *the promotion of educational and informational programmes designed to enhance awareness and understanding of economic, social and cultural rights both within the population at large and among particular groups such as the public service, the judiciary, the private sector and the labor movement;*
>
> *b) The scrutinizing of existing laws and administrative acts, as well as draft bills and other proposals, to ensure that they are consistent with the requirements of the ICESCR;*
>
> *c) The provision of technical advice or by undertaking surveys in relation to economic, social and cultural rights, including when requested by public authorities or other appropriate agencies;*

[121] Proclamation No. 210/2000, Ethiopian Human Rights Commission Establishment Proclamation, Negarit Gazette 6th Year, no 40, Addis Ababa 4th July, 2000. The powers and duties of the Commission are listed under article 6 of the establishment proclamation.

[122] *The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, General Comment No. 10, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts. 19th Sess., U.N. Doc. E/C.12/1998/25 (1998).

d) The identification of benchmarks at the national level against which the realization of ICESCR obligations can be measured;

e) conducting research and inquiries designed to ascertain the extent to which particular economic, social and cultural rights are being realized, either within the country as a whole or in areas or in relation to communities that are particularly vulnerable;

f) Monitoring compliance with specific rights and providing reports to the public authorities and civil society; and

g) Examining complaints alleging violations of applicable economic, social and cultural rights standards within the state.

The Commission is also empowered to undertake investigations on violations of human rights upon complaints or by its own initiation.[123] Thus, it can address the violations of socio-economic rights of the mass impoverished people.

8. Conclusion and Recommendations

The justiciability and judicial enforcement of socio-economic rights have been changed through time. The Committee on ICESCR is empowered to receive communications on violations of socio-economic rights. The African Commission on Human and Peoples' Rights applied the integrated and the violations approach in enforcing socio-economic

[123]Proclamation No. 210/2000, article 6(4).

rights. The Constitutional Court of South Africa rectifies the violations of socio-economic rights. The Indian Supreme Court, though there is an express provision that excludes the court from enforcing socio-economic rights, through applying the integrated approach, enforces the socio-economic rights.

A sizeable number of the Ethiopian population live in poverty and is suffering from tremendous socio-economic hardships. Furthermore, economic, social and cultural rights are vaguely incorporated under the recent Constitution. Moreover, the Constitution provides policy guidelines that the state should follow to reduce or if possible to eliminate the destitute lives of the people. However, socio-economic rights enshrined in the FDRE constitution are phrased in a way that the rights could not be enforced before the judiciary. This problem should be resolved by adopting the approaches followed by the Committee on ICESCR and the African Commission. Furthermore, in India, though the rights are expressly unenforceable before the courts, the Indian Supreme Court integrated socio-economic rights in to the right to dignified life. The constitutional and political development of India with regard to the relationship between fundamental rights and freedoms-Bill of Rights- and Directive Principles of State Policy offers interesting lessons for Ethiopia. To sum up, the innovative efforts of the Supreme Court of India have contributed to the application of the integrated approach to enforce socio-economic rights. The Court has recognized socio-economic dimensions of the right to life-with a colorful and liberal interpretation of the right. Thus, the judiciary has given teeth to socio-economic rights

listed under the directive principles of state policy.[124] Thus, our judiciary has to learn much from the experiences of India and other countries so as to make the life of our impoverished, deprived and marginalized people meaningful.

Moreover, the deprived and impoverished sections of the people do not know the scope of their rights and the obligations of the state. During the violations of their rights, they do not believe that their rights are violated. They only expect remedies from the government that satisfy their interests rather than taking the matters to the attention of the judiciary. Therefore, awareness creation on the fundamental constitutional rights of the mass, the obligations of the state under the constitution and international human rights instruments and the impacts of enforcing them should be undertaken by the legal experts, including judges and lawyers and other stakeholder institutions such as Ethiopian Bar Association and Ethiopian Women Lawyers' Association.Finally, much is also expected from the Ethiopian Human Rights Commission to ensure the implementation of the constitutionally guaranteed rights of the citizens. Socio-economic rights have been given less attention by the government. The Commission, which is Government Human Rights Commission, must give equal attention in addressing the violations of civil and political rights and socio-economic rights. The role of the Commission in addressing the violations of any human right must be different from that of other governmental institutions. Much is expected from the Commission; it can contribute a lot to the realization of socio-economic rights, which is fundamental to fully exercise civil and political rights.

[124] M. Pieterse, supra note 76, at 375.

Status of Subnational Constitutionalism in the Federal Democratic Republic of Ethiopia: Implications of Theoretical Evaluation of Some Facts

Yitages Alamaw Muluneh [♣]

Abstract

By adopting federalism, the Federal Democratic Republic of Ethiopia (FDRE) has domesticated the prominent prerequisite for subnational constitutionalism, i.e. the establishment of subnational units (SNUs), called Regions, with designated powers. The SNUs have competence over regional/subnational (SN) matters and governance. They can also write SN constitutions by which they administer themselves. This paper argues that the establishment of SNUs and the existence of SNCs do not evince a robust SN constitutionalism (SNCM) in the country. However, based on some theoretical normative evaluation of how much the constitutional system and process at SN level fare with the ideals of SN constitutionalism, it can be witnessed that there are practices that go hand in hand with SN constitutionalism on the one hand and that are inconsistent with SN constitutionalism on the other. It, finally, concludes that strengthening the promising steps, and a systematic approach and commitment to tackle the pitfalls enhance SN constitutionalism in the SNUs.

1. Introduction

After the fall down of *Derg* in 1991, Ethiopia dispensed decentralized governance. Since then, two successive developments having remarkable imprint in the history of SN constitutionalism of the country emerged. The first was the adoption of the Transitional Period Charter (TPC) in 1991. TPC envisioned autonomous SNUs with designated areas of

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competence that could write SN constitutions and govern themselves by them.[1]

The second development is the adoption of Constitution of the FDRE (CFDRE), which has officially declared Ethiopia a federal country in 1995.[2] The CFDRE has established two tiers of governments: Federal Government and State Governments.[3] Regions/States are SNUs that have their own exclusive areas of competence,[4] and are empowered to write their own respective SN constitutions[5] and govern their affairs by the same. This has created explicit potential and possibility for dual but interrelated constitutionalism in FDRE. As the SN constitutions in federal states are part and parcel of the entire constitutional structure of the systems and play a vital role in giving the systems a direction,[6] SN constitutions in FDRE should be treated as such. The federal system in FDRE should also well be conceived as a system that needs to setup a notion of national and SN constitutional law as complementary partners in a complex collective scheme of constitutional self-governance. Thus, studies relating to Ethiopian recent constitutional process have to be directed towards analyzing the generation, development, interpretation,

[1] In this work, 'subnational units (SNUs)' refer to the sphere of governance immediately below the national government. Similarly, 'subnational government (SG)', 'subnational constitution', and 'subnational constitutionalism' refer, respectively, to 'government', 'constitution', and 'constitutionalism' in SNUs.
[2] Constitution of the Federal Democratic Republic of Ethiopia (CFDRE), Proclamation No.1/1995, *Federal Negarit Gazeta*, Year 1 No.1, Arts 1, 46 (1) & 50 (1).
[3] Nine SGs are established on the basis of the settlement patterns, language, identity and consent of the peoples concerned. CFDRE, Art.46 (2).
[4] CFDRE, Art.52 (2).
[5] CFDRE, Art.50 (5).

[6] Daniel J. Elazar (a), 'From the Editor of Publius: State Constitutional Design in the United States and Other Federal Systems,' *Publius*, Vol. 12, No. 1, (1982), p.1.

and enforcement of constitutional norms both at the national and SN levels.

This work deals provides a theoretical study of aspect of the current complex constitutional process. Though SN constitutionalism is often identified with written SN constitutions, not all SN constitutional texts are committed to the principles and serve the ends of SN constitutionalism. Enacting SN constitutions does not guarantee SN constitutionalism as SN constitutionalism needs adherence to values/norms, institutions and procedures of prominence. Therefore, whether SN constitutions in a given state adhere to the dictates of SN constitutionalism cannot be determined without some sort of normative evaluation. FDRE is not an exception to this. Like in the other federal states,[7] whether the existence of SN constitutions indicates a corresponding emergence of robust practice of SN constitutionalism has remained unclear in FDRE, too.

Thus, this work tries to evaluate how the SN constitutions in FDRE fare with the dictates of SN constitutionalism. It would point out some of the facts that go hand in hand with the development of robust constitutionalism at SN level on the one hand and that hinder such development on the other. This would be made in four parts. The first presents the meaning and presuppositions of SN constitutionalism as it is employed here. Part two gives brief overview of the path taken towards

[7] James A. Gardner, In search of subnational constitutionalism, A paper prepared for Seventh World Congress (SWC), International Association of Constitutional Law (IACL), Athens, Greece, June 11-15, 2007, Buffalo, Legal Studies Research Paper Series, Paper No. 2007-016, p.1.

SN constitutionalism in Ethiopia in light of constitutional development of the country. Part three shows some facts that are consistent with and others that present challenges to the emergence of robust SN constitutionalism in FDRE. Finally, a brief conclusion would be made.

2. Subnational Constitutionalism: What is it? What does it presuppose?

2.1. Preliminary considerations

Though constitutionalism is a concept attracting various meanings, here it is taken as a notion referring to several factors serving as indices by which degrees of constitutionalization can be measured. Particularly, it includes the following imperatives: government founded, defined, governed and directed by a constitution, and whose power is constrained by laws, the constitution being the supreme law;[8] addressing the relationship between the national and the other levels of governance, which are emerging and constitutionalized, and the issue of adequate allocation of competences so as to establish legitimacy and coherence of the entire constitutional system;[9] presence of precondition favourable to the establishment of peace and security, and the promotion of tolerance and diversity;[10] popular sovereignty and democratic government (especially, with separation of powers or other checks and balances; and,

[8] Bernard Bekink, 'The intrinsic uneasy triangle between constitutionalism, secularism and the right to freedom of religion- A South African Perspective,' *TSAR*, Vol.3 (2008), 481.

[9] Thomas Cottier and Maya Hertig, 'The prospects of 21st Century constitutionalism,' *Max Planck Yearbook of United Nations Law*, Vol.7, 2003, 261-328, p.298.

[10] Andras Sajo, Limiting Government: An introduction to constitutionalism, 2000, p.10.

an independent judiciary);[11] presence of legally defined limits on the power of the majority;[12] institutions to monitor and assure respect for the constitutional blueprint, limitations on government, and individual rights;[13] respect for self-determination;[14] and, legitimacy of a constitution, which results from the support (willful acceptance and internalization) of the constitution by the people.[15]

2.2. Subnational Constitutionalism: What is it?

This work conceives SN constitutionalism as a concept referring to application of constitutionalism as given above at SN level, *mutatis mutandis*. Besides, SNCM has, at least, two fundamental perspectives: perspective of *process* and perspective of *result*.[16] The former refers to the dictates of constitutionalism; whereas, the latter refers to the end results of the former. I focus on the first perspective as it is facilitator of achieving SN constitutionalism in a given SNU.

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[11] Larry Catá Backer, 'Theocratic Constitutionalism: An introduction to a new global legal ordering,' *Indiana Journal of Global Legal Studies*, Vol.16 No.1 (2009), p.100.

[12] Jon Abbink, 'Ethnicity and constitutionalism in contemporary Ethiopia,' *Journal of African Law (JAL)*, Vol.41, p.160.

[13] Louis Henkin, A new birth of constitutionalism: Genetic influences and genetic defects, in *Constitutionalism, identity, difference and legitimacy: Theoretical perspectives* (Michel Rosenfeld ed., 1994), pp. 40-42.

[14] The same as above. The right to choose, change, or terminate political affiliation. The same as above.

[15] Vivien Hart, Democratic constitution making (U.S. Inst. for Peace, Special Report No. 107, 2003). Sam Brooke, Constitution-making and immutable principles, (MA Thesis, Tufts University, The Fletcher school, 2005), p.7.

[16] SHI Shifeng, Towards Multiple-Constitutionalism: A New Paradigm for Constitutional Reform in China?, A paper for the SWC of the IACL, Athens 11-15 June 2007, Workshop 11, p.3.

2.3. Subnational Constitutionalism: What does it presuppose?

SN constitutionalism presupposes some conditions relating to constitutional structure in a country.[17] First, it requires existence of, at least, two levels of domestic governance in a country. Second, it presupposes a domestic structure that basically involves these levels. Third, it demands all levels should be allowed to have their own respective constitutions.[18] Fourth, it requires these levels of governance have respective constitutional space. Finally, it calls that all the requirements need to be constitutionally entrenched at national level.

As far as the CFDRE is concerned, this writer assumes that these presuppositions are arguably fulfilled.[19] Therefore, the fulfillment of these preconditions can be seen as a promising factor for the development of SN constitutionalism.

3. The Path Taken: Overview of the Transitional Period

In May 1991, the Ethiopian People's Revolutionary Democratic Front (EPDRF) took over power.[20] Soon after (from July 1-5, 1991) a national Peace and Democracy Conference, was called and convened by EPDRF in order to adopt the TPC and establish a Transitional Government (TG) as blueprinted therein.

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[17] The same as above.
[18] SHI Shifeng, at note 16 above, p.2.
[19] CFDRE, Arts 46-52, requirement (R)1; Arts 1, 47-52, 94-105, R2; Art.50 (5) R3; Arts 50-52, 94-105 R4; R1, R2, R3 & R4 are entrenched under the CFDRE adopted at national level, R5.
[20] S. Vaughan, *The Addis Ababa Transitional Conference of July 1991: Its origins, history and significance*, (Centre of African Studies, Edinburgh University, 1994), pp. 5-6.

The TPC affirmed the right of NNPs to self-determination and to administer their own affairs within their own defined territories.[21] Thus, it demanded the creation of 'local and regional councils…defined on the basis of nationality.'[22] Shortly after, a proclamation was issued to this effect.[23] Ethiopia was divided into 14 SNUs.[24] The arrangement had also provided SN structure through which 'minority nationalities' could participate in SN politics.[25] Of the powers given to SNUs, SN constitution making power is important for this work. State Councils were empowered to issue SN constitutions in their respective territory.[26] Some specific or 'special' powers of economic, fiscal, and administrative nature were also granted to SNUs.[27] This put the welcome mat for sub-nationalism, SN constitution making and SN constitutionalism.

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[21] TGC, Art.2.

[22] TGC, Art.13.

[23] The National/Regional Self-Governments Establishment Proclamation No.7/ 1992 (Proclamation No.7/1992). "'Nation' or 'nationality' means a people living in the same geographical area and having a common language and a common psychological makeup". Proclamation No.7/1992, Art.2 (7).

[24] Proclamation No.7/1992, Art.3. The SNUs were called National Regional Transitional Self-Governments.

[25] T. M. Vestal, *Ethiopia A Post-Cold War African State*, (Westport, Praeger, 1999), p.7; S. Fullerton Joireman, 'Opposition Politics and Ethnicity in Ethiopia: We Will All Go Down Together,' *JMAS* (1997), pp399-400.

[26] TGC, Art.15 (1). It had the powers to issue SN laws; to establish the various organs of the SNU, and define the powers, appoint the officers and supervise the activities of the same; and, to, generally, exercise the 'special' SN powers. Power to elect the Executive Committee, and the Chairman and Secretary of the State Council among its members; to determine the seat and the working language of the state government; to negotiate and approve agreements concluded with adjacent SNUs with respect to national and border matters. Proclamation No.7/1992, Art.15.

[27] Proclamation No.7/1992, Art.10. The powers included the power to borrow from domestic sources, to impose and collect dues and taxes, and to prepare, approve and implement their respective budget; to plan, direct and supervise social and economic development programs in accordance with the relevant policy of the TG; to administer, develop and protect the natural resources in their respective territory in accordance with the relevant general policy and law of the TG; to establish and direct security and police forces for maintaining the peace and security within SNU; and, to establish SN courts. Proclamation No.7/1992, Art.10 (3), (5) (6), (8), (9).

However, the move towards SN constitutionalism was not promising.[28] First, it was boldly proclaimed under the TPC that the TG 'shall exercise all legal and political responsibilities for the governance of Ethiopia.'[29] Thus, the ultimate government power rests with the central government.[30] Besides, the TPC established the organs of the TG only, organs of SNUs were established by an ordinary proclamation, of course, with a backup from the TPC.[31] In addition, SNUs were unequivocally declared to be entities subordinate to the TG in every aspect.[32] The state council, which was 'the repository of overall political power regarding the internal affairs of' the SNU, was made accountable in particular to the COR.[33]

To add to this, though the Proclamation seems to unequivocally bestow residual powers to SNUs, this was highly circumcised.[34] First, its language was not precise.[35] Second, the areas reserved for the TG were major and broad.[36] The enumerations were also open-ended. Furthermore, though the Proclamation provided that powers and responsibilities of ministries, authorities, and commissions of the TG

[28] Opposition parties also boycotted the election for SCs which were supposed to enact SNCs. T Lyons, 'Closing the Transition: The May 1995 Elections in Ethiopia', *JMAS* (1996), p.126; S. Fullerton Joireman, at note 28 above; T. M. Vestal, at note 28 above.
[29] Fasil Nahum, *Constitution for a Nation of Nations,* (Red Sea Press, Asmara, 1997), pp.38-47
[30] The same as above.
[31] The same as above. Proclamation No.7/1992.
[32] Proclamation No.7/1992, Art.3 (3).
[33] Fasil Nahum, at note 42 below.
[34] The same as above.
[35] Proclamation No.7/1992, Art.9. Art.9 (1) reads: SNUs 'shall have legislative, executive and judicial powers in respect of all matters within their' boundaries except such matters that were specifically reserved for the TG 'because of their nature.'
[36] Proclamation No.7/1992, Art.10. They were defence, foreign affairs, 'building and administering major communications network', printing of currency, declaration of a state of emergency and deployment of the army where situations beyond the capacity of regional governments arose.

were to be proposed by the Council of Ministers and imposed that the proposal should be consistent with the powers and duties of SNUs, the ultimate decision on the proposal was to be made by the COR, a structure at central level.[37]

With respect to structure of SNUs, the Proclamation provided that each SNU has seven organs.[38] These organs could be viewed as referring to one or the other of the three conventional government organs. The state councils were legislature of the SNUs.[39] The SN executives were consisting of, among others, the Executive Committees (SNECs), which were the highest executive organs of the SNUs.[40] Each SNEC was accountable both to the Council of Ministers and to the respective state council.[41] With respect to the SN courts, the proclamation, which envisaged two parallel court systems, had established *Wereda* and superior court system in each SNU.[42]

Finally, the Proclamation had left various important areas for SNUs to determine them by SN laws. These included adoption of SN constitutions; manner of collection and utilization of SN revenue; the jurisdiction and administration of SN courts; the assignment of duties to

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[37] The same as above. S. Morrison, 'Ethiopia charts a new course,' *Journal of Democracy*, Vol.3 No.3., 1992, 129-130; John Cohen, 'Transition toward Democracy and Governance in Post Mengistu Ethiopia,' Harvard Institute for International Development, Harvard University Development Discussion Paper no.493, 1994, p6.

[38] Proclamation No.7/1992, Arts.9 &15. They were the State Council; SNEC; Judicial Organ; Public Prosecution Office; Audit and Control Office; Police and Security Office; and, Service and development Committee.

[39] The same as above.

[40] The same as above. It consisted 11- 19 members elected by the State Council among its members. The same as above.

[41] The same as above.

[42] The same as above.

the SN Prosecutor; and, the powers and duties of *Kebele*s and Higher and similar areas.[43]

Having regard to the above discussions, it can be seen that a remarkable step with respect to entrenching SN constitutionalism was made during the TP like never before. Some of the promises and pitfalls to SN constitutionalism witnessed during this time are briefly provided below:

Promises:

- Establishment of SNUs with designated areas of SN competence;
- Authorization of SNUs to enact SN constitutions and establish SN Audit and Control Offices;
- Determination to realize self-rule by the TG as manifested by the adoption of the TGC and the proclamation;
- Protection of minority ethnic group (nationalities) under the Proclamation;
- Diffusion of the inclusive participation witnessed at national level during the adoption of the TGC to SNUs;
- The attempt to ensure accountability of the state governments to the electorate by making SN executives accountable to subnational constitutions, which are elected by the people; and,
- The possibility available for interpretation of the TGC by the SN judiciaries, at least, in cases involving constitutional issue, and one or more SN government organ or residents of a given SNU

[43] Proclamation No.7/1992, Arts 9,10 & 15.

are parties. This is because, the Self-Government set-up by then does not provide for a constitutional court.[44]

Pitfalls:

- Limited experience of democracy and SN constitutional-making experience;
- Limited human power in the courts for judicial review;
- Ambiguous and limited SN constitutional space;
- Empowering state councils constitutions to enact SN constitutions that seems to curtail the direct but only indirect participation of the people in SN constitution- making process;
- Little popular participation in the making of SN constitutions;
- Little effort to create SN constitutional knowledge to the people;
- Lack of separation of powers as the SNECs and the state councils have the same members; and,
- A broad role of the TG in controlling SNUs, including accountability of state councils to the COR, and, accountability of SNECs to the Council Ministers of the TG.

4. Subnational Constitutionalism in FDRE: Some Promises and Challenges/Pitfalls

SN constitutions, SN constitution-making process and SN constitutionalism in FDRE can partly be viewed as outcome of lessons taken from the SN constitutional practice during the Transitional Period.

[44] However, in cases of constitutional disputes involving the TG and a SNU, or arising between two or among more SNUs, it appears that, possibly, the COR will be the arbiter. S. Morrison, at note 37 above; John Cohen, at note 37 above.

Therefore, in order to give a comprehensive insight to the SN constitutionalism in FDRE, the significance of the previous brief discussion should not be undermined. Having said this, I would proceed to other points of consideration.

4.1. Authorizing subnational constitutions: The case of FDRE

To begin with, studies relating to SN constitutions have been very limited regardless of their duration of existence.[45] The significance of SN constitutions as independent sources of law has also been emphasized only recently.[46] In countries like the US, SN constitutions are frequently celebrated as alternative, if not second, source of justiciable rights.[47] Moreover, SN constitutions differ in their contents from place to place[48] and in some states guarantee wider protections for individual rights than national constitutions.[49]

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[45] Robert Williams, 'Introduction,' *Rutgers Law Journal (RLJ)*, Vol.39, No.4 (2008), pp.799- 800.

[46] The same as above; Jonathan L. Marshfield, 'Authorizing Subnational Constitutions in Transitional Federal States: South Africa, Democracy, and the Kwazulu-Natal Constitution,' *Vanderbilt Journal of Transnational Law*, Vol.41 (2008), pp 585-638.

[47] Jonathan L. Marshfield, at note 46 above, p.587.

[48] Ronald L. Watts, 'Provinces, States, Lander, and Cantons: International variety among subnational constitutions,' *RLJ*, Vol.31 (2000), pp 941-959; Jonathan L. Marshfield, at note 61 above; John Dinan, 'Patterns of subnational constitutionalism in federal countries,' *RLJ*, Vol.39 No.4 (2008), p.838; Campbell Sharman, at note 26 above.

[49] G. Alan Tarr, 'Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism,' *Revue québécoise de droit constitutionnel*, Vol.2 (2008), p.179; Elizabeth Pascal, 'Welfare rights in state constitutions,' *RLJ*, Vol.39 (2008), pp883-884; Arthur B. Gunlicks, 'Land Constitutions in Germany,' *Publius: Journal of Federalism*, Vol.28 (1998), pp 121-122. One reason, 'constituent units may wish to safeguard rights that are of particular concern to their residents.'

The practice in decentralized states around the world tells that not all of them have authorized SNUs to write SN constitutions, and that SN constitutions differ in their contents, structure and creation. Peculiarities existed as the reason for decentralization varies.[50]

Coming to FDRE, the system represents a different federal practice. Though, the CFDRE authorizes SNUs to write SN constitutions, it neither obliges them to do so nor it explicitly requires SN constitution for admission of new SNU into the federation.[51] It simply empowers SNUs to write SN constitutions. SNUs have the discretion to write their respective constitutions. The practice so far shows that SNUs are created by the CFDRE and are automatically made members of the federation. Besides, CFDRE says that '[w]hen ... a new [SNU] [is] created by ... referendum, [it] directly becomes a member of the [FDRE, without any need for SN constitution].'[52]

[50] Daniel J. Elazar (b), at note 24 above, 178; John Dinan, at note 63 above, pp.839-840; Daniel J. Elazar, at note 6, especially, p.6-10. For instance, the US federalism requires SNUs to adopt SN constitutions before admission into the Union. US Constitution, Art.IV, *Sec* 3, *C* 1. In contrast, India does not allow SNUs to write SN constitutions. Indian Constitution, Art 3, 168-212; Daniel J. Elazar, at note 6 above; Jonathan L. Marshfield, at note 61 above, p.588. The Republic of South Africa has a system that can be viewed as a unique blend of these two systems. The National Constitution allows SNUs to adopt SNCsand at the same time discourages them to do so. Constitution of the Republic of South Africa, (CRSA) 1996, Secs 104 (1) (a), & 142-145. SNUs in the RSA are known as Provinces. Only two SNUs (KwaZulu-Natal and Western Cape) attempted to write SN constitutions and only one of them (the latter) succeeded to adopt after a tiresome certification process. It leaves a very limited space for SN constitutions, CRSA Sec.143, which may compel SNUs to even question the need for SN constitutions. Again, CRSA needs certification of SNCs, Sec.144, which is tiresome (as the Constitutional Court seriously examines every article of the SN constitution); embodies a set of rules that serve as SN constitutions, Secs 103-141.

[51] CFDRE, Arts 47 (1) & 50 (5).

[52] CFDRE, Art.47 (3) (e). To be created by NNPs concerned.

From the foregoing follows *why did all SNUs in FDRE adopt SN constitutions?* They adopted SN constitutions for practical reasons. This would be better shown by discussing the significance of SN constitutions and their link with CFDRE.

4.2. Significance of SN Constitutions and their link with the CFDRE: Theoretical Overview

A principal feature of federal systems is that they rely upon fixed constitutional arrangements for their maintenance and to secure those objectives for which they are established.[53] Those arrangements are often provided in written constitutions which concretize constitutional positions at the time of their adoption and serve as the basis for further constitutional development within the state.[54] Similarly, the federal system in FDRE is entrenched through a written constitution, the CFDRE, which has all these intents and purposes.

In its design, the federalism in FDRE reflects the system of 'shared and self-rule'. It establishes a system that unites nine SNUs and the federal government within a more comprehensive political system and that allows the SNUs and the federal government to maintain their respective fundamental political integrity as it articulates and expresses diversities of the Ethiopian society. As federalism is said to signify 'unity in diversity' in a society, this is particularly true of the Ethiopian federal system. The CFDRE provides for norms on matters that recognize diversity and promote 'unity' of the country; whereas, the SN

[53] Daniel J. Elazar, at note 6 above.
[54] The same as above.

constitutions are supposed to embody particularly provisions on matters that reflect ‘diversity’ of the respective SNUs.

Just like CFDRE, the SN constitutions are based upon certain underlying principles and traditions of constitutionalism and constitution making at SN level. Therefore, they are meant to be written in such a way that they reflect SNUs are distinct entities of ‘self-rule’ within the broad structure of federal governance in FDRE. The underlying principles, purposes, contents and objects of the SN constitutions may also vary given their particular underlying principles, which may result from societal diversities in the SNUs. The SN constitutions are also part and parcel of the entire constitutional structure of the Ethiopian federal system and are pivotal in shaping the entire federal system in the country. Thus, the federal system in FDRE should be conceived as a system that needs to establish a conception of national and SN constitutional laws as complementary partners in a complex and collective venture of constitutional self-governance.

As the CFDRE and SN constitutions are part and parcel of the entire constitutional process in FDRE, the CFDRE is of importance to SNUs for various reasons. First, the CFDRE has had the historical role of being the agency through which SNUs have been established. Second, it provides the constitutional structure for the entire federal system, i.e. the basic constitutional framework for Ethiopia as a federation and for the creation of federal government and state governments with designated areas of concern. Third, the scope of SN constitutions can to a larger part only be defined negatively to provision of the CFDRE as SNUs are given residual

powers.[55] Thus, the CFDRE has only partly defined SN governmental powers expressly. Other SN powers are put only ambiguously. This shows that whatever mechanism of craving out the powers of SNUs may be followed[56], it is difficult to clearly define SN powers without SN constitutions.

Besides, the CFDRE, in its treatment of the state government structure, defines some of the machinery and processes of government at the SN level and puts them beyond the ability of SNUs acting alone to change them.[57] However, the CFDRE says very little about most of the significant matters of governmental structure and operation at SN level.[58] It says very little about matters of SN governmental structure and operation, and scope of powers and ambit of operation of SNUs. As a result, these matters fall within the ambit of SN constitutions. This is advantageous to come up with SN constitutions that well reflect fundamental values of the NNPs in the SNUs. Moreover, SN

[55] CFDRE, Art.52 (1). It tells that residual powers are 'All powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States.'

[56] For instance, SN constitutions may be made in co-operation with the House of Federation of the federal government or individually by the SNUs as there is no any rule which prohibits so. However, the practice shows that the federal government provides for a draft SN constitution and SNUs adopt it.

[57] CFDRE, Arts 50, 78,79,80,81, 99, 101-103 cum. Art.105 (2).

[58] Structure of SGs and accountability of SN legislatures. CFDRE, Art.50 (2) - (9). Independence, structure, tenure and jurisdiction of the Judiciary of the federal government and SNUs. CFDRE, Arts78, 79, 80 & 81. For instance, the CFDRE requires the SNUs to have freely elected legislatures accountable to the electorate but it does not define, for instance, their terms of office and frequency of election. CFDRE, Art.102. It says little about the mode of representative government to be adopted by the SNUs, the nature and/or structure of SN legislatives, executives and judiciaries in the SNUs beyond a general description of their powers. CFDRE, Art.50 (3)- (6).

constitutions are significant to expand the scope of SN governmental powers as SNUs are given residual power under the CFDRE providing such an opportunity.

Moreover, though the CFDRE enshrines fundamental rights and freedoms, it does not prohibit SNUs from including human rights provisions in SN constitutions. Thus, SN constitutions may include additional rights and be additional/second sources of justiciable rights and/or means to constitutionalize some more rights not lifted to such level under the CFDRE.

As complementary partners in a complex, collective enterprise of constitutional self-governance in FDRE, SN constitutions are, for instance, essential in realizing the object of NNPs to 'build a political community founded on the rule of law and capable of ensuring lasting peace, guaranteeing democratic order, and advancing economic and social development.'[59] They provide the complete and predefined government structures through which NNPs realize their sovereignty[60] and the concomitant right to democratic participation in public affairs, and the representation and accommodation of societal- ethnic, cultural, and linguistic- differences at SN level.[61]

[59] CFDRE, preamble, para.2.
[60] CFDRE, Art.8. A norm provided under this provision.
[61] CFDRE, Arts 5, 34 (5) & 39. The rights provided under these provisions.

They are also important with respect to CFDRE's object to grant adequate government power to the lowest units of government.[62] First, SN constitutions would serve as a means to create such lowest units. Second, SN constitutions enable such units enjoy greater protection as they will not be abolished or altered without amendments to SN constitutions, which are not often easily made.

Thus, SN constitutions in FDRE serve important purposes. There is very considerable scope for the SNUs to shape the nature and mode of their government through the medium of SN constitutions. SN constitutions, in sum, provide the contextual logic for SN politics and governance. This makes them essential in order to understand the SN governmental process. This, in turn, indicates that understanding the process, fundamental principles and values, and practices of each SN constitution is significant in understanding the SN constitutionalism in the respective SNU. Therefore, examination of the CFDRE indicates that the style of constitutionalism in a SNU is largely a matter of SN concern.

Finally, it is important to mention that the CFDRE jealously guards norms that reflect national identity/unity against intrusion by any custom, practice, decision, and law including SN constitutions.[63] Therefore, SN constitutional norms shall be in line with or, at least, not be contradictory to the national constitutional norms. Moreover, the CFDRE clothes the federal government with powers to impinge directly in areas under the

[62] CFDRE, Art.50(4). to enable the people to participate directly in the administration of such units.
[63] CFDRE, Art.9 (1).

competence of state governments;[64] categorically provides that the potential has existed for the federal institutions, which are beyond the control of the SNUs, to affect the conduct of government at the SN level;[65]obliges state governments to respect and protect the fundamental rights and freedoms it enshrines;[66]and, requires SNUs to ensure observance of the CFDRE and to obey it.[67]

5.3. Examination of Promise and Challenges to Subnational Constitutionalism in FDRE

5.3.1. Examination of the federal structure (CFDRE itself)

It is undeniable that CFDRE has laid down clear basis for the emergence of SN constitutionalism and resulted in a concrete progress in the realm of self-governance. Nonetheless, a closer examination suggests that the CFDRE informs mixed results with respect to SN constitutionalism.

The CFDRE is promising for the emergence of SN constitutionalism for, at least, three reasons. First, it establishes autonomous SNUs with SN

[64] CFDRE, Arts 51 (14), 55 (16) & 62 (9). This may be taken as one fact hampering the robust development of SN constitutionalism in FDRE.

[65] Particularly, the Federal Supreme Court and its cassation power; the House of Federation and constitutional interpretation, allocation of undesignated taxation powers, decisions on which civil laws should fall under the ambit of SNUs, decision on division of revenue and grant of subsidies, resolution on intervention into SNUs if any SNU (in violation of the CFDRE) endangers the constitutional order; Human Rights Commission and Ombudsman through observation of violation of human rights; and, House of Peoples' Representatives through legislation, ratification of treaties and international agreements, resolution to intervene into SNUs when SN authorities are unable to arrest violations of human rights within their jurisdiction, and other powers. CFDRE, Art.80 (3) (a); Arts 62 (1) & 83, Art.99, Art.62 (8), Art.62 (7), and Art.62 (9); Art.55 (14) & (15); and, Art.55 (1) (12) & (16), respectively.

[66] CFDRE, Art.13 (1).
[67] CFDRE, Art.9 (2).

matters.[68] Second, it empowers SNUs to adopt SN constitutions. Third, by establishing state governments and giving, to some extent, their structures,[69] it informs norms consonant with SN constitutionalism: the principle of separation of powers, accountability of subnational constitutions and judicial independence at SN level.[70] However, given the manner of power allocation, it poses serious challenge to the development of SN constitutionalism. First, all the crucial powers are given to the federal government; whereas, state governments are left only with little powers. Of course, by looking into the list of powers there seems much power is given to state governments; however, these powers are lost because of the claw back clauses[71] under the CFDRE itself.[72] Thus, the constitutional space left for SNUs is very much limited impacting upon the scope and importance (with respect to matters) of SN

[68] CFDRE, Arts.47 & 51, particularly sub-art.(8).

[69] CFDRE, Art.50 (2) & (5).

[70] CFDRE, Arts 50 (2), & 78-81. Institutional and financial independence of the judiciaries is provided therein.

[71] Like clauses on policy and law making, fiscal matters and subsidy, the power to determine the mode of selection for public officials, their term of office, and to 'establish qualification for voting for officials' of SNUs, etc.

[72] This is why some writers say that the CFDRE and the federalism under it are of a 'centripetal character.' John Young, 'The Tigray People's Liberation Front', in *African Guerrillas*, C. Clapham (ed.), (Bloomington: Indiana University Press, 1998), 321; C. Clapham 'Controlling Space in Ethiopia', in *Remapping Ethiopia: Socialism & After*, W. James, D. Donham, E. Kurimoto, and A. Triulzi (eds.), (University of Ohio Press & James Curry Press, 2002), p.26; M. Gudina, Ethiopia: Competing ethnic nationalisms and the quest for democracy, 1960 – 2000, (PhD dissertation, 2003), p.121; S. Vaughan and K. Tronvoll, 'The Culture of Power in Contemporary Ethiopian Political Life', *SIDA Studies*, No.10, (2003) p.12; Jon Abbink, 'New configurations of Ethiopian ethnicity: The challenge of the South,' *Northeast African Studies*, Vol.5, No.1, p.167, 1998; Berhanu G. Balcha, Constitutionalism in the Horn of Africa: Lesson from the new constitution of Ethiopia, Development, Innovation and International Political Economy Research (DIIPER), Aalborg University, Denmark, 2009, available at http://www.diiper.ihis.aau.dk/research/3397011, accessed on Dec.15, 2009, pp.5-6. Compare also CFDRE Art.51 with Art.52. In addition, SNUs do not have the power to determine the mode of selection for public officials, their term of office, and to 'establish qualification for voting for officials' of SNUs and their constituent units.

constitutionalism. The concentration of policymaking, financial and budget allocation powers in the hands of the federal government also show centripetal nature and impacted on SN constitutionalism. To make matters worse, SNUs do not have any role in debating the policies and in proposing legislation formulated at the federal level, unlike other federal systems, such as the German, Canadian, Nigerian and Mexican that have given more power of this kind to SNUs.[73] In addition, the SNUs in FDRE have very narrow, if any, access to challenge decisions made by the House of the Federation and Council of Constitutional Inquiry, 'which are structured within the jurisdiction of the federal government,' in issues concerning constitutional disputes.[74]

Besides, SNUs, which are given limited revenue sources, have weak capacity in terms of human power. This makes them highly dependent upon the federal government. It also limits capacity of SNUs to establish SN institutions necessary to oversee the acts of SN officials and ensure that they act within the bounds of the SN constitution or to entrench SN constitutionalism. This is worsened by inability of victims to hire independent legal professionals' services due to either inadequate availability and/or inability to afford their fees.

Finally, though SNUs may include rights embodied in human rights instruments ratified by the House of Peoples' Representatives (HPR) in their laws, the assignment of disputes arising from violation of rights

[73] Jon Abbink, at note 72 above, p.167; Berhanu G. Balcha, at note 72 above.

[74] Berhanu G. Balcha, at note 72 above, pp5-6.

under these instruments to the federal judiciary has limited the role of SN judiciaries in adjudicating cases involving such instruments.[75] The mere inclusion of these rights under SN constitutions does not make such cases subject to the jurisdiction of SN judiciaries.[76] This has caused confusion on the role of SN judiciaries and ultimately curtailed the enforcement of human rights claims by SNUs.

5.3.2 Lost Opportunities for SN Constitution: Two SN constitution making processes

Since the CFDRE, FDRE has witnessed two remarkable opportunities for SN constitutionalism. The first was the process of making SN constitutions observed soon after the adoption of the CFDRE. During that time, SNUs were heavily reliant on the federal government as they 'used a model draft prepared by the then States' Affairs Desk of the Federal Prime Minister'[77] in making their respective SN constitutions. As a result, SN constitutions were similar in the legal/political language used, and in the drafting styles and techniques with CFDRE, and among themselves, too.[78] This also showed that SNUs were highly engaged in copying the CFDRE and SN constitutions issued by some fast-moving state governments, and subjected to indoctrination by the federal government[79] and such state governments. The second SN constitutional-making process took place from 2001 to 2002.[80] In this period, SNUs

[75] Federal Courts Proclamation No.25/1996, Federal Negarit Gazeta, 2nd Year No.13, Arts 3 (1) & 5 (2), 6 (1) (a).
[76] CFDRE, Art.9 (4).
[77] Tsegaye Regassa, State Constitutions in Federal Ethiopia: A preliminary observation (A Summary for the Bellagio, Conference, March 22-27, 2004), p.8.
[78] The same as above.
[79] Tsegaye Regassa, at note 77 above, p.7.
[80] A period known as the 'third wave of decentralization.'

were 'required' by the federal government to revise their SN constitutions in order to devolve power to the lower level of SN structure (*Wereda* and *Kebele* administrations) and to inculcate some constitutional principles[81] and the procedure through which the right to self-determination[82] can be exercised.[83]

These processes evinced practices promising and challenging to the development of robust SN constitutionalism in the country. In the first process, though the mere fact of writing SN constitutions and the consequent inclusion of some constitutional principles therein provided practices consistent with entrenching SN constitutionalism, the process was highly encased by factors that hinder the development of a robust SN constitutionalism. First, SNUs were engaged in copying the draft by the federal government, CFDRE and other SN constitutions, which were issued a short time prior to them. Second, SNUs were subject to indoctrination by the federal government and fast-moving SNUs, at least, through the copying syndrome. Third, during this process, most, if not all, of the SN constitutions had resulted from a procedure that hardly involved the NNPs in the SNUs as they were more often than not

[81] Such as the principles of separation of powers, check and balance, transparency, public participation, accountability of SGs and efficient state structure. A Proclamation to Provide for the Revised Constitution of the Afar Regional State, Proclamation No. 14/2002 (Afar Con.), Preamble, para.5; A Proclamation to Provide for the Revised Constitution of the Benishangul Gumuz Regional State, Proclamation No.31/2002 (BG Con.), Preamble, para.5; Oromia Regional State Revised Constitution, Proclamation No.46/2001 (Oromia Con.), Preamble, para.4.
[82] This is a right provided under the CFDRE, Art.39 (1).
[83] The same as above.

exclusively drafted by the Legal Standing Committees of the respective SNUs and simply adopted by legislatures of the same.[84]

These realities hindered the development of not only SN constitutionalism but also a diversified and contextualized trend of SN constitutionalism. Because, they compelled SNUs to think and operate within a given domain; to fail to see the possibility of widening the scope of their powers which they can do as they are given residual power under the CFDRE that may afford an opportunity for the development of SN constitutionalism in broad areas; and, to fail to take due consideration of their peculiar circumstances that may present a fertile ground for the development of SN constitutionalism in their respective contexts. Finally, they may negatively hamper attitude of the NNPs in the SNUs for two reasons.

First, they might create a shadow of doubt on the identity of the state governments on the part of the NNPs as the SNUs tended to be highly influenced by demands of the federal government than SN needs. Second, as NNPs were also not involved in the SNC making process, they could lack sense of 'our constitution' feeling on the one hand and could strongly develop sense of 'its (the state government's) constitution' on the other. These wash away the public trust required to establish SN constitutionalism, to which Ethiopians in general and the NNPs in the

[84] Tsegaye Regassa, at note 77, p.7. Thus, they did not pass through the conventional stages the CFDRE had passed through. Tsegaye Regassa, at note 88, pp.6-7. CFDRE passed through the following stages: drafting by Constitutional Commission, and deliberation by the public or representatives elected for such purpose and for adoption [Constitutional Assembly].

respective SNUs struggled to secure, and have little capital at their disposal. Public trust is important in the development of SN constitutionalism.

In the second SN constitutions making process too, there were factors that had presented both promises and challenges to the development of SN constitutionalism. In addition to the promising facts discussed in relation to the first process, the reasons for the second SN constitution-making process presented promising move towards entrenching SN constitutionalism.

Coming to the factors posing challenges, the following are worth mentioning. First, the second SN constitutional- making process was not the result of SN initiatives but an 'order' handed down from the federal government.[85] This contradicts the power of SNUs to amend their SN constitutions granted under the CFDRE and goes against amendment provisions of SN constitutions, which did not empower the federal government to initiate amendment of SN constitutions.[86] This showed that SNUs are under the pressure of the federal government even on matters (to amend and repeal SN constitutions) under their competence. Second, the NNPs in the SNUs were not also involved in the second SN constitution- making process as the SN constitutions were drafted by different organs without direct public involvement and simply adopted by the respective SN legislatures. These practices have tarnished the public trust on the autonomy of SNUs. This, in turn, presented a challenge to

[85] Tsegaye Regassa, at note 77 above, pp7-9.
[86] See, for instance, the Constitution of the Federal State of Tigray, 1995, Art.99.

create public trust that is necessary to entrench constitutionalism at SN level. The possibility of development of independent SN constitutionalism (constitutionalism that reflects the actions of SNUs without any interference from the federal government) is also curtailed. Third, at this time, SNUs were 'required' to accept draft constitution prepared in the form of fit-all jacket and they did so within a very short period one cannot imagine to be sufficient to amend a constitution, which is a fundamental document and that has to go through stringent requirements.[87] This hampered the possibility to expand the areas of SN constitutionalism (as the constitutional space was limited) and a diversified SN constitutionalism (as SNUs had no adequate time to see into their peculiarities).

1.3.3. Overview of SN Institutions Necessary for Constitutionalism

Independent institutions that serve as watchdog over acts of organs of state governments and that foster democratic SN governance are central to ensure a robust SN constitutionalism. Consistent with this, SN constitutions in FDRE have empowered their respective State Councils to establish 'institutions necessary for the promotion of social services, economic development and building democratic system.'[88] This formulation is different from the one adopted under the CFDRE.[89]

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[87] Tsegaye Regassa, at note 77 above, p.6.

[88] Afar Con., Art.47 (3)(m); BG Con., Art.49 (3)(12); Oromia Con., Art.49 (3) (k). However, the Oromia Con. employs different language that tends to limit the nature of institutions that may be established. It says 'Establish institutions necessary for expanding social service and fastening economic developments.'

[89] The CFDRE empowers the HPR to establish a Human Rights Commission (HRC), the institution of the Ombudsman, the Office of Auditor General (OAG) and National

The SN constitutions are promising for the development of SN constitutionalism as State Councils are given wider discretion than the HPR to create and establish various institutions that foster SN constitutionalism. This is true only if the State Councils are committed to democracy and SN constitutionalism. Lacking such commitment, however, the formulation of the SN constitutions may pose more serious problem to the development of SN constitutionalism than the CFDRE is to the development of national constitutionalism; because, SNUs may justify their failure to establish such institutions under the pretext of lack of explicit obligation to establish them unlike the HPR, which is compelled to establish specific institutions. To add to this, the SN constitutions tell that establishment of any such institution is dependent upon a single ground that is hardly reachable by the NNPs as the decision on this fact is exclusively under the competence of the State Councils. So far, however, it appears that State Councils are somehow committed towards ensuring SN constitutionalism as most of the SNUs have already established anti-corruption commissions at SN level.

Finally, SN constitutions require State Councils to establish SN 'Audit and other Control (or inspection) office'.[90] However, the effectiveness of such institutions is arguable as the Heads, especially the Auditor General

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Election Board (NEB), and to determine their powers and functions by law. The HPR, arguably, is not empowered to establish other institutions. Besides, its power and involvement in the establishment the HRC, OAG and NEB is circumcised as the wordings of the CFDRE suggest that the HPR is not empowered to select and appoint the members of these institutions except for the Ombudsman institution. In case of the HRC, OAG, and NEB, the HPR has only the power of approval of a nominee selected and submitted to it by the Prime Minister. See, CFDRE, Article 55 (13), (14) (15), 74 (7), 101 & 102.

[90] Afar Con., Art.47 (3)(h); BG Con., Art.49 (3)(8); and Oromia Con., Art.49 (3) (f).

(AG) and Deputy-Auditor General (DAG) of the SNUs are to be selected and nominated by the Chief Executive (CE)[91]who is the Managing Head and Chairman of the Executive Council, and President of the SNUs.[92] The State Councils are only empowered to approve such nominations.[93] Having regard to the powers and functions of OAGs,[94]it is possible to see the problem that may arise from giving the power to select and nominate the AG and DAG of OAG to the CE, which is the most important organ to be audited and inspected by the OAG. However, the SN councils have attempted to minimize the undesired effects of such arrangement in three ways.

First, they have tended to ensure financial independence of the OAGs as they entitle the AGs to prepare their annual budget by themselves, submit their annual budget directly to the State Councils for approval, and use their budgets upon approval by the same.[95] Second, they have made the AGs accountable to the State Councils.[96] This puts them under the control of the State Councils and enables a sort of check and balance on the acts of the OAGs headed by individuals selected and nominated by the CEs. Third, they have empowered the State Councils to determine the powers and functions of the AG.[97] This makes the OAGs serve the

[91] Afar Con., Art.59 (3) (d) & Art.108 (1); BG Con., Art.61 (3)(e) & Art.117 (1); Oromia Con., Art.110 (1).
[92] Afar Con., Art.59 (1); BG Con., Art.61 (1); Oromia Con., Art.57 (1).
[93] Afar Con., Art.47 (3) (f); BG Con., Art.49 (3)(6); Oromia Con., Art.110 (1).
[94] They audit and inspect the accounts of the SG institutions (especially that of the Executive) and other offices, ensure that the budget allocated by the SCs has been utilized for the activities planned within a budget year, and submit report thereon to the SC. Afar Con., Art.108 (2); BG Con., Art.117 (2); Oromia Con., Art.110 (2).
[95] Afar Con., Art.108 (3); BG Con., Art.117 (3); Oromia Con., Art.110 (3).
[96] Afar Con., Art.108 (4); BG Con., Art.117 (1); Oromia Con., Art.110 (4).
[97] Afar Con., Art.108 (5); BG Con., Art.117 (4); Oromia Con., Art.110 (5).

interest of the public by stipulating, directing and regulating their powers, functions and conduct. These demonstrate that the SNCs have seriously attempted to ensure that the OAGs should not tend to favour the organs that selected and nominated the AGs and DAGs. This shows the emphasis placed on these institutions. This, in turn, provides a promising step towards entrenching SN constitutionalism.

5.3.4. Overview of Independence of Subnational Judiciaries

CFDRE virtuously declares the independence of the judiciary at all levels.[98] Likewise, the SN constitutions boldly declare so.[99] Though this can be celebrated as a sprinter for SN constitutionalism, declaration of independence does not, in and of itself, equate to the creation of SN judicial independence. Therefore, prevalence of SN judicial independence may be assessed from various dimensions beyond such declaration in order to have a complete picture of the situation at SN level. Here, I would evaluate SN judicial independence based on one of such dimensions: SN judiciaries' relationship with the federal judiciary.

Federalism requires that FJ further 'twin policies of preserving the integrity of [SN] law and respecting the institutional autonomy of [SN] judicial systems.'[100] In the US system, the principle of comity limits potential conflicts between SN judiciaries and the federal judiciary.[101]

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[98] CFDRE, Arts 78, 79 & 81.
[99] Oromia Con., Arts 61 (1) & 63-66; BG Con., Arts 65 (1)& 67-70; and, Afar Con., Arts 64 (1) & 66 -69.
[100] L. H. Tribe, *American Constitutional Law*, (2nd ed. New York: Foundation Press, 1988), pp.196-197.
[101] L. Epstein and R. G. Walker, *Constitutional Law for a Changing America: Institutional powers and constraints*, (4th ed. Congressional Quarterly Inc., Washington, 2001), p.359.

The US Supreme Court (USSC) has established a parameter known as 'adequate and independent state grounds test,' which tells: the USSC will not resolve either the SN or the federal issues in a case so long as a SN court decision rests on adequate and independent state ground.[102] As a result, SN judiciaries are entitled to interpret their own statutes and constitutional provisions, and if their reasoning rests on 'independent and adequate' SN grounds, their decisions are not subject to review by federal courts.[103] One of the justifications for this doctrine, said the USSC, is respect for the independence of SN judiciaries.[104]

In FDRE, however, the relationship between the federal judiciary and SN judiciaries is arranged in such a way that Cassation Division of the Federal Supreme Court (CDFSC) reviews all cases decided not only by the federal judiciary but also by the SN judiciaries, including cases decided by the Cassation Division of SN Supreme Courts, so long as the decision contains 'a basic error of law.'[105] CDFSC is further empowered to interpret and apply SN laws in deciding such cases involving SN matters.[106] The problem has been aggravated by two other facts.

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[102] The same as above.
[103] The same as above.
[104] S. S. Abrahamson and D. S. Gutman, 'The new judicial federalism: State constitutions and state courts,' *Judicature*, Vol.71 (1987), p.90.
[105] CFDRE, Art.80 (3) (a).

[106] The Federal Supreme Court (FSC) 'has a power of cassation over *any final* court decision containing a basic error of law.' CFDRE, Art.80 (3) (a). 'Interpretation of a low [sic] by the [CDFSC] rendered ... with no less than five judges shall be binding on federal as well as State Councils at all levels. The [CDFSC] may however render a different legal interpretation some other time.' Federal Courts Proclamation Reamendment Proclamation, Proclamation No.454/2005 (Proc. No 454/2005), *Federal Negarit Gazeta*, 11th Year No. 42, Art.2 (2), para.1.

First, despite the efforts made to devolve power to SNUs, little has been, at least formally, done to develop ties, allegiance, or professionalism within the federal judiciary and SN judiciaries.[107] 'There is a clear divide and rivalry between the [federal judiciary] and [SN judiciaries] that hampers the development of such ties. It was reported that on the one hand [the federal judiciary acts as if it were] superior to other courts, while at the same time [SN judiciary] actively resist federal interference.'[108]

Second, both the CFDRE and federal laws are not clear as to the limits of the CDFSC's power.[109] Particularly, what constitutes 'a basic error of law' is unclear. The CDFSC can review a final decision rendered by SNJs on matters even under the exclusive competence of SNUs. Thus, 'independent and adequate' SN grounds test has no place in FDRE. In addition, SN judiciaries are required to adhere to interpretation of SN laws rendered by the CDFSC and also are prohibited to alter this interpretation subsequently as future change of such interpretation can only be made by the CDFSC.[110] Therefore, the whole structure of the judiciary has ignored the concept of respect for the independence of SN

[107] Michelle Guttman / The IBRD/WB, *Ethiopia: Legal and Judicial Sector Assessment*, (2004), p.15.
[108] The same as above.
[109] CDFSC is not prohibited to interpret SNCs as Art.80 (3) (a) of CFDRE says 'any case' irrespective of the law used in the decision and Art.2 (1), para.1 of Proc. No 454/05 too says 'a law,' without distinction.

[110] Proc. No. 454/2005, Art.2 (1), para.1.

judiciaries and has impacted upon the development of independent SN constitutionalism.[111]

2. Conclusion

In Ethiopia, the emergence and development of the constitutional process at SN level has gained a momentum after the fall down of *Derg* in 1991 in general and after the adoption of federalism in 1995 in particular. However, the existence of self-governing SNUs, which can write and administer themselves through SN constitutions, does not with certainty evince the emergence of a robust SN constitutionalism. The system entrenched exhibits both promises and challenges to the development of a robust SN constitutionalism. Given the promises, a systematic approach to tackle the challenges helps fostering SN constitutionalism in the near future.

[111] In addition, many view review power of the CDFSC over the final decisions of SNJs on matters under exclusive SN competence as reflection of the views of the FG on SNJs that has negatively contributed to the level of prestige and authority SNJs command in the eyes of the general public. This in turn has negative impact upon the development of SN constitutionalism as public trust in the SGs (as SN judiciaries are one organ of SGs) falls (given the unrestricted review power of the CDFSC).

Ethiopian Law on Transfer Pricing: A Critical Examination

Yosef Alemu Gebreegziabher[♣]

'Anything that can be priced can be mispriced' (Raymond Baker, *Capitalism's Achilles: Dirty money and how to renew the free market system*)

Abstract

Transfer pricing by multinational corporations is one of the darkest sides of international investment. Companies transfer large amount of profit untaxed out of a jurisdiction with the highest tax rate to countries with lowest corporate tax rate by mispricing their transactions. The OECD and UN came up with model conventions aimed at tackling this dilemma in member countries. Ethiopia, in its part, has introduced provisions governing transfer pricing in both the Customs and Income Tax Proclamations. The Proclamations require related companies to make their transactions at arm's length. Nonetheless, lack of directives and absence of comparable data, *inter alia,* are hindering the application of the laws on transfer pricing in the country, eventually, resulting in a loss of the very much needed tax revenue.

1. Introduction

This article aims at throwing some light on one of the hardly discussed subject matters of the Ethiopian tax system, that is, transfer pricing by multinational corporations (hereinafter, MNCs). The earlier tax laws of the country simply by-passed this matter without devoting a single

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provision governing the area. Given the economic and political realties at the time, the absence of legal regime dealing with the subject-matter is understandable, to say the least.

After the change of government in 1991, the country immediately embarked on decentralizing the economy and opening up many investment areas previously considered as government's only. In addition, the government has also lifted the restrictions on private ownership of properties. Encouraged by these and subsequent investment laws, many local and international companies have started to apply for new investment permits in Ethiopia. In the past ten years, around 6,000 foreign based companies have applied for investment permits at the Ethiopian Investment Authority.[1]

	Year	No. of Investment requests
1	2004	07
2	2005	294
3	2006	394
4	2007	567
5	2008	908
5	2009	945
6	2010	1270

Table 1 Source: Ethiopian Investment Authority (EIA)

[1] Data gathered from the Ethiopian Investment Authority. The data can be accessed from the data collection center of the Authority free of charge. The investors applied to the authority between July 2003-2013.

The volume of import has also increased from 4,932,925 metric tons in 2004/05 to more than 8 metric tons in 2009/2010.[2] With the increase of imports, the income from customs duty has also increased from 2,953.81 billion birr in 2005/06 to 5.854.66 billion birr in 2009/10, with annual average growth rate of 19.9.[3] The total revenue from foreign trade has also increased from 11.26 billion birr in 2005/06 to 35.71 billion birr in 2009/2010.[4] The country is profoundly benefiting from the recent increase in FDI. Nonetheless, I would argue, investment measures not complimented with the appropriate transfer pricing measures could result in a loss of desperately needed local tax revenue.

	Year	Volume of import(Metric Ton)
1	2004/05	4,932,925
2	2005/06	5,344,825.5
3	2006/07	4,665,454.28
4	2007/08	5,8511,904.23
5	2008/09	7,807,006,73
6	2009/10	8,492,485.84

Table 2 Source: Ethiopian Revenue and Customs Authority (ERCA)

In this article, the transfer pricing provisions of Ethiopia as provided in the Income and Customs Proclamations is critically examined. The writer has conducted literature review with a view of examining the transfer

[2] Ethiopian Revenues and Customs Authority, *Ethiopia: Foreign Trade and Federal Duty and Tax Revenue Collection (2005/06-2009/10), Statistical Bulletin* Vol.1p.16.

[3] Ibid. In addition to the customs duty goods imported into the country are subject to Excise tax (average rate of 30% for some goods the rate can be 100%), Value Added Tax (Flat rate of 15%) and Sur tax (10%).

[4] Ibid. Imports into Ethiopia are subject to the payment of Customs duty (the rate vary from good to good), Value Added Tax (15% flat rate tax for all imports of goods and services), Sur Tax (there is a 10% Sur tax on all imports) and Excise tax.

pricing principles and methods applicable in most jurisdictions around the world. Focus group discussions with the responsible departments in Ethiopian Revenue and Customs Authority, (hereinafter, ERCA) have also been conducted.

The article has five sections. The first section provides for an introduction to this article followed by the second section which sketches the relevance of the concept of transfer pricing to the Ethiopian tax system. Section three outlines the basic precepts of transfer pricing and transfer pricing methods existing in the Ethiopian Income Tax Proclamation. The fourth section deals with the provisions of the Customs Proclamation governing the subject-matter, but from a different perspective. The convergence-divergence nature of the Income Tax and Customs Proclamation in terms of regulating transfer pricing is dealt with in the fourth section. The main pitfalls of the current tax system in regulating transfer pricing is also discussed in the fourth section followed by conclusion.

2. Transfer Pricing: Basic Concepts and Methods

Recent developments in technology, transportation and communication have resulted in the growth of MNCs around the world. It is estimated that there are now more than 82,000[5] MNCs each with an average of 10 affiliates around the world.[6] Value added activities of MNCs amount to 11% of the world gross domestic products (GDP).[7] MNCs transact with

[5] UNCTAD Word Investment Report 2010 available at http://unctad.org/en/Docs/wir2010_en.pdf accessed on August 31, 2013.
[6] Ibid.
[7] Ibid.

each other extensively; it is even estimated that 60% of the international trade is between MNCs.[8] MNCs charge each other for the services or goods one receives from the other; the price at which they transact is referred to as transfer price. Transfer pricing, therefore, is the pricing of goods and services for transactions among MNCs.[9] It generally '*refers to the setting of prices for transactions between associated enterprises involving the transfer of property or services'*.[10]

In efficient market system, sale between two enterprises is based on market profitability. The company selling the item or rendering a particular service will not sell the items or render the services unless it gets a profit from the transaction. At times, companies provide goods or render services to a party at a price that it would not be willing to give to other clients. This by itself is not a problem. Companies may sale their items at lower or higher prices due to various justifiable economic reasons, more frequently than not, however, MNCs sell their products at a lower price or purchase a product from the subsidiary at a hugely inflated prices solely to reduce their tax obligations.[11] These kinds of acts

[8] Ibid.

[9] Alexandre Tadeu Seguim, New Transfer Pricing Rules in Brazil, 19 NW. J. INT'L L. & BUS. 393, 395 (1999); see Susan C. Borkowski, Advance Pricing (Dis)Agreements: Differences in Tax Authority and Transnational Corporation Opinions, 22 INT'L TAX J. 23 (1996).

[10] UN Practical Manual On Transfer Pricing for Developing Countries, Department of Economic and Social Affairs(2013).2.

[11] *Death and taxes :the true toll of tax dodging* ,A Christian aid Report (2008)5, Glen Rectenwald, *A Proposed Framework For resolving The transfer Pricing Problem: Allocating the tax base of Multinational entities based on real economic Indicators of benefit and burden* , DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW [Vol 223,2012)423, Robert Z. Aliber ,*Transfer Pricing A taxonomy of Impacts on Economic welfare ,in Alan M.Rugman and Lorriane Edne*n(ed), Multinationals and Transfer Pricing(1985)82, Marc M. Levey et el ,*Transfer Pricing Rules and Compliance Handbook*(2007)2.

'*impact on the legitimate tax revenues of countries where economic activity of the MNC takes place, and therefore the ability of such countries to finance development*.[12] For instance, it is estimated that Ethiopia has lost around 10 million Euros in tax revenues due to mispricing by MNCs.[13]

Many countries around the world use the *arm's length* as the main method in order to regulate transfer pricing.[14] Brazil,[15] notably, however, introduced a unique system to determine prices. In addition, there is a growing suggestion from group of economists for the adoption of a *formulary* approach, especially in developing countries.[16]

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[12] UN manual Cited supra note 7 at 3.

[13] *False profit: Robbing the poor to keep the rich tax free* ,A Christian Aid Report(2009)22, U.S. researcher Raymond Baker estimates that up to $500 billion in capital flows out of developing countries through transfer pricing abuses. See Raymond Baker, Capitalism's Achilles: Dirty money and how to renew the free market system(2005)172.

[14] John Braithwaite, Markets in Vice, Markets in Virtue(2005)89-91, Karl Wündisch(ed.), *International Transfer Pricing in the Ethical Pharmaceutical Indust*ry(2003)105-108, Michelle Markham, *The Transfer Pricing of Intangibl*es(2005)20-23, Brian J. Arnold and Michael J. McIntyre, *International Tax Primer*(2002)60-62.

[15] Marcos Aurélio Pereira Valadão,Transfer Pricing in Emerging Economies :Brazilian Case,Avilable at http://www.un.org/esa/ffd/tax/2012EgmTax/Presentation_PereiraValadao.pdf,Accessed on May,21,2013, Brazil-Changes to Transfer Pricing rules(2013)available at http://www.kpmg.com/global/en/issuesandinsights/articlespublications/taxnewsflash/pages/brazil-changes-to-transfer-pricing-rules-2013.aspx accessed on May 22, 2013, Attaining Falaco, Brazilian transfer pricing –A Practical Approach Could this be a model for Developing Countries ,A presentation available at http://www.taxjustice.net/cms/upload/pdf/Tatiana%20Falcao%201206%20Helsinki%20ppt.pdf,accessd on May22,2013.

[16] Reuven S.Avi-Yonah and Kimberly Clausing, *A Proposal To Adopt Formulary Apportionment For Corporate Income Taxation: The Hamilton Projec*t , Working Paper No.85 of June 2007, University of Michigan Law School ("The Hamitlon Project"), Reuven S. Avi-Yonah, *et al* , *Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Spl*it, University of Michigan Law School Program in Law and Economics working paper ,available at http://law.bepress.com/umichlwps-olin/art95 accessed on June 12 ,2012.

In Ethiopia, article 29 of the Income tax Proclamation regulates MNCs intra trade. The article reads: [17]

> *'Where conditions are made or imposed between persons carrying on business in their commercial or financial relations which differ from those which would be made between independent persons, the Tax Authority may direct that the income of one or more of those related persons is to include profits which he or they would have made but for those conditions. The Tax Authority shall do so in accordance with the directives to be issued by the Minister.'*

According to the above provision, ERCA can use either one of the following approaches to regulate MNCs intra trade.

2.1. The Arms' Length Method

As provided in article 29(1) of the proclamation, the arm's length approach is the primary approach that would be made applicable in case of MNCs intra trade.

The arm's length approach, as enunciated in the OECD and UN guidelines, is the most widely practiced method around the world. The arm's-length principle states that the amount charged by related party to another for a given product must be the same as if the parties were not related. An arm's-length price for a transaction is, therefore, the price of that transaction on the open market. The principle prohibits the regulation

[17] Income Tax Proclamation No.286/2002,art.29.

of the price for a particular item by anything other than market forces. In this regard, article 9 of the OECD Model Tax Convention states the following:

> *'[Where] conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those Conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.'*[18]

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[18] Michelle Markham,cited supra note 14,at110, Wagdy Moustafa Abdallah,*Critical Concerns in Transfer Pricing and Practice*(2004)150, Michael C. Durst, Making Transfer Pricing Work for Developing Countries, December 10,2013 ,available at http://www.taxjustice.net/cms/upload/pdf/Durst_2010_developing_countries.pdf,acessed on may 18,2013. See also Michael C. Durst, *It's Not Just Academic: The OECD Should Reevaluate Transfer Pricing Laws,' Tax Notes International* , Jan. 18, 2010, p. 247, Doc 2009-26892 , or 2010 WTD 11-14 ; and Durst, *The President's International Tax Proposals in Historical and Economic Perspective*, Tax Notes International, June 1, 2009, p. 747, Doc 2009-11696 , or 2009 WTD 103-14, Robert Feinschreiber and Margaret Kent, *Asia-Pacific Transfer Pricing Handbook*(2012)485, Robert Feinschreiber, *Transfer Pricing Methods: An Applications Guide*(2004)70, Marc M. Levey et al , *Transfer Pricing Rules and Compliance Handbook*(2007)160, Alan Paisey and Jian Li, *Transfer Pricing: A Diagrammatic and Case Study Introduction, with Special Reference to China*(2012)108, Erik Wintzer, *Transfer Pricing for Multinational Enterprises: An Integrated Approach* (2007)22, See also Article 9 paragraph 1 of the OECD Model Tax Convention , available at http://www.oecd.org/tax/transfer-pricing accessed on June 12 ,2013, The UN Model Convention Article 9(1) states the following

"Where: (a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or, (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would have been made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of these conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly

The OECD empowers local tax authorities to adjust profits when the price charged by related companies differs from those which might have been charged by unrelated parties for the same transaction. Both model laws treat related MNCs as if they were unrelated independent entities.

Transfer pricing rules are intended to govern transactions among related parties.[19] As a result, relatedness or otherwise of it, is a central concept to the operation of transfer pricing. Therefore, tax evasion arrangements between unrelated parties, *albeit* showing clear pricing differences from the ordinary market, are not subject to article 29.[20]

According to the Income Tax Proclamation, a related person, for natural person includes any relative of the natural person.[21] Relative, on the other hand, encompasses the spouse of the person; or an ancestor, lineal descendant, brother, sister, uncle, aunt, nephew, niece, stepfather, stepmother, stepchild, or adopted child of that person or of the spouse, and in the case of an adopted child the adoptive parent.[22] All these individuals are considered related according to the law. As a result, transactions among enterprises owned by these individuals will be the subject of the law. For instance, an enterprise owned by two brothers

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[19] In the UN model tax convention the term used in order to refer to these groups of taxpayers is 'associated enterprise'. The model has defined associated enterprises as (a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or, (*b*) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State.

[20] A transfer pricing rule resembling to that introduced by Brazil will give an opportunity to tax authorities to tackle profit moving scheme even when the parties are unrelated.

[21] Income Tax Proclamation Cited supra note 17, art.2(4)

[22] Ibid.

shall be considered related; hence, they could be subject to transfer pricing procedures.

In addition, a trust and in respect of which a relative is or may be a beneficiary is considered related persons.[23] For instance, 'A' who is the brother of 'B' may be beneficiary of a particular trust, therefore, any dealing between the trusts and 'A' could be considered as a related party transaction. A partnership, joint venture, or unincorporated association or body or private company; and any member thereof irrespective of the degree of control shall be considered related persons.[24]

In the case of a share company a person that controls 10% or more of the right to vote, or the rights to distributions capital or profits, either directly or through one or more interposed companies, partnerships, or trusts is considered a related person.[25] The writer argues that a 10% threshold for establishing relatedness is a very low standard for starter country like Ethiopia. This will create a cumbersome task on tax auditors as it requires them to check the books and accounts of many related companies.

When MNCs transact each other, they structure their transactions in such a way as to ensure that profits are located in a jurisdiction with the most desirable tax consequences. As a result of this, transfer pricing is basically viewed as a transaction between related and non-related parties. Consequently, the presence of a resident and nonresident company is considered to be an indispensable part of transfer pricing rules in most

[23] Ibid.
[24] Ibid.
[25] Ibid.

countries. The Ethiopian law, however, does not require the presence of nonresident party in the transaction. The rules governing transfer pricing can even be made applicable to transaction made between two non related parties.

3. Advance Pricing Agreement (APA)

An advance pricing agreement (hereinafter, APA) is an agreement between the tax authority and MNC regarding the pricing of goods. A typical APA includes the set of criteria for the determination of the arm's length transfer pricing, transactions within the scope of the agreement and time within which the agreement applies.[26] APA is considered by many to be a more co-operative approach to addressing transfer pricing compliance.[27] In addition, APA is further credited for relieving the taxpayer and the tax authority of costs related to tax audits. The Income Tax Proclamation also contains the following provision regarding APA:

> *'In order to ensure the just and efficient application of this Article, the Tax Authority may make agreements in advance with persons carrying on entrepreneurial activities, subject to conditions if necessary that specified conditions between*

[26] OECD Tax and Development Center, Advance Pricing Arrangements Approach to Legislation (2012)2.

[27] Diane M. Ring, *On the Frontier of Procedural Innovation: Advanced Pricing Agreements and the Struggle to Allocate Income for Cross-Border Taxation*, 21 Mich. J.of Int. Law (2000) 143, Anuschka Bakker and March M.Levy (ed), *Transfer pricing and Dispute Resolution: Aligning strategy and Execution*(2011)116, Carlo Romano, *Advance Tax Rulings and Principles of Law: Towards a European Tax Rulings System?*(2002)38, Alan Paisey and Jian Li cited supra note 18 at 108.

related persons do not differ from those which would be made between independent persons.'[28]

In the Ethiopian context, ERCA is given the power to make advance-pricing agreements with MNCs. However, in countries like Ethiopia where there exists a very ineffective auditing system, MNCs will have little incentive to enter into an APA with tax authorities. As a result, not even single MNC has applied for an APA to this date.

In addition to Article 29 of the Income Tax Proclamation, ERCA may also use other provisions, introduced by the law with the main purpose of achieving other objective, to complement the application of Article 29. These scattered provisions and the extent of their applicability in regulating transfer pricing are discussed in the next sub section.

3.1. Thin Capitalization[29]

Debt financing is one of the fund-raising schemes available to traders, equity financing being the other. According to Ethiopian tax law, Schedule 'C' taxpayers, while calculating their taxable income, are given the right to deduct interest payment on their debt from their gross income.[30]

[28] Income Tax Proclamation Cited supra note 17, art.29(2).
[29] Thin capitalization is when large proportion of the capital of the company is through debt financing rather equity financing.
[30] Ethiopia follows a scheduler approach to the taxation of income. Accordingly, there are four schedules each taxing a distinct and separate type of income. Schedule `A` is used for income from employment, `B` for incomes from rental of building, `C` for incomes from business and the rest of incomes will be taxed using schedule D.

When it comes to loans from foreign institutions, however, the law has made it crystal clear that such loans can only be deducted if it fulfills some requirements. First, the lending institution must secure permission from the National Bank of Ethiopia. Furthermore, prior to granting the loan, the lending institution must inform the tax authority about the modality of the loan. And finally, *'the borrower … withholds 10% from the gross interest payable to the lender and transfers same to the Tax Authority within two months of the end of the fiscal year'*. [31]

These requirements give ERCA a golden opportunity to examine, *inter alia*, the nature of the loan, the modality of repayment, the interest to be paid, the relationship of the parties, etc. As a result, ERCA will have an ample opportunity to keep at bay the possibility of related parties giving loan to each other and moving large amount of money as interest payment. In addition, the 10% withholding obligation on the local taxpayer reduces the amount of untaxed profit leaving the country even when the loan agreement is undetected mispricing arrangement, *albeit* by 10%.[32]

3.2. Services Rendered by a Head Company to the Subsidiary

One of the transfer pricing schemes by the MNCs is in the form of fee called consultancy fee. According to this scheme, subordinate companies transfer large amount of fund as a consultancy fee to the head company or to affiliates controlled by the head company. For example, a resident

[31] Income Tax Regulation No.78/2002, art.10.

[32] A resident company that failed to withhold the 10% from the nonresident company shall be prohibited from deducting the amount paid as interest as the end of the tax year. In addition, there will be a penalty for failure to withhold the stated amount.

horticulture exporting company may enter into a market assessment service contract with a related nonresident company.

Receiving services from nonresident unrelated party has not been outlawed by the proclamation. The law rather made it difficult for MNCs to transfer funds untaxed by using this scheme. Accordingly, a business located and operating in Ethiopia as a branch, subsidiary or associated company of a business located and operating abroad must prove the following in order to deduct the cost of service to nonresident company from its gross income. First, the payment in question was made for services actually rendered.[33] Second, the company is required to prove that the service was necessary for the business and could not be performed by other persons or bodies or by the business itself at a lower cost.[34] This has never been a problem to MNCs as they normally present a cooked data to present that the services were in fact rendered.[35]

3.3. Regulation of Commission Work

Commission work is the other area of concern. A related company residing outside the country may demand payment from the company in Ethiopia for commission works it has carried in favor of the company residing in Ethiopia. Regarding this matter, the law laid down stringent criterias that must be fulfilled for such payments to be considered deductible. Accordingly, companies are required to prove that a service is in fact rendered. This requires companies to present

[33] See article 8(6) of the Income Tax Regulation.
[34] Ibid.
[35] In the chapter dealing with the Dirty Money User manual, Baker, from his rich experience working with MNCs has discussed ways of easily by passing requirements like this. See Baker Cited Supra note 13at p.24

objective evidence showing the completion of the work. Furthermore, the amount paid as a commission must correspond to the normal rate used by other businesses engaged in similar trade.[36]

3.4.Transfer of Business Assets

The taxpayer may sell a property purchased for business purposes at a later date. Such transfer may attract a loss or a gain. In this regard, the Income Tax Proclamation recognizes the loss by the taxpayer.[37] Accordingly, a taxpayer is entitled to a deduction for losses incurred while transferring business assets. The law, however, does not recognize losses incurred when the transfer is between related parties.[38] The non-recognition of such loss mitigates transfer of properties that aim at avoiding tax obligations among MNCs.

3.5. Loss on Transfer of Certain Investment Property

An income derived from transfer of investment property is subject to the payment of income tax.[39] A taxpayer may record loss or gain from the transfer of the property. The gain is subject to tax at 15% flat rate. On the other hand, when the taxpayers' record is loss, the loss is offset against gains derived from properties that are subject to the same schedule. For instance, a person that losses ETB 10,000 on transfer of shares can deduct this amount from the income s/he get by selling another set of shares at other times. This loss carry forward rule,

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[36] Id.art.8 (5).
[37] Income Tax Proclamation supra note 17, art .24.
[38] See art.24(6)of the Income Tax Proclamation.
[39]Id., art.37. Shares of Companies and building used for factories and offices are the properties that will be subject to the payment of the tax.

however, does not apply to losses recorded between related parties.[40] This rule restricts the possibility of transferring shares between related companies, which is mostly not motivated by economic reasons.

4. Transfer Pricing in the Customs Proclamation

A customs duty is levied on all imports into the country unless the goods are specifically exempted. The customs value of the goods is the base of the duty. Consequently, the amount of customs duty from each item depends on the customs value for the good, higher customs value results in higher tax revenues to the tax authorities and the vice versa results in lower tax revenue.

According to the Customs Proclamation, transaction value is the primary valuation method used to determine the customs value of imported goods.[41] The transaction value is defined in the Proclamation as 'the price

[40] Id. art.37(6)of the Income Tax Proclamation.

[41] Customs Proclamation No. 622/2009, art.33(1). See also Winham, Gilbert R., *International Trade and the Tokyo Round Negotiation* (1986).106,Sheri Rosenow and Brian J. O'Shea,*A Handbook on the WTO Customs Valuation Agreement*(2010)5, Nuschka Bakker, Belema Obuoforibo, *Transfer Pricing and Customs Valuation: Two Worlds to Tax as One*(2009)62, Ainsworth, RT 2007, IT-APAS: harmonizing inconsistent transfer pricing rules in Income Tax Customs VAT, *Boston University School of Law, Working Paper Series*, Law and Economics, No. 07-23(2007),http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1013518_code355514.pdf ?abstractid=1013518&mirid=1,accessed on April 11,2012. Rajkarnikar, P., 2007 "Implementation of the WTO customs valuation agreement in Nepal: An ex-ante impact assessment", pp. 195-220, Chapter VI in ESCAP, *Trade facilitation beyond the multilateral trade negotiations: Regional practices, customs valuation and other emerging issues – A study by the Asia-Pacific Research and Training Network on Trade*, (United Nations, New York) Available online at: http://www.unescap.org/tid/artnet/pub/tipub2466.pdf accessed on July 10,2012,Dominik Lasok, *The Trade and Customs Law of the European Union*,3rd ed(1998)278, Junji Nakagawa, *International Harmonization of Economic Regulation*(2011)31,Hironori Asakura, World *History of the Customs and Tariffs* (2003)282.

actually paid or payable for the goods.'[42] As explained in the interpretive note to article 1 of GATT, such payment need not be made in the form of money. Other forms of payment such as payment through letter of credit or other form of negotiable instruments are also considered proper modes of payment.[43]

However, the transaction value, which is the primarily chosen method of valuation in GATT and Customs Proclamation, may not be accepted by the customs authorities due to various justifiable reasons. Whenever this happens, the customs value of a good is determined using the transaction value of identical goods.[44] Nevertheless, when goods identical to the product being assessed do not exist in the market, the transaction value of similar goods shall be taken as a third alternative transactional value of the good.[45] Moreover, if the above methods fail customs authorities may use the deductive, the computed or the fallback method in order to determine the customs value when the other systems fail to produce the needed result.[46]

When the parties involved in international trade are related parties, the transaction value must pass either the circumstances of sale test or test

[42] Ibid. See also article 1(1) of the Agreement *on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.*
[43] Interpretative note to article 1(1) of the Agreement.
[44] Customs Proclamation Cited supra note 41 , Art.34, the identical goods must be of those sold for export to Ethiopia at the same commercial level and in substantially the same quantity at or about the same time as the goods being valued. When information is not available on identical good of substantially the same quantity at about the same time, the transaction value of identical goods sold at a different commercial level or in different quantities by making adjustments to take account of differences attributable to the commercial level or to the quantity.
[45] Id. art.35.
[46] Id. arts.36-38.

value in order to be accepted as the customs value for the good.[47] If the importer fails to prove either one of the test, ERCA can determine the customs value of the goods. However, concerning the issue as to how ERCA determines the customs value is concerned, nothing is provided in the Proclamation. Yet, obviously, it ERCA determines it based on estimation.

4.1. The Circumstances of Sale Test

As provided in Article 33(5) of the Proclamation, the transaction value between a related buyer and seller may be accepted as customs value if examination of the circumstances of the sale of the imported merchandise indicates that the price has not been influenced by the relationship of the parties involved.[48] The Customs Proclamation nonetheless failed to specify what circumstances to look at and how to look at those matters. It is unfortunate that the valuation directive that was supposed to cover this matter has completely overlooked the matter.[49] ERCA however can use the interpretive note to paragraph of the GATT as guidance. The interpretative note provides that during transaction among related parties, the customs authorities, among others things should look at whether:

> "[t]*he price was settled in a manner consistent with the normal pricing practices of the industry in question…[t]he*

[47] A buyer and a seller shall be deemed to be related if they met one of the following requirements; one of them is an officer or director of the other's business or the two businesses b) they are legally recognized partners in business or the two businesses have employer-employee relationship. In addition if one of the business owns at least 10 % of the shares of the other's business or one of them directly or indirectly or both of them are directly or indirectly controlled by a third party or both of them directly or indirectly or related by consanguinity or affinity up to the second degree.

[48] Id. art.33 (5).

[49] See Customs Valuation Directive 70/2004, available at http://www.erca.gov.et/docs/1564.pdf.acessed on May 12,2013.

price was settled in a manner consistent with the way the seller settles prices for sales to buyers who are not related to it; or [t]he price is adequate to ensure recovery of all costs plus a profit that is equivalent to the firm's overall profit realized over a representative period of time in sales of merchandise of the same class or kind"[50]

4.2. Test Value

Under test value, the transaction value between related parties is tested using specified standard values. This method requires importers to prove that their transaction closely approximates to :

- ✓ the transaction value in sales, between buyers and sellers who are not related, of identical or similar goods for export to Ethiopia during the same period or
- ✓ The customs value of identical or similar goods the customs value of which is determined according to the computed value method or the customs value of identical or
- ✓ Similar goods the customs value of determined according to the fallback method. [51]

5. Income Tax *vs*. Customs Duty: Divergence or Convergence?

Rules regulating transactions among related parties exist in both the Income and the Customs Proclamations. The Customs Proclamation primarily targets to increase transfer price between related parties so as to generate the maximum revenue possible. On the contrary, the Income

[50] Interpretive Note to article 2 of the GATT.
[51] Customs Proclamation cited supra note 41, art..33(5).

Tax Proclamation aims at reducing transfer pricing as low as possible so as to increase the taxable income of the resident company through reducing the legally allowed deductible items. This divergent nature of the two rules create additional cost on MNCs as it requires them to comply with both, at times contradictory formalities answering the same single question '*what is the arm's length price of a product?*'[52]

As it has been discussed in the previous section, the provisions of the Income Tax Proclamation that govern transfer pricing cannot be put into practice as it is due to lack of directives outlining the arm's length approach to be deployed. On the other hand, we can find provisions enough to govern customs valuations in the Customs Proclamation. This gives unique opportunity for the country in terms of integrating the customs and Income Tax Proclamation provisions governing the area. Accordingly, while drafting the arm's length methods to be applied in the country, ERCA must align it to customs valuation, lest importers will incur unnecessary compliance burdens, ultimately making the country a less desired destination for FDI.

[52] In order to find a workable solution to this problem the World Customs Organization (WCO) and the OECD jointly hosted two international conferences on Transfer Pricing and Customs Valuation. The first conference took place at the WCO headquarters in Brussels in May 2006, and the second conference was held at the same venue in May 2007WCO/OECD CONFERENCE ON TRANSFER PRICING AND CUSTOMS VALUATION at http://www.oecd.org/document/39/0,2340,en_2649_201185_36541927_1_1_1_1,00.html, See also International Conference on Transfer Pricing and Customs Valuation at http://www.oecd.org/document/39/0,3343,en_2649_201185_36541927_1_1_1_1,00.html.Even though an agreement had not been reached on convergence of the two systems, delegates came to understanding that tax authorities must take the implications of one decision over the other.

6. Challenges in Controlling Transfer Pricing in Ethiopia

Flow of FDI into the Country is increasing every year, with the increase in investment the volume of import into the County is also increasing. These two factors make income and customs transfer pricing a huge risk to the national revenue unless tackled by appropriate legislative and administrative measures. Currently, nonetheless, the tax machinery has blatantly failed to address the problem due to the following reasons.

Firstly, the Customs Proclamation has incorporated detailed provisions governing transfer pricing, *albeit* with provisions which require further clarity.[53] The same cannot be said about the Income Tax Proclamation, however. The Proclamation has entrusted the Ministry of Finance and Economic Development the power of legislating a directive to further implement transfer pricing provisions. Yet, the Ministry has failed to come up with detailed directives governing this area.

Secondly, the primary step in the regulation of transfer pricing, *inter alia*, is the identification of those businesses considered to be related. Both the Income and the Customs [Proclamations] have incorporated their own tests in order to determine the relatedness or otherwise of companies. Yet again, the authority has not identified companies considered to be related; consequently, companies trade with each other without any restrictions.[54]

[53] Under the circumstances of test, the law has to make it clear the circumstances that will be used in order to test a particular transaction.

[54] One Task force organized by the Ethiopian Customs and Revenue Authority is compiling data on enterprises suspected of being related.

Thirdly, controlling transfer pricing requires well-trained expertise and well organized system for documentation. Nonetheless, the department in the tax authority is under staffed compared to the MNCs that it strives to control.[55] In addition, the Income Tax Proclamation has not incorporated a single provision that requires companies to keep and submit documents when they transact with related parties.

Fourthly, the transfer pricing approach incorporated in the Income Tax Proclamation requires the availability of a comparable data. Obviously, for some items, comparable data is unavailable in the country due to absence of competing market forces. The authority, nonetheless, failed to organize a comparability data even in areas where more market forces exist.

Conclusion

The Ethiopian government has done a commendable work in making the country a desirable destination for investment. As a result, the flow of foreign investment in the country is rising. With increase in flow of international trade, the revenue from international trade is also increasing. Nonetheless, absence of clear transfer pricing rules and non-implementation of those scanty provisions that the Country has is resulting a huge loss in local revenue.

[55] Till August 2013, the department in the customs branch entrusted with this responsibility has only less than 5 personnel, whereas its income branch does not exist at all. Field observation conducted by the researcher.

An organized and clearly structured income and customs transfer pricing regulations, therefore, would enable the Country to collect revenues from international transactions. In order to realize this objective, the Country must first introduce a directive that clearly outlines the arm's length approach to be used by related parties. In addition, documentations that must be submitted when related parties enter into transactions must be clearly specified in the Income Tax Proclamation. The document submitted by taxpayers, in addition to its use to determine the arm's length or otherwise of transactions at hand, can also assist the authority in its assessment of the comparability of other businesses dealings in identical or similar matters. Furthermore, while drafting the directive, contradictions must be avoided between the provisions of the Customs Proclamation dealing with similar matter.