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The Oromia Rural Land Dispute Settlement Scheme, So ambiguous and Expectedly Not Working

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Introduction

In a region where a great majority of the population lives in rural areas, rural land disputes deserve a unique treatment. It sounds very reasonable, in such regions, to design a unique dispute settlement scheme for rural land disputes. This is exactly what the Oromia region has done. However, the scheme set up by the region suffers from serious ambiguities, which inevitably makes the scheme not working. Therefore, in this paper an attempt is made to show where the scheme suffers from ambiguities and what evils may result from the ambiguities and how the ambiguities should be addressed. As the scheme is set out under Oromia Rural Land Administration and Use Proclamation No.130/2007, this work is limited to the analysis of this proclamation in light of general principles of alternative dispute resolution.

This paper is divided into **V** sections. Section **I** gives the outline of the scheme. Section **II** pins down the parts of the scheme suffering from ambiguity. Section **III** conjures up the evils resulting from the ambiguities. Section **IV** deals with the way forward. Finally there is a "conclusion and recommendation" section.

I. The Dispute Settlement Scheme

Proclamation no.130/ 2007[1] (henceforth the proclamation) of the *Oromia Region*[2] sets out the rural land dispute settlement scheme (henceforth referred as the scheme). Art. 16 of this proclamation[3] is the only provision laying out the scheme. When a dispute over a rural land

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[1] The full name of this proclamation is: "Proclamation to amend the proclamation No. 56/2002,70/2003.103/2005 of Oromia Rural Land Administration and Use Proclamation No.130/2007."

[2] Oromia region is one of the 9 states constituting the Federal Democratic Republic of Ethiopia.

[3] The article reads:

Conflict and Dispute Resolution

1) Any conflict or disputes arising on land shall be resolved as follow:

(a) First application shall be submitted to the local Kebele Administration.

(b) The parties shall elect two arbitrary [*sic*] elders each.

c) Chairpersons of arbiteration[*sic*] elders are elected by the parties or by the arbitral elders[*sic*], if not agreed

arises, according to this provision, an application must first be submitted to the local k*ebele* Administration[4].Then the disputing parties must appoint two *elders*[5] each[6].The elders will have a chairperson who is appointed by themselves, parties or the *kebele* administrator. Of course, the *kebele* administrator appoints a chairperson when both parties and then elders are not able to reach an agreement to appoint one.

Once the elders are composed this way, then they must report *the result of their work*[7] to the *kebele* administrators with in 15 days[8].It is the responsibility of the *kebele* administration to make the elders observe this time line[9]. The reported findings of elders then must be registered by the kebele administration. The *kebele* administration is also required to put its seal on the copy of elders' finding and hand over it to the parties. A party who is not happy with the result reported by the elders can initiate a proceeding over the dispute in a *woreda* court with in 30 days of the registration of the result in the *kebele* administration[10]. The party

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up on shall be assigned by local kebele administrator.

(d) The Kebele Administration to whom the application is lodged, shall cause the arbitrary[*sic*] elders to produce the result of the arbiteratio[sic] 15 days.

(e) The result of given by the arbitration shall be registered at the Kebele Administration., and a sealed copy shall be given to both parties.

f) A Party who has complaint on the rating[sic] elders has the right to institute his case to the Woreda court attaching the result of arbitration elders [*sic*] within 30 days as of the date registered by the Kebele Administration. .

g) Woreda court should not receive the suit if the result given by the arbitration is not attached to it.

(h) The right of further appeal to the high court is reserved for the party dissatisfied by the decision given by the woreda court.

(i) If the high court reversed the decision rendered by the woreda court, the dissatisfied party may appeal to the Supreme Court.

j) The decision given by the Supreme Court shall be the final.

2) Notwithstanding the provision described Sub-Article I of this Article, the parties shall have the right to resolve their cases in any form they agreed upon.

[4] The proclamation says nothing as to the form and content of the application

[5] Note here that I prefer to use this term, ***elders*** rather than the phrases used in the English version to express these individuals. The individuals are expressed in the English version in a so ridiculously –worded phrases as "arbitrary elders", "arbitral elders" as you can see in the above note.

[6] The law is silent as to the solution if a party is not willing to appoint his side of elders

[7] Here note that I prefer to use the phrase "the result of their work" rather than the phrases used in the proclamations such as "the result of arbitration", in the English version; "the result of conciliation", in the Amharic version and in the Orompha version, because such phrases are used mindlessly as it is shown in section two of the paper.

[8] 15 days since when? There is no answer in the proclamation

[9] What if this time limit could not be observed? Again, there is no answer in the proclamation

[10] No answer in the proclamation as to the question any good cause exception for untimely applications.

must attach the findings of the elders with their application to the court as the courts must not accept the application with out the findings being attached thereto.

A party who is not happy with the decision of the *woreda* court can take an appeal from its decision to a high court. If the high court reverses the decision of the *woreda* court, an appeal lies to the Supreme Court. The decision in the Supreme Court will be final.

This is the scheme for the rural land dispute settlement in the *Oromia* region[11]. However, this scheme suffers from ambiguities. The ensuing section pins down these ambiguities.

II. The Ambiguities in the Scheme

As shown above, there are many questions to which the proclamation fails to give answers, but the scheme is ambiguous basically at two other important points which has the potential of making the whole scheme a- not – working one. In this section, these ambiguities are identified and explained.

A. The Role of Elders; How Do They Need to Approach the Disputes?

A reader who comes across, in art.16 of the proclamation (the English version), such phrases as "arbitrary elders" [sic] (see art.16 (1) (b)), "arbitration elders" (see art.16 (1) (c), "the result of…arbitration" (see art.16 (1) (e)) etc may rush to conclude that the role of the elders is that of arbitrators. A bit more focused reading, however, reveals that their role is not intended to be that of arbitrators as we know arbitration in the 1960 civil code(art.3325-3346) and the 1965 civil procedure code(arts.315-319 and 350-357)[12]

The decision of arbitrators (it is called "award") is as enforceable in the court of law as court judgments are. This is unequivocally stated under art.319 of the 1965 Civil Procedure Code.[13]Once arbitrators pass their decision on a dispute, the dispute cannot be entertained subsequently by courts. The only ways that put courts in contact with arbitrators' decision

[11] Note that the scheme, however, does not prohibit parties from resolving their dispute in way other than just expressed in the above paragraphs if they could agree (see art.16 (2) of the proclamation)

[12] Note here that the arbitration laws which are currently in use in both state and federal jurisdiction are found in these codes.

[13] Even it is required to be written in the same form as court judgments (see art.318(2) of the 1965 Civil Procedure Code)

are the procedure of appeal (see art.350- 354 of the Civil Procedure Code), setting aside (see art-355-357 of Civil Procedure Code) and the execution of awards(see art. 319 of the Civil Procedure Code).

The elders' "findings" in the proclamation have none of the qualities of the award as explained in the above paragraph. Art 16(1) (f) of the proclamation clearly state that any party dissatisfied with the elder's finding can start a fresh proceeding in the *woreda* court. Thus, we can conclude that elders are not intended to do arbitration as we know arbitration in both the civil and civil procedure codes. Unlike the codes, the proclamation does not give the elders' finding the effect of *res judicata*[14]. However, one may argue that the *woreda* court is intended to serve as an appellate court reviewing the elders' finding based on art.16(1)(h) of the proclamation which reads: "The right of ***further*** appeal to the high court is reserved for the party dissatisfied by the decision given by the *woreda* court". The problem with this argument is that unlike the English version both the Orompha version(the controlling version) and the Amharic version of art,16(1) (h) of the proclamation do not presuppose the existence of any appeal before the disputes land in the high courts.

If the *woreda* court is intended to serve as an appellate court, why is it not clearly provided? All the three versions (the Orompha, Amharic and English) of art.16 (1)(f) state that a party dissatisfied with elders' finding can institute his case in the *woreda* court – there is nothing which goes like " the party can lodge his appeal to the *woreda* court." If the *woreda* court is intended to be an appellate court, what is the need of those requirements under art16 (1) (g) stating that the findings of elders must be attached to the application? It will be superfluous to state this as an application for appeal needs to have as an annex the records of the lower court and in this case the records of elders (see art. 327 (2) and 350(3) of the Civil Procedure Code). Therefore, the legislator is not talking about appeal when it says a dissatisfied party "has the right to institute his case to the *woreda* court."[15]

Once we rule out the possibility that the role of elders could be that of arbitrators, the next question is: is it that of conciliators? The answer is a resounding "No". Of course in the Amharic version of the proclamation we encounter such phrases as "¾°`p iTÓM-‹". "¾°`l"

[14] As to the *res judicata* effect of awards, see art.244 (2) (g) of the Civil Procedure Code.

[15] I have posed the question to 3rd year summer students of 2009/10 academic year (almost all of them are judges in *woreda* courts of *Oromia* region)whether they treated such cases as an appeal or fresh suits, all of them told me that they treated them as fresh suits.

¨<Ö?ƒ"(See !6 (1) (S) (W) ([) of the proclamation) in the Orompha version as "*araara"* (see art16(1) (d),(e)(f) of the Proclamation) and then we may be tempted to conclude that the elders are intended to do conciliation or play conciliator. However, after a serious look, what we glean from the proclamation cannot in any way lead to the conclusion that their role is that of conciliator, as we know conciliation and conciliators in the Civil Code (note that the region's law of conciliation is found mainly in the civil code (arts.3318-3324).From the provisions of the Civil Code on the conciliation, all we can easily get is that conciliation is a voluntary process[16].It is impossible to imagine a conciliation process with out the cooperation of parties to the dispute. However, as it is shown in section I, the scheme requires land disputes to first be submitted to elders. Make no mistake here. Conciliation could be law- required – a law may require disputes to be tried with conciliation first before any proceeding is tried subsequently[17]. However, what we have in the proclamation cannot be understood even as this kind of (law- required) conciliation.

Legislations may require disputes to be submitted to conciliation before any other proceedings are tried, but all these legislations require this based on the acknowledgment of the fact that the conciliation (or conciliators) may not produce any result and therefore they provide the next step with out tying it with the existence of a *finding*[18] by the conciliators. In other words, these legislations make the next procedure (beyond the conciliation) available for parties even if there is no finding by the conciliators for whatever reason. However, in the proclamation the next proceeding (i.e. the court proceeding) is tied with the existence of findings by the elders. Art 16(g) of the proclamation states that the *woreda* courts must not handle rural land disputes unless the finding of the elders is annexed. That means the next proceeding is not available for parties unless there is a finding by the elders. Therefore, the role of elders is intended to be different from conciliation. Conciliation does not necessarily result in a finding by conciliators.[19]

[16] See art.3307, 3318, 3322(2) of the Civil Code.
[17] See the Labor Law Proclamation No.377/ 2003, art. 141 and Cooperative Societies Proclamation No.147/1998, art, .46.
[18] This term must be understood to mean "a proposed solution". It must not be understood to include "memorandum of non conciliation" as expressed under art3321 (3) of the Civil Code.
[19] Assume parties are not willing to give any information on the dispute to conciliators, how can conciliators then come up with any finding. Under this circumstances, conciliators are simply supposed to draw "memorandum of non-conciliation"(see art.3321(3) of the Civil Code)

There is also evidence that what elders are intended to do is not conciliation (as we know conciliation from the Civil Code). From art 16(1) (f) of the proclamation, we can understand that there is a possibility that the findings of the elders could bind parties with out their express consent to the findings. However, art.3322 (2) of the Civil Code sates that "[t]he parties shall not be bound by the terms of the compromiser drawn up by the conciliator unless they have ***expressly undertaken in writing to confirm them*** (emphasis added).

The other evidence is the legislator's intention of not wanting the elder's finding to be confidential. Confidentiality is a key element in conciliation. Obviously, the success of conciliation depends on the availability of the necessary information to both the parties and conciliators[20]. Parties will not give such necessary information if they feel that the information can be used against them by the opponent party or by any public authority in any other proceeding. Parties will not give such information if they feel that the information is embarrassing to their personal lives or prejudicing to their commercial transaction. So to encourage parties to give information (and then to substantially increase the likelihood of the success of a conciliation), the information obtained in conciliation must be kept confidential. Parties give information in the expectation that the information will be kept confidential. Thus, confidentiality is one of the fundamental elements of conciliation.

When we come to the proclamation, parties are required to annex the findings of elders to the application to a court (see art.16 (1) (f) (g) of the Proclamation).It means parties to a rural land disputes cannot have an expectation that the proceeding before the elders will be kept confidential. It is difficult to imagine conciliation with such an environment. No conciliation works unless this expectation is there on the part of parties. So, all we can conclude is that the elders are not intended to do conciliation.

If the role of elders is neither that of arbitrators nor conciliators, so what is it? Here, one may contend that neutral third persons (other than courts) may involve in a dispute resolution not necessarily as arbitrators or conciliators (as we know arbitrators and conciliators in the Civil Code or the Civil Procedure code), they may be involved in other capacities.[21] ; and therefore

[20] That is the reason why art.3319 (1) of the Civil Code requires parties to provide necessary information to conciliators.

[21] For example in USA, there are such forms of ADR (in which third persons are involved) as:

- **Fact-Finding** – it is a process by which a neutral expert, or group of experts, is asked to resolve a factual dispute. The fact-finder relies upon information provided by the parties as well as information

the proclamation could be understood as assigning the elders other role than the role of arbitrators or conciliators. No body can say that the proclamation must make the role of elders only either that of arbitrators or conciliators. It could be a different one, but the question is if their role is intended to be a different one, then the proclamation (or any law supplementing the proclamation) must come up with reasonably detailed procedures or guidelines as to the way elders need to approach the dispute. Then looking at such procedures, we would be able to tell what the role of elders is. Unfortunately, there are no such procedures or guidelines. If their role was that of either arbitrators or conciliators, the proclamation would not need to come up with the detailed procedures and other rules as such things are already covered in the part of both the Civil Code and the Civil Procedure code on conciliation and arbitration. All needed is to cross- refer to the codes.

In general, the proclamation is so confusing that it is difficult to tell what the role of elders is intended to be in the rural land dispute settlement scheme.

B. The Value of the Elder's Findings

The other ambiguous thing in the proclamation (or the scheme) is the status of the findings of the elders. Let us say that the disputants express their consent to the findings, what will then its status be? Is it going to have the status of a contract or a court decision? The proclamation is silent to this issue. So, a problem could arise if one of the parties fails to comply with the findings of the elders to which they express their consent. The proclamation does not give any clue how to get the party comply with it.

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he collects himself. He analyzes the facts bearing on the dispute, and issues a factfinding report. The report is non-binding and used as an aid to settlement negotiations. Factfinding is often ordered in disputes that arise in the public sector.

- **Mini-trial** - is a voluntary procedure in which parties engage in a truncated, non-binding trial before a neutral they select to be their judge. The attorneys for each side present documentary evidence and summarize the testimony they would present at trial. The mini-trial is usually used by corporate defendants to give executives an opportunity to assess the strength of their own case and that of their opponent. The goal of a mini-trial is to induce the parties to settle their dispute.

- **Med-Arb - it** is a combination of mediation and arbitration in which a third party neutral first attempts to achieve a mediated settlement of a dispute. If mediation fails, the same neutral then becomes an arbitrator conducts a hearing and renders a final decision.

- **Court-ordered arbitration - it** is a form of dispute resolution in which parties are required to present their cases to a neutral, court-appointed arbitrator before they can proceed to trial. It is used in many states and federal district courts for civil cases. In court-ordered arbitration, the arbitrator hears the evidence and issues a decision, and either side may appeal for a trial de novo. Some states impose fee-shifting so that a party who appeals an arbitration award to a civil trial and fails to better his position at trial must pay a portion of the other side's costs.

The question as to the status of elder's findings arise also when one of or both parties does not express their consent to the finding. The glance at article 16(1) (f) suggests that it could still be binding on the parties unless a court proceeding is initiated with in 30 days of the date of the finding is registered by the *Kebele* administration. It is not clear how binding it is, though (as raised above, is it binding in the same way as contract is or court judgment?)

The other scenario which calls for an answer as to the status of the finding is when one or both parties to the dispute are not happy with it and initiate a proceeding in the court over the dispute. It is not clear how the court must treat the finding of the elders[22]. Can the court ignore it all in all and resolve the dispute following the same regular procedure it applies in other cases?[23] Or is the court to give any weight to the finding? If the answer is in the positive, what is that weight the court must attach to the finding? The proclamation fails us here too and gives us no clue to these questions.

III. The Price of Ambiguity

In a state where more than 90% of the population is living in the rural areas, rural land disputes takes a special place[24]. They must be studied and handled very carefully. These disputes are not just ordinary disputes; they have a very far-reaching impact on a range of issues from economics to politics and to peace and security. If a scheme for the settlement of rural land disputes is not painstakingly designed, it may result in too many plots of land not tilled or harvested in the right season due to the ongoing dispute over them. Inevitably, such scenarios will have a bearing on the economy of the country and in other spheres too including the politics.

A bad scheme may also end up creating hostilities between the disputants rather than allowing creative solutions, which can satisfy all parties to the dispute. Obviously, a farmer

[22] Note here that when a dispute is brought before the court, the finding of the elders must be attached to the application by the parties; courts cannot proceed with the case unless it is attached –see art.16(1)(g)of the proclamation

[23] If the answer is yes , then what is the point of obliging parties to go through the procedure before the panel of elders and making them annex the finding of elders to the application

[24] Out of the total population of 27,158,471 living in Oromia region, 23,788,431 live in rural areas. See Federal Democratic Republic of Ethiopia Population Census Commission, *Summary and Statistical Report of the 2007 Population and Housing Census, population size by age and Sex*,p.66,UNPF,2008

whose land (that means his livelihood, to say the least) is taken away in an environment of such hostility may resort to self-help that definitely creates disorder (state of nature scenario) in the rural communities. Therefore, there is no exaggeration to say that rural land disputes are so unique that they must be treated that way.

A scheme for the settlement of land disputes must be, among other things, affordable, efficient and sensitive to the vulnerable groups of a society(such as children, women, the poor,etc).To come up with such scheme, it is needed to identify and characterize different rural land disputes[25].However, all understandings about the far-reaching impact of rural land disputes; all studies as to the nature of frequently arising disputes etc, is meaningless if the scheme finally designed is fraught with ambiguities. Ambiguity is this much costly. A scheme, which is ambiguous, takes us nowhere. The legislator cannot achieve whatever goals it has in mind in designing the scheme at the outset. Now let us conjure up some more specific evils arising from the *ambiguities*[26] of the rural land – dispute - settlement scheme of the Oromia region.

The ambiguities in scheme prolongs and multiplies litigations – This bearing of the ambiguities can best be explained via an example. Let us assume, Mr. X brings a claim against Mr. Y. The panel of elders is composed.[27] Mr. Y then prefers not to appear before the elders hoping that whatever finding the elders finally come up with, he can take the case to courts any ways as long as he does not like it (see Art. 16(f) of the proclamation which states a Party who has complaint on the elders' finding has the right to institute his case to the *Woreda* court). After the elders report their findings, he takes the case to the *Woreda* court. This court, which is not clear about the status of the elders' finding (see the discussion on the ambiguity of the status of the elder's finding in section II (b)), ignores it *intoto* and gives a decision favoring Mr.Y based on its assessment of the case.

[25] In one work, Babette Wehrmann, *LAND CONFLICTS, A practical guide to dealing with land disputes*,Eschborn(2008)available: http://www.landcoalition.org/pdf/08_GTZ_land_conflicts.pdf, Disputes are classified into four general categories and within these categories, conflicts are separated into 35 different types and over 50 sub-types.

[26] Note that this ambiguities are discussed in the above section(section II of this paper)

[27] . Note here also that the proclamation does not have a solution how a panel of elders is composed if a party is not willing to appoint his side of elders, but to explain the point at hand let us assume that the panel of elders is composed

Obviously, Mr. X cannot settle down with the decision of the *Woreda* court. In the absence of clear rule on the status of elders' findings, no body settles down until all available ways are exhausted. Thus, he will want to take an appeal to the high court on the ground that the *woreda* court erred in ignoring the elders' finding all in all. The high court may reverse the lower court's decision holding that the finding must always be upheld unless gross mistakes are there. At this point it will be the turn of Mr.Y to take an appeal to the Supreme Court. This example just gives us a taste of how the ambiguity in the scheme pushes parties to never give up before utilizing every path the scheme provides. It means protracting and multiplication of litigations.

Some writers [28] explain such situations by comparing the situation to betting on a sporting event. When the outcome of the game is certain, as when "a powerful team is scheduled to play a weak one," the lack of uncertainty generates less interest in the game among bettors. When there is great uncertainty in the outcome, however, bettors are more likely to gamble. So the uncertainty of the value of the findings and the role of elders makes it more likely for the parties to engage in litigations after litigations.

The Scheme leads to different perception of the rule of the game and that in turn leads to unfairness –Due to the ambiguity, parties to the dispute cannot have a common perception of what the role of the elders is and consequently what the rule of the game is. One party may perceive that the rule of the game is to be frank and giving away all the information and trying hard to arrive at agreement with the opposing party. The other part may perceive that the rule of the game is to be very defensive, argumentative and argue fiercely to beat the opposing party. Assume that elders perceive the rule of the game to be the same as what the latter party perceives it to be, then the final result will be unfair to the party perceiving the rule of the game as openness, free exchange of documents, etc. Even if the open-player takes the dispute to the court thereafter, the information and/or documents he gives before the panel of elders could be brought as evidence against him in the court room. It means, the open player, will face an up hill battle in the court room too.

The Scheme opens the room for abuse – It is difficult to hold somebody accountable in the presence of vague rules. So, elders can switch from one role to the other to unduly benefit

[28] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 16–17 (1984).

one of the disputants. Even judges may totally ignore or seriously look at elder's finding depending of the sides they want to unduly benefit. When any claim against them is brought, they may defend themselves arguing that what they did was what they think the right thing to do. When the rules cannot be determined objectively, then subjectivity rules. This makes the holding of elders and judges accountable a very tough job. This, in turn, emboldens unethical elders and judges to abuse their power.

Erodes the farmer's confidence in the scheme – the scheme opens the room for similar cases to be treated differently by different courts or by different panels of elders. Obviously, this foster mistrust among the farmers in the dispute settlement scheme. No system affords to lose the confidence of the majority of public.

In general, these evils resulting from the ambiguity denies the Oromia rural land dispute scheme from having fundamental elements of an effective dispute settlement system such as efficiency, fairness and user's vote of confidence, to name a few.

IV.The Way Forward

I cannot see anything shorter than legislation action clarifying the role of elders and the status of their findings to fix the problem in the scheme. The only evil of the ambiguity that seems to be dealt with out a legislation act, but with a smart move with of elders is the unfairness that results from parties' different perception of the rule of the game. Elders, from the out set, can inform the parties what they are going to do and what behaviors they expect from parties. This may create an environment of common understanding of the rules of the game and avoids unfairness

However, the deeper inquiry of the matter reveals that even this evil, which, in its face value, seems to be addressed with out a legislation act cannot be fully addressed without it. The first obvious reason is that there is no guarantee that all elders inform the parties about their plan and their expectation from the parties in the absence of explicit guiding rules. The other reason is that there is a danger that what is perceived by the elders as their role is may not be perceived by others as legislator- intended - role of elders. Let me explain this with the help of examples. Let us see elders inform parties (Mr. X and Mr. Y) that they must open to each

other and to elders and that evidences must not be held back and that admissions must be made freely as elders are going to hold conciliation.[29]

Then, Mr. X, with a strong desire to reach an agreement with Mr. Y in the conciliation process, admits a disputed fact, which he otherwise would not. Unfortunately, elders could not come up with a proposal that mutually satisfies both parties. The dispute then lands in the court. When this happens, Mr. Y can produce Mr.X's admission in the conciliation process as evidence against the latter. If the court perceives that the role of elders is not supposed to be conciliation, then the court will admit the admission as evidence. Mr. X's interest will then be unfairly jeopardized due to his admission that he would not do it otherwise if he were not informed by the elders that they were going to do conciliation.(Note here that there is a principle that evidences obtained in the conciliation process must be made inadmissible in other proceedings. The whole purpose of this principle is to encourage parties to the conciliation to freely admit and exchange evidences which they would not do otherwise.)

Therefore, the ambiguity in the scheme must be addressed by a legislation act only. In other words, a law dispelling the ambiguity is urgently needed. This law must clearly state the role of elders and the status of their findings. This law must explicitly state whether the elders is intended to do conciliation or arbitration or any other thing. If elders are intended to do either conciliation or arbitration, the law can simply cross refer to the Civil Code or the Civil Procedure Code governing arbitration or conciliation as to the details unless deviation is needed. If a deviation from the rules of the Civil Code and Civil Procedure Code is needed in some areas, the law must stipulate that explicitly. If the role of elders is intended to be different from arbitration and conciliation, then this law must express that role. *Reasonably*[30] detailed procedures or guidelines that elders must follow in playing the role must also be laid down in the law. The role of courts in elders' handling of the dispute must also be unequivocally expressed. To lend more clarity to the scheme, the law must include, on the top of just mentioned matters, the objective of the scheme and other similar things giving general directions where we want the scheme to take us.

[29] Note that conciliation is the system where parties hold frank discussion with the help of neutral persons (conciliators) in an effort to arrive a compromise agreement regarding a dispute between them.

[30] I used this expression to indicate that excessive details are not necessary and may result in rigidity and inaccessibility.

Conclusion and Recommendations

The Oromia rural land dispute settlement scheme, as set out under art.16 of the proclamation, is fashioned in such a way that disputes are first to be submitted to elders before they are thrown to courts. However, the scheme makes it difficult to determine how the elders are supposed to approach disputes before them- It is not clear whether elders needs to approach the dispute as arbitrators or conciliators or in any other capacity).

The other ambiguous thing in the scheme is the value of elder's findings. The scheme does not shed any light how the elder's finding (which has become binding on parties) is enforced- no clue whether it is to be enforced in the same way as contract or court judgments). The ambiguity regarding the value of elders' findings arises in other situations too. If parties oppose the findings and start proceedings in a court, the scheme gives no idea how the court needs to treat the finding.

All these ambiguities, inevitably, result in the prolonging and multiplication of litigations, in an unfair system, eroding farmers' confidence in the system and mitigating the accountability of elders and judges. In other words, the ambiguity costs the system its workability. Thus, it is recommended for urgent promulgation of a law (which amends the proclamation). This law is recommended to be:

- Explicit in stating the role of elders either as conciliation or arbitration or any other thing. and
- Cross-referring to the rules of Civil Code and Civil Procedure Code on conciliation or arbitration if elders are intended to do either of the two and
- Explicit in mentioning areas of deviation from Civil Code and Civil Procedure Code if some deviations are found necessary
- Equipped with a reasonably detailed procedures or guidelines that elders must follow in playing the role if the role of elders is intended to be different from arbitration and conciliation. The role of courts in elders' handling of the dispute must also be unequivocally expressed.
- Explicit in stating the objective of the dispute settlement scheme as that gives general directions where scheme is intended to take us.

The Regulation of Atypical/non-standard Employment Relation in Ethiopia

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Abstract

Universally workers' protection is centred on the standard employment relationship (full-time, indeterminate employment) based on the distinction between 'employee' and 'independent contractor'; nonetheless globalization coupled with advances in technology and other related processes such as casualization, externalization and informalization, has resulted in the proliferation of different forms of work that deviate from the conventional employment relationship. There is also an increase, worldwide, in the number of persons who perform work outside the employment circle because they are labelled independent contractors though in fact they are under the same level of economic dependence and vulnerability with those who perform work as 'employees'. It is to this category of workers that literature refers collectively as 'atypical employees' or 'non-standard employees'. Despite the fact that there have been moves internationally and nationally to integrate these classes of worker, it remains clear that they constitute a labour force which is less well paid and less secure. The aim of this piece of writing is inter alia exposing the protection gap in Ethiopia in terms of protecting atypical employees equally with the standard employees and forwarding possible suggestions to improve their protection without compromising much the employer's real interest in flexibility.

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I. Meaning of atypical employment relationship

Historically full-time, indefinite employment was the norm all over the world. Nonetheless, in the past few decades the number of employees in flexible working arrangement has risen.[1] Virtually all over the world the number of permanent jobs is declining and part-time, temporary, contract, subcontracted, outsourced jobs and other forms of non-standard jobs are increasing.[2]

Generally there are two approaches of conceptualizing non-standard/atypical employment forms.[3] The first one involves applying three different criteria: stability of the work relationship, length of working time or the degree of entitlement of an employee to social rights according to the working regime.[4] The second approach is to rely on the literal meaning of the term 'non-standard' or 'atypical'.[5] Literally, non-standard means something that deviates from the normal, standard, typical or regular. This approach, therefore, involves an inverse procedure whereby one first identifies the characteristics of the normal employment relationship and then proceeds to judge whether a specific employment relationship deviates from the standard employment relationship or not.[6] An employment relationship is considered to be standard/regular when employees sell labour to an employer for remuneration; work full-time according to a known schedule; work continuously for one employer with one contract instead of sequence of contracts of employment; and work at a place and according to a schedule determined by the employer.[7]

Currently, due to myriads of reasons, there is a shift towards non-standard employment both in developed and developing economies.[8] This being the situation with respect to those who

[1] Thompson, *The Changing Nature of Employment* (2003) 24 ILJ 1798

[2] Mills, *The Situation of Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility?* (2004) 25 ILJ 1207

[3] Hanzelova, *Non-standard Employment in Slovak Republic*, Institute for Labour and Family Research, Slovak republic 51(2007).

[4] Id at 51.

[5] Id at 51.

[6] Id at 53.

[7] Id at 53.

[8] Collins, *Independent Contractors and the Challenges of Vertical Disintegration to Employment Protection Laws* 10 Oxford Journal of Legal Studies 353 (1990). The phenomenon started in the industrialised countries

work within the employment paradigm, an increase in the number of persons who perform work outside the circle of employment relationships has also been recorded worldwide.[9] This is typically done by portraying the relationship as commercial arrangement between client and service provider or by designating an intermediary as employer, thereby contracting out the statutory obligations that attach to employment relation.[10] While this is a workplace reality, labour law protections universally continue to be centred on the 'traditional/typical' employment relationship.[11] As a result we currently have, all over the world, a tendency whereby workers who should be protected by law are not receiving protection in law or in fact or receiving less protection than those in a standard employment relationships, merely because their relations do not fall within the parameters of standard employment relations.[12] Here in below is the discussion of some of the changes happening in the world of work in terms of forms of employment.

Put generally, the shift of employment from standard to non-standard employment may take the form of casualization, externalization or informalization. Casualisation pertains to the changing of permanent; full-time employees in to temporary, irregular, fixed-term employees, or part-time employees.[13] Therefore, casualisation has an effect of diminishing the number of permanent full-time employees.[14]

It also fragments the workforce into two[15]. Casualisation divides the work force into two; permanent, full-time workers on the one hand and those whose work arrangement is other

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and is expanding to developing nations. Globalization, advance in technology and demographic factors are some of the most noticeable reasons.

[9] Niekerk et al *Law @ Work*, at 21 (LexisNexis 215 North Ridge Road 2008). In this regard literature identifies different categories of workers ranging from e-lancers', to dependent contractors and those who are in a disguised employment relationship, where a de facto employment relationship, for various reasons, is given another name. 'E-lancers' are workers recruited on the Internet and they have no fixed days or hours of work. They may also have full autonomy as to how the work is performed, and subject only to a deadline.

[10] Id at 22

[11] International Labour Office, *The Employment Relationship* International Labour Conference, 95th session, Geneva report V(1) 4 (2006).

[12] Id at 4.

[13] Fenwick et al, *Labour law: A Southern African Perspective at 19* (IILS Geneva 2007)

[14] Id at 19. It is not a new phenomenon though it is on increase nowadays. It has been taking place in many countries particularly with respect to employees whose skills are readily and easily available, such as, secretarial staff.

[15] Dick, *The Growing Informalization of Work: Challenges for Labour-Recent Developments to Improve the Rights of Atypical Workers* 11 Law, Democracy & Development (Special Edition)

than the permanent, full-time on the other. This it is submitted erodes union's strength and it also creates an apparent conflict of interest among the work force as the standard employees perceive the non-standard ones as threats to labour standards.

Externalization is more drastic than casualization.[16] It generally pertains to all contractual/commercial arrangements through which employers avoid directly employing workers. It includes arrangements such as subcontracting, outsourcing and use of labour broking.[17] It also increases the number of workers in non-standard employment.[18] Externalization is justified on a number of grounds; the most common one being that it allows enterprises to focus on their 'core activities.'[19] It is suggested that in a global market enterprises can only survive and prosper if they keep on becoming more and more focused and specialized.[20] This idea seems economically quite sensible. However, it is noted by some that the true motivation is an employers' intention to contract out the responsibilities attaching to employment.[21] This is possible because employers by externalizing employment through outsourcing and/or subcontracting can replace an employment contract, that they should otherwise have with the person actually performing the work and which should have been regulated by labour laws, with some commercial contract which is beyond the regulatory framework of labour laws.

43(2007). Casualisation divides the work force into two; permanent, full-time workers on the one hand and those whose work arrangement is other than the permanent, full-time on the other. This it is submitted erodes union's strength and it also creates an apparent conflict of interest among the work force as the standard employees perceive the non-standard ones as threats to labour standards.

[16] Fenwick et al (2007) IILS, Geneva 20 (cited in note 13). It is radical in the sense that it often changes the status of workers from being an employee to independent contractors or at least it involves changing their status of being employees of the person for whom they work while casualization changes the status of employees from permanent full-time employees to temporary, part-time or casual worker of the same employer.

[17] Cheadle et al, *Current Labour Law* at 139 (LexisNexis 2004)

[18]Theron, *The Shift to Service and Triangular Employment: Implications for Labour Market Reform* ILJ 15 (2008). He noted that the single most important distinguishing characteristic of externalization is that it reduces the number of people employed by the enterprise, thereby narrowing the scope of the application of labour law.

[19] Fenwick et al (2007) IILS, Geneva 20 (cited in note 13). That is, the operations and activities in which they have expertise, or areas of business where they have established a competitive advantage.

[20] Blanpain, *Work in the 21st Century* 18 ILJ 189 (1997)

[21]Fenwick et al (2007) IILS, Geneva 20 (cited in note 13).

Informalization is defined, by Fenwick et al, as 'a process through which workers are compelled to move from mainstream formal employment to the informal economy.'[22] According to them informalization in the context of employment, creates a class of employees who are de jure covered by labour law but who are in fact unable to enforce their rights.[23] Informal employment worldwide is generally characterized by lack of decent work compared to formal employment.[24]

II. Forms and incidence of atypical employment in Ethiopia

Despite the paucity of literature to provide exact figures on non-standard employment relationships in Ethiopia, it can be established that some of the kinds of atypical employment relationships have been in place for a long time and some have recently been introduced into the Ethiopian labour market. It can even be assumed that relatively new phenomena such as outsourcing and subcontracting are on rise.[25] This is evident from the emergence of Private Employment Agencies (PEAs) that render services, basically of cleaning and security, and medium scale subcontractors.[26]

From the interviews and limited literature available the following forms of atypical employees are identified in Addis Ababa: part-time workers, home-workers, dependent contractors and workers in outsourced and subcontracted jobs. The national labour force survey conducted in 2005 by the Central Statistical Authority shows that the Ethiopian labour

[22] Id at 18

[23] Id at 18

[24] Chen, et al, *Mainstreaming Informal Employment and Gender in Poverty Reduction: A Hand-Book for Policy Makers and Other Stake Holders* (2005) 14

[25] De Gobbi, *Labour Market Flexibility and Employment and Income Security in Ethiopia: Alternative Considerations*, at 21 (International Labour Office (2006). A high level of flexibility and insecurity at the same time emerges from the fact that employment nationwide is mainly in agriculture as a sector, in self-employment as status, and informal in nature. The number of Private Employment Agencies registered to perform private employment service in Addis Ababa has increased up to 56 by the time the writer had access to the record of the Addis Ababa City Administration civil and Social Affairs Bureau, which is entrusted with the power, to give licenses to PEAs operating in the city. It is also indicated that there are some Private Employment Agencies operating without having the license to do so or with a license that has already been cancelled for different reasons.

[26] Id at 21. In dealing with the incidence of non-standard employment in the Ethiopian context, however, one point is worth remembering. It is the country's non-membership to the World Trade Organization so far. The country is still in the process of accession into the world trading system. This is important because trade liberalization will inevitably be followed by high competition which in turn may cause firms among other things to go for more flexible work arrangements. The accession will also bring the country into the globally liberalized market which creates an atmosphere that breeds and fuels most of the changes happening in the world of work in other countries, particularly in terms of increase in non-standard employment.

force consists of, among others, self-employed, temporary, casual and contract workers.[27] The construction sector, among the sectors, accounts for the highest number of temporary, contract and casual workers.[28] In deed it is difficult to maintain a water tight distinction between these different categories of atypical employees, as they overlap.

Employees in a contract of employment for a definite period of time or fixed-term employees are one category of non-standard employees in Ethiopia. They are defined under the Labour proclamation as employees who perform work under a contract of employment for a definite period of time or specific project.[29] This category includes; temporary workers, irregular workers and occasional workers. It is generally submitted that this class of employees are less secured.[30] Mostly they are not organized[31] and have less access to vocational training.[32]

Part-time employment is commonly used among private colleges in Addis Ababa. And according to the interview conducted in the three private colleges, part-time employees are not conceived, to belong to the permanent work force of the workplace where they work as part-timers.[33] Almost all of them in the colleges that the interview covered are employed on a fixed-term contract that lasts only for a semester and it is within the exclusive prerogative of their employer to renew the contract or to terminate it upon the expiry of the semester.[34] As the amount of time they work is considerably less than the normal working hours, they earn

[27] National Labour Force Survey (2005) Central Statistical Authority, table 7.5

[28] National Labour Force Survey (2005) Central Statistical Authority, table 7.5

[29] The Labour Proclamation No. 377/2003 art. 2, 4 and 10 read together. The proclamation provides an exhaustive list of circumstances under which an employment for definite period is allowed. In all other cases the contract of employment is deemed permanent employment. A detailed discussion is found in the next section.

[30] Yehenew, *Labour Market Flexibility and Employment Income Insecurity: Legal and Institutional Frame Work* (2005) 3 www.ilo.ch/public/english/employment/strat/download/bg2.pdf [accessed on 18/06/2008]

[31] Interview with Ato Birhanhiowt Libanos, Senior Expert of Industrial Relations in the unionisation department of Confederation of Ethiopian Trade Unions (CETU) [July 5, 2008]

[32] Id

[33] Interviews with, Ato Kifle Beyen, Administration Department Head, Alpha University College, W/o Fantaye Awash, Personnel department Head, Unity University College and Ato Desalegne Berihe, Assistant Administrator of the Law Faculty, Saint merry college. [July 10, 2008]

[34] Id.

less and do not benefit from any kind of social security scheme and collective representation. They also usually work on weekends and get no or little chance to attend trainings.[35]

Home working is another form of employment that has been traditionally in use in Ethiopia.[36] Though there is no evidence to establish whether the use of this form of atypical employment is rising or not in Addis Ababa, a rapid assessment conducted by Ministry of Labour and Social Affairs (MOLSA) indicates that there are workers who perform work for another person from their home or any other place of their choice.[37] The study showed that only 17% of those who are interviewed get annual leave, only 25% are given maternity leave and 50% do not benefit from weekly rest days and holiday leaves.[38] It is totally impossible for them get organized.

Concerning 'triangular employment relationships'[39] in Addis Ababa; the use of PEAs, subcontracting and outsourcing are known. However, all of these kinds of employment forms are only just emerging. This makes it difficult to find complete statistical information.

Outsourcing, as a modality of externalizing work, is defined as 'an arrangement whereby an activity or service performed by employees within an employer's business (usually a 'non-core' or 'ancillary' service such as cleaning, catering or maintenance) is 'contracted out' to be performed by an outside party.'[40] Another way to conceptualise outsourcing is to see it as a job-subcontracting often relating to ancillary activities.[41]

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[35] Id.

[36] Home workers are defined under the Labour Proclamation as persons who habitually perform work for an employer in his home or any other place freely chosen by them in return for wages without any direct supervision or direction by the employer. They are all deemed as working for a definite period or a specific project. See articles 46 (1) and 46 (3) of the Labour Proclamation.

[37] Negaligne, Rapid assessment on home work contract, Ministry of Labour and Social Affairs, Industrial Relation Department (2008). [Translation mine]

[38] Id.

[39] C 181Private Employment Agency Convention, 1997. Triangular employment relationship is defined as a situation where employees of an enterprise (the provider) perform work for a third party (the user enterprise) to whom their employer provides labour or service.

[40] Esselaar, *The debate over outsourcing in South Africa: Evidence from a case study*

<http://www.commerece.uct.ac.za/Research_Unit/DPRU/Conf2002pdf/Esselaar.pdf.> [accessed June 15 2008]

[41] International Labour Office, *Contract Labourat 20* (Geneva, 1997)

Despite an acute shortage of information on outsourcing practices in Addis Ababa, it is quite discernable that very recently employers have started to outsource mainly their cleaning and security services.[42] This can be supplemented by the fact that persons or institutions providing security and cleaning services have emerged in the past few years.[43] The reasons for outsourcing, some of the employers who have outsourced their security and cleaning services have said, is primarily to get rid of the concomitant responsibilities of employment relationship and reduce administrative burdens and costs.[44] It is done by entering in to a commercial agreement with persons or companies that hold themselves out to render these services with their own labour force.

Subcontracting has been broadly classified by ILO into labour-only and job subcontracting.[45] Subcontracting labour is known in Ethiopia, though not widely and formally in use.[46] It is in use in the construction sector in Addis Ababa. Some construction companies make use of labour-only subcontracting.[47] In labour-only subcontracting the contractor is paid for the number of workers supplied and the amount of time they work. The employee of the

[42] The interview with Ato Birhanhiwot Libanose, showed that some institutions such as National Bank, Road Transport Authority, Ethiopian air lines, Unity university college, have recently outsourced their security and cleaning services.

[43] The number of registered/licensed private employment agencies (PEAs) in Addis Ababa has reached 56 by the time the writer had access to the record of the Addis Ababa City Administration civil and Social Affairs Bureau, which is entrusted with the power, to give licenses to PEAs operating in the city. PEAs perform as intermediaries to bring employers and those who seek work together without being a party to the employment contract, and/or render a service of making workers available, locally or internationally, to third parties (client/user enterprises) by concluding a contract of employment with the workers. Thus, in instances where they perform the second function, which is the focus of this writing; they are employers for all legal intents and purposes whereas, in fact, the client is the one in complete control of the workplace and decides on important aspects of work.

[44] Interviews with Hiruy Girma, A Cite Agent for Kharafi Construction Company and Fantaye Awash, Personnel Department Head, for Unity University College. [august 3, 2008]

[45] International Labour Office at 20 (Geneva, 1997) (cited in note 41). In labour-only subcontracting, the contractor is paid for the number of workers supplied and the amount of time worked.

[46] Selelshi, *Subcontracting Strategy for the Ethiopian Micro and Small Enterprises* at 16 (Ethio-German Micro and Small Enterprises Development Program 2001).

[47] For example, there were 250 workers employed by subcontractors and working for sunshine construction by the time this interview was conducted. Interview with, Ato Gobeze Asebe, Head of the Human Resource Division of Sunshine Construction Company. [July 20, 2008]

contractor work alongside the user enterprise's other employees, but they are paid by the contractor, their official employer. Mostly they are not organized.[48]

Dependent 'independent' contractors constitute another category of atypical employees. This group includes all workers who are given the label independent contractor while in fact they are not. Often it is a consequence of employers' attempts to disguise the employment relationship.[49] Thus, employers with a view to cutting their costs, which in turn will help them to stay competitive in the market, resort to disguising a true employment relationship by giving a different name to the contract and allowing a certain level of autonomy to the employee, while the latter is economically or in fact dependent on the employer.[50]

Generally, like the situation everywhere, these classes of employees are less protected than the permanent workforce. Some of them are explicitly excluded from the scope of application of the Labour Proclamation No. 377/2003.[51] Those who are supposedly covered by the labour proclamation are less protected or they do not in fact enforce their rights. It is also hardly possible to find them organized.[52] Almost all of them in Addis Ababa constitute an unorganized labour force.[53] They also hardly benefit from skills development training at the workplace.[54]

[48] Interview with Ato Birhanhiowt Libanos, Senior Expert of Industrial Relations in the unionisation department of Confederation of Ethiopian Trade Unions (CETU) [July 5, 2008]

[49] Benjamin, *An Accident of History: Who is (and should be) an Employee under the South African Labour Law* (2004) 25 ILJ 789. Dependent 'independent' contractors are those who are given the label 'independent contractor' while they are in fact dependent on a particular relationship. Employers try to disguise a truly employment relationship basically due to the fact that protection is accorded to workers based on the distinction between 'employees' and 'independent contractors' and doing so will allow them to operate beyond the regulatory framework of Labour a Law.

[50] Mills (2004) 25 ILJ 1203 (cited in note 2).

[51] See for example, article 3 & 46 of the Labour Proclamation No. 377/2003. Those who perform work without there being employment contract are totally excluded and with regard to home workers it is provided that they are not automatically entitled to all the protections under the proclamation.

[52] Interview with, Ato Birhanhiowt Libanos, Senior Expert of Industrial Relation and unionisation department of Confederation of Ethiopian Trade Unions (CETU) [July 5, 2008]

[53] Interview with, Ato Birhanhiowt Libanos, Senior Expert of Industrial Relation and unionisation department of Confederation of Ethiopian Trade Unions (CETU) [July 5, 2008]

[54] Id.

III. Legal response to the changes in the world of work in the international plane

On the international plane, a series of ILO reports since 2000, have identified that the legal protection of workers, all over the globe, which is based on the distinction between 'employees' and independent contractors, is not in accord with the reality at workplace level.[55] Considerable change has also occurred within the scope of employment relationship, resulting in a proliferation of different forms of employment relationships that do not squarely fit to the full-time permanent employment model, on which labour laws are premised globally. Moreover, the distinction between independent contractors and employees has been blurred.[56] Hence there have been some moves by the ILO to reconsider the legal scope of the employment relationship in order to extend the protections of labour law to those who need it. In this regard the measures taken with respect to private employment agencies, home workers, and the legal scope of employment relationship are worth noting. Herein under a brief review of the measures taken in the international plane is made believing that what has happened at the international level can be a good source of ideas to be borrowed and bent to fit to the Ethiopian context.

A. Private Employment Agencies Convention

The ILO adopted a Convention in 1997 to regulate, inter alia, the triangular employment relationship.[57] This convention though seems at odds with workplace realities in designating the Temporary Employment Agency (TEA) as the employer of the workers it provides for its client, has contributed towards the protection of employees involved in triangular employment relationships. To mention some of its provisions: the convention requires member states to take measures to ensure that workers placed by TEAs are not denied their right to freedom of association and bargain collectively and are not subjected to discrimination.[58] The convention also requires states to take measures to adequately protect

[55] See for example, International Labour Office (2006) International Labour Conference, 95th session, Geneva report V (1) 4 (cited in note 11).

[56] This, it is submitted, has rendered traditional tests developed by courts, to distinguish independent contractors from employees, incapable of fully addressing the issue.

[57] C 181Private Employment Agency Convention, 1997.

[58] C 181Private Employment Agency Convention, 1997 articles 4 & 5

workers placed by TEAs with regard to minimum wages, working time and other working conditions, statutory social security benefits, access to training, safety and health, compensation and maternity protections.[59]

1. The Convention on Home Workers

The ILO has also adopted a convention on home workers.[60] This convention, among others, is meant to improve the application of international labour standards conventions and recommendations laying down minimum conditions applicable to home workers and accord additional protections that take in to account the unique characteristics of home working.[61] The convention generally requires states inter alia to promote equality of treatment of home workers and other wage earners.[62] Particularly state parties are required to promote equality of treatment with respect to home workers' right to establish organisations of their choice and participate therein, protection against discrimination in employment, protection in the field of occupational safety and health, remuneration, access to training, maternity protection, minimum age of entry in to work and statutory social security.[63]

2. Employment Relationship Recommendation

In 1997 there was an attempt by the ILO to adopt a convention on 'contract labour' which was basically intended to regulate disguised employment relationships. Unfortunately the attempt failed, as the social partners could not agree on some of the issues tabled.[64] Following its failure to adopt the convention on 'contract labour', ILO has issued a recommendation concerning the employment relationship in 2006.[65] The recommendation focuses on the regulation of disguised employment.[66] The recommendation inter alia proposes that national

[59] C 181Private Employment Agency Convention, 1997 articles 11 (a-j)

[60] C177,Home Work Convention, 1996

[61] C177,Home Work Convention, 1996, preamble

[62] C177,Home Work Convention, 1996 article 4 (1)

[63] C177,Home Work Convention, 1996, article 4 (2) (a)-(h)

[64] The incident was noted, by Theron, as the first in the history of ILO where it failed in its standard-setting task. See, Theron (2008) ILJ 15 (cited in note 18).

[65] R198 Employment Relationship Recommendation, 2006

[66] R198 Employment Relationship Recommendation, 2006 (I) (4) (b). It defines a disguised employment relationship to include all the situations where an 'an employer treats an individual as other than an employee in a manner that hides his/her true legal status as an employee through contractual arrangements'.

policies for protection of workers in an employment relationship should at least combat disguised employment, ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties and ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein.[67]

In an effort to combat disguised employment the recommendation proposes that the determination of the existence of employment relationship should be guided primarily by facts relating to the performance of work and remuneration rather than the name given to the contract by the parties.[68] Moreover it calls on states to lay down a presumption as to the existence of employment relationship upon demonstration of one or more relevant indicators.[69] However, as a recommendation it is not binding on member states, it will only serve as a guideline for states to consider their laws accordingly.

IV. Relevant European Union (EU) directives

The European Union has taken some sophisticated legislative measures in order to accord protection to some of the kinds of atypical employees that have emerged. What follows is a brief review of the major moves by the EU taken so far to regulate flexible forms of employment.

A. Part-Time Work Directive

This Directive constitutes one of the first major moves taken by the EU to respond to the changing workplace reality. It was issued to implement the framework agreement concluded between Union of Industrial and Employer's Confederation of Europe (UNICE) and the

[67] R198 Employment Relationship Recommendation, 2006 (I) (4) (a)-(g). It also proposes that states should take measures to ensure compliance with, and effective application of laws. It also calls up on states to take into account, in their national policies, the protection of specifically vulnerable groups (women, young and older workers and workers in the informal sector, migrant workers and workers with disabilities)

[68] R198 Employment Relationship Recommendation, 2006 (II) (9)

[69] R198 Employment Relationship Recommendation, 2006 (II) (13) (a). It provides lists of possible indicators that should give rise to the presumption. It includes inter alia whether the work: is carried out according to and under the direction of the other party; involves integration of the worker in the organization; is performed solely or mainly for the benefit of the other party; is performed within specific working hours or at workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the workers' availability; or involves the provision of tools, materials and machinery by the party requesting the work and periodic payment of remuneration which constitutes the workers' sole or principal source of income.

European Centre of Enterprises with Public Participation (CEEP) on the one hand and the European Trade Union Confederation (ETUC) on the other.[70] The directive states that it has the object of, among other things, eliminating discrimination against part-time workers at the workplace and to assist the development of part-time work in a manner acceptable to workers and employers.[71]

The directive requires member states, within the context of non-discrimination, to have regard to the Employment Declaration of the Dublin European Council of December 1996, when they design their statutory social security structure.[72] This declaration calls on states to make their social security schemes 'more employment-friendly by developing social protection systems capable of adapting to new patterns of work and of providing appropriate protection to people engaged in such work.'[73]

The directive also provides that part-time workers shall not be treated in a less favourable manner than 'comparable full-time workers'[74] with respect to working conditions.[75] The principle of *pro rata temporis* is prescribed in all appropriate situations.[76] It also requires states to take measures to avoid obstacles to opportunities in part-time work.[77] In addition, it makes it unacceptable to dismiss an employee because an employee has refused to be transferred to part-time worker or vice versa, unless it can be justified by employers' operational requirements.[78] It also stresses that employers should have regard, to the extent

[70]Council Directive 97/81/EC, article 1

[71] As can be seen from the preamble, the framework agreement provides for general principles and minimum requirements relating to part-time work.

[72] Council Directive 97/81/EC, preamble

[73] Council Directive 97/81/EC, preamble

[74] Council Directive 97/81/EC, clause 3 (2). The term 'comparable full-time worker` means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills.

[75] Council Directive 97/81/EC, clause 4 (1). Different treatments that are based on objective grounds are, however, justified.

[76] Council Directive 97/81/EC, clause 4 (2)

[77] Council Directive 97/81/EC, clause 5 (1) (a)

[78] Council Directive 97/81/EC, clause 5 (2)

possible, to employees' requests to switch form part-time to full-time and the reverse. Employers are also required to take measures, to the extent possible, to provide timely information on the availability of part-time or full-time employment, as the case may be, so as to facilitate transfer from one form of employment to another and facilitate access to part-time workers to vocational training to enhance career opportunities and occupational mobility.[79]

B. Fixed-term Workers Directive (FTWD)

This directive was issued to implement the framework agreement, concluded between the social partners (ETUC, UNICE and CEEP), on fixed-term workers.[80] The framework agreement on fixed-term workers recognizes both the paramount importance of indefinite employment and the responsiveness of fixed-term employment to the needs of both employers and employees under certain circumstances and aims at preventing abusive use of successive fixed-term contract.[81] The directive emphasises the principle of non-discrimination to promote the quality of fixed-term work. It provides that fixed-term workers must not be treated in a less favourable manner than comparable permanent workers in respect of employment conditions merely because of the fixed-term nature of their contract or employment.[82]The directive provides for minimum working conditions for fixed-term workers.[83] Moreover, when it comes to social security system it calls up on states to give effect to the Employment Declaration of the Dublin European Council in 1996.[84] Furthermore, the directive requires employers to inform fixed-term workers about vacancies for permanent employment opportunities in the undertaking and as far as possible facilitate

[79] Council Directive 97/81/EC, clause 5 (3)

[80] Council Directive 1999/70/EC, article 1.

[81] Council Directive 1999/70/EC preamble

[82] Council Directive 1999/70/EC. Clause 4 (1). Where appropriate the principle of *pro rata temporis* is prescribed: See clause 4 (2). Comparable permanent worker is defined under clause 3 (2) as a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills.

[83] Council Directive 1999/70/EC, preamble.

[84]Council Directive 1999/70/EC preamble. The Employment Declaration of the Dublin European Council in 1996 requires states to design 'more employment-friendly social security systems by developing social protection systems capable of adapting to new patterns of work and providing appropriate protection to those engaged in such work'.

access to training opportunities for them.[85] The directive also provides measures that member states shall take to prevent the abusive use of successive fixed-term contracts.[86]

C. The Draft Directive on Temporary Agency Workers

Another move worth noting by the European Union with regard to the protection of non-standard employees is the draft directive on temporary agency workers.[87] The underlying principle in the draft is ensuring a balance between the need to protect temporary agency workers and the need for allowing sufficient flexibility in labour markets.[88] It stresses the principle of equal treatment.[89] It provides that temporary workers posted by agencies must at least receive a working and employment conditions they could have received had they been recruited by the user undertaking itself.[90] The client is not required to treat them in the same way it is treating its permanent employees but, rather, in the same way it would have treated them had it recruited them on its own.

However, when it comes to protection of pregnant workers, nursing mothers, children and young workers, it requires employers to comply with protections that are established by legislation, regulations, administrative provisions, collective agreements and/or any other general provisions. Basic working and employment conditions are defined to include only working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other general provisions relating to: the duration of

[85]Council Directive 1999/70/EC. Clause 6 (1) & (2)

[86] Council Directive 1999/70/EC. Clause 5. The following measures are required by states members; objective reasons justifying the renewal of such contracts or relationships; the maximum total duration of successive fixed-term employment contracts or relationships; the number of renewals of such contracts or relationships.

[87]The Draft Directive of the European Parliament and the Council on temporary work, 2002/0072 (COD) Article (1) (1). The draft directive applies to workers with a contract of employment or employment relationship with a temporary agency, which are posted to user undertakings to work temporarily under their supervision.

[88] The Draft Directive of the European Parliament and the Council on temporary work, 2002/0072 (COD) Article (5) (1)

[89] The Draft Directive of the European Parliament and the Council on temporary work, 2002/0072 (COD) Article (5) (1)

[90] The Draft Directive of the European Parliament and the Council on temporary work, 2002/0072 (COD) Article (5) (1)

working time, over time, work breaks, rest periods, night work, paid holidays and public holidays and pay.[91]

The draft directive provides for possibilities by States to derogate from the principle of non-discrimination and regulates it.[92]

V. Protection of Atypical Workers in Ethiopia

The legal regime that governs employment and labour relations in Ethiopia in the private sector is mainly composed of the 1991 Constitution of the Federal Democratic Republic of Ethiopia and the Labour Proclamation No. 377/2003. Hence a critical analysis of the protections they accord to atypical employees is made herein under.

A. The Constitution of the Federal Democratic Republic of Ethiopia (the FDRE Constitution)

The FDRE constitution adopted in 1995 devotes one article to entrench labour rights under the heading economic, social and cultural rights.[93] The constitution provides inter alia for workers' right to form associations to improve their conditions of employment and economic well-being.[94] It further states that the right includes the right to form trade unions and other associations to bargain collectively with their employers and it also entrenches their right to strike.[95]

[91]The Draft Directive of the European Parliament and the Council on temporary work, 2002/0072 (COD) Article (3) (1) (f). The basic working and employment conditions listed by the draft directive fall short of those afforded by the Fixed-Term Workers Directive (FTWD). For instance, the FTWD provides workers on temporary fixed-term contracts the same access to occupational pension schemes and training as permanent staff and makes it unlawful for such workers to waive their right to a redundancy payment.

[92] The Draft Directive of the European Parliament and the Council on temporary work, 2002/0072 (COD) Article 5 (2) (3). States, therefore, can derogate from the principle of non-discrimination, but only where there is a collective agreement in place which gives adequate protection to agency workers. And with respect to pay the principle of equal treatment does not apply unless the workers' assignment is to last longer than six weeks or he/she is employed by the agency as a permanent employee and get paid in between assignments.

[93] The Constitution of the Federal Democratic Republic of Ethiopia 1995, art 42

[94] The Constitution of the Federal Democratic Republic of Ethiopia 1995, Art 42 (1) (a)

[95] The Constitution of the Federal Democratic Republic of Ethiopia 1995, Art 42 (1) (b). With regard to government employees' right to form trade unions and/or associations, and bargain collectively and strike the constitution provides that those who enjoy the right shall be determined by law. Therefore, government employees' right to form trade unions and bargain collectively under the constitution is not automatic. Currently, workers in the public service cannot form trade unions and hence bargain collectively, as the civil

Article 41(2) further entrenches a 'floor of rights' that is automatically applicable to all workers including government employees.[96] The constitution uses the word 'worker' as opposed to 'employee' and so far it has not been interpreted. However, it is submitted that the word should be interpreted purposively to encompass all those who need the protection of the law owing to their relationship with the person to whom they work. In this regard it is submitted that the term 'worker' as used in the constitution should be understood broadly.[97] Hence it should apply not only to those who perform work under an employment contract (standard and non-standard employees) - as it is narrowly defined under the Labour Proclamation – but also to those who perform work without being in a contract of employment but are in need of protection because of their economic vulnerability/dependence in their relationship with the person for whom they work. Therefore, should this purposive interpretation of the constitutional provision gets acceptance, one point worthy of consideration here is whether this constitutional provision can be relied on directly by 'workers' who do not have a contract of employment but are in need of protection and even by workers who are in a contract of employment but excluded by the labour proclamation from its ambit. That is to say whether they need to attack the constitutionality of the labour proclamation first or they can just directly rely on the constitutional provision and seek the protections enunciated under the constitution. I believe they do not need to attack the constitutionality of the proclamation first. This is because what we have here is a situation whereby a constitutional provision is not given effect fully by a proclamation in terms of its scope. Not a proclamation which is in contradiction with a constitutional provision. Hence workers who are not in a contract of employment but need the protections of the law and workers in a contract of employment but are excluded by the labour proclamation can rely directly on the constitutional provision and seek the protections thereof to the extent the proclamation is not applicable on them.

B. The Labour Proclamation No. 377/2003

service proclamation, which is enacted to regulate employment in the public service sector, does not confer those rights on civil servants.

[96]The Constitution of the Federal Democratic Republic of Ethiopia 1995, Art 42 (2). This includes; workers' right to reasonable limitation of working hours, to rest, to leisure, to periodic leaves with pay, to remuneration for public holy days and healthy and safe work environment.

[97] In most jurisdictions the term 'employee' is defined so narrowly and based on the common law contract of employment that there are now world-wide workers who may not qualify as 'employee' but who really need the protection of the law. In this regard it has been noted at the ILO level that distinction should be made between 'worker' and employee.

The labour proclamation of the 2003 proclamation applies to all employment relationships which are based on the contract of employment.[98] Article 4 (1) provides that 'a contract of employment shall be deemed formed where a person agrees directly or indirectly to perform work for and under the authority of an employer for a definite or indefinite period or piece work in return for wage.'[99]

Thus direction by the employer and the existence of wage are made together the determinant factors in characterising a relationship as an employment one thereby subjecting it to the regulation of the proclamation. It is submitted that this enables employers to easily avoid labour law through contractual arrangements whereby they only contract out the payment of wage for other persons and maintain the direction aspect of the relationship. Moreover the direction element tends to exclude those who perform work under economically dependent and vulnerable conditions but only have autonomy in deciding on how and when the work is to be done whose protection would have been in line with the central purpose of labour law i.e. rectifying the power imbalance between an employer and employee. It is assumed that this may encourage employers to allow some level of autonomy for employees and easily circumvent the proclamation.

Again it is not clear under the law as to whether courts should simply accept that a contractual relationship is a relationship other than employment merely because the contract purports to be so or they have to inquire into the real nature of the relationship and determine the existence of employment relationship regardless of the label attached to the contract. However, courts seem to just give effect to what the contract purports to be.[100] This it is submitted runs counter to the central purpose of labour law and may encourage employers to

[98] The word 'worker' is sometimes used in the proclamation interchangeably with the term 'employee'. However, the overall reading of the proclamation and particularly articles 3, 2(3) and 4(1) of the proclamation make it clear that what is intended is 'employee' in the strict sense of the word.

[99] The Labour Proclamation No. 377/2003 art 4 (1).The proclamation does not directly define the word employee, rather it defines it, by making a cross-reference to the definition of contract of employment under article 4; 'as a person who has an employment relationship with an employer in accordance with article 4 of this proclamation.'

[100] See for example, Ato Gelana & others v Hayat Share Company (2007), Federal First Instance Court, Case Number 37016. In this case the plaintiffs requested compensation for unlawful termination of their employment and the respondent (the employer) contended that they are not any more employees rather they are all independent contractors and it adduced a document in which they all signed that they will be working as an independent contractor and the judge held, just by relying on the contract without any further investigation into the real nature of the relationship between the parties, that they are not employees and as such cannot bring any claim based on the labour proclamation.

conclude contract with their employees, where the latter's undertake to perform work as an independent contractor while the real nature of the relationship is that of employment, and hence bypass the labour law. The ILO employment relationship recommendation on this point adopts the principle of primacy of facts.[101] This it is submitted will extend the scope of the protection to those who are in disguised employment relationship.

The absence of any kind of presumption in favour of the existence of employment relationship, upon establishment of some factors, which ought to shift the onus, as is the case under the ILO employment relationship recommendation 2006, makes the situation worse for workers in a disguised and truly ambiguous employment relationship. This is so because it is up to the worker who seeks the protection of the labour law to first prove the existence of employment relationship.

Despite the problems associated with protecting workers who work outside of the narrowly defined circle of the contract of employment under the proclamation, the proclamation applies to all employees - standard or non-standard. Indeed the Federal High Court, has interpreted the phrase 'any other conditions' under article 14 (1) (f), which reads as; 'it shall be unlawful for an employer to discriminate between workers based on nationality, sex, religion, political outlook or any other conditions', to include forms of employment. The court held that an employers' act of exclusion of an employee from a bonus because he/she is temporarily employed is unlawful even when a collective agreement provides so.[102] Those who work in the informal sector are also *de jure* protected as long as they work under a contract of employment.

There are, however, some atypical employees who are not fully protected under the proclamation. For instance with regard to home workers the proclamation gives to the Ministry of Labour and Social Affairs the power to prescribe provisions of the proclamation that shall apply to them and the manner of their application by directive.[103] Thus home workers are not automatically entitled to all the benefits and protections under the proclamation; rather, it is up to the Ministry to decide which protections under the

[101] That is to say, the determination of whether a relationship is that of employee-employer or independent contractor-client is to be guided primarily by the circumstances under which the work is performed, rather than by what the contract purports to be.

[102] See for example, Basha Alemayehu & others v Ethiopian Electric Power Company (2000) Federal First Instance Court, Case Number 24182.

[103] The Labour Proclamation No. 377/2003 art 46.

proclamation are available to them. However, so far the Ministry has not issued any directive to that effect. It means that they are now practically left without any protection whatsoever under the proclamation. The proclamation also considers the employment of all home-workers as employment for definite period or specific project.

Another area where atypical employees are said to be less protected under the proclamation has to do with the employment security of employees on a contract of employment for a definite period of time. Any contract of employment is deemed to have been concluded for an indefinite period irrespective of what the parties provide.[104] However, the proclamation provides circumstances under which contracts for a definite period can be concluded.[105] When a contract for a definite period is allowed the duration of the contract should be fixed based on objective grounds such as completion of specific job or occurrence of specific events. The proclamation further limits the duration of a contract for a definite period of time to not more than 45 consecutive days and not to be done more than once, if the purpose for which it is done, is either to replace a permanent employee who suddenly and permanently vacated his post or temporary placement to fill a vacant position in the period between the study of the organizational structure and its implementation.[106]

There is, however, no protection in the case of non-renewal of a contract of employment by an employer when the employee has a reason to objectively expect so. This is relevant in the case of employees employed for a definite period of time to perform; an irregular work which relates to permanent work of the employer but performed on an irregular interval; seasonal work that relates to permanent part of the employers work but performed only for a specified period of the year but which are regularly repeated in the course of the years; an occasional

[104]The Labour Proclamation No. 377/2003 art 9. The word 'any' makes it clear that the principle applies to all employment contracts including instances where there exists triangular relationship.

[105] The Labour Proclamation No. 377/2003 art 10 (1) (a-i). This includes instances where an employee is employed for; a specified piece work, replacement of a worker who is temporarily absent due to leave, sickness or any other cause; in the event of abnormal pressure of work; for performance of urgent work needed to prevent damage or disaster to life or property, to repair defects or break downs in works, materials, buildings or plant of the undertaking; an irregular work which relates to permanent work of the employer but performed on an irregular interval; seasonal work that relates to permanent part of the employers work but performed only for a specified period of the year but which are regularly repeated in the course of the years; an occasional work which does not form the permanent activity of the employer but which is done intermittently; temporary replacement of a permanent employee who has suddenly vacated his/her post or temporary placement of a worker to fill a vacant position in the period between the study of the organizational structure and its implementation.

[106] The Labour Proclamation No. 377/2003 art 10 (2)

work which does not form the permanent activity of the employer but which is done intermittently. It is submitted that the absence of obligation on the employer to renew the contract of seasonal workers whenever the work is there, at least on the same terms and conditions, constitutes a protection gap.

When it comes to contractual arrangements under which the relationship is given a triangular appearance such as employment of workers through PEA, or the employment relationship is deemed to exist between the worker and subcontractor and/or the person to whom the work is outsourced or the PEA, as the contract is entered into between them. This it is submitted may be used by employers to avoid regulatory frameworks by resorting to use PEA or subcontracting arrangements. At times, however, the true nature of the relationship may dictate that the principal subcontractor or the client be regarded the employer of the person actually performing the work for all purposes and intents.

There is a proclamation enacted to regulate the operation of PEAs.[107] The proclamation allows any person among other things to provide services of making a worker available locally or abroad by concluding a contract of employment with such a worker without receiving any payment from the worker.[108] Under this circumstance the employment relationship exists between the PEA and the worker for all intents and purposes. However, as it is indicated above to designate the PEA as an employer and attribute all the responsibilities to it may sometimes not accord with reality. This is due to the fact that often it is the user enterprise that controls important aspect of the work and the PEAs' role may not be more than pay rolling. If for instance the user enterprise says I do not want one of the workers supplied by the PEA around, then that employee will lose his/her employment. Hence it is at odd with the reality to regard the PEA as the employer while it is the user enterprise which practically exercises control over the worker. There is no also time limit up on the expiry of which a worker placed by a PEA will be regarded as the employee of the user enterprise as is the case under the EU Directive. The proclamation provides for joint and several liability of the third party/user firm with the PEA only in the event of contravention of the contract of employment.[109] It does not provide for joint and several liability of the third party/user

[107] Private Employment Agency Proclamation No. 104/1998

[108] Private Employment Agency Proclamation No. 104/1998 art 1 (b). A license is made mandatory to render the abovementioned service and once issued it stays valid for two years subject to renewal.

[109] Private Employment Agency Proclamation No. 104/1998 art 17

enterprise with the PEA in the event of contravention of the protections under the labour proclamation.

With regard to collective representation the proclamation entitles all employees to establish trade unions inter alia to bargain collectively regardless of the form of their employment.[110] However, only undertakings that employee at least ten workers are allowed to form trade unions provided that trade unions must at least have ten members.[111] For workplaces with less than ten workers it is provided that employees of different undertakings can form what is known under the proclamation as 'general trade union', which will have the same function as trade unions and must also at least have ten members.[112] This, it may be argued, offers an opportunity for non-standard employees and to those in the informal sector to form their own organization.

Even if article 115 (1) (a) of the proclamation, at face value, seems to allow the existence of more than one trade union at an enterprise, it practically makes it difficult by providing that, in cases of multiple unions at workplace, only the trade union that achieves majority membership of 50 per cent + 1 can enter into collective agreements.[113] This it is submitted will practically make it difficult if not impossible for non-standard employees, who often constitute an unorganized workforce, to form their own union and bargain for better working conditions at workplaces where there is another trade union. Under the proclamation collective agreements can be concluded either at plant level or industry level, however, there is no mechanism of extending collective agreements to non-parties.

The proclamation provides for a duty to bargain in good faith.[114] Thus once employees have formed trade unions then they can seek the assistance of the Labour Relation Board not only to bring a recalcitrant employer to negotiation but also to make sure that he/she/it is negotiating in good faith. And issues on which the parties could not agree after negotiating in good faith shall be submitted to the competent dispute settlement tribunal.[115] Though it is not

[110] The Labour Proclamation No. 377/2003 art 113 (1)

[111] The Labour Proclamation No. 377/2003 art 114 (1)

[112] The Labour Proclamation No. 377/2003 art 114 (2)

[113] The Labour Proclamation No. 377/2003 art 115 (1) (a)

[114] The Labour Proclamation No. 377/2003 art 130 (4)

[115] The Labour Proclamation No. 377/2003 art 130 (5)

directly provided one can say from the reading of article 138 of the labour proclamation that if an employer is said not to have been negotiating in good faith after sitting for negotiation the matter shall be submitted to the LRB for determination. Whether this is proper and justifiable intrusion in to the institution of collective bargaining and when an employer can be said is not negotiating in good faith is left for another writing. The existence of the duty seems helpful to non-standard employees who manage to organize. Nonetheless, the insecure and unstable nature of their work and the exclusion of some of them, such as home workers, from the labour proclamation, make it highly difficult for them to organize, if at all.

Conclusion and recommendations

The world of work has been tremendously evolving posing a major challenge to labour law which was mainly set to regulate standard employment relationship based on the distinction between 'employee' and 'independent contractor'. Though it has always been one of the most vexed and difficult issues in labour law to distinguish between an 'employee' and 'independent contractor', the changes happening in the workplace such as externalization of employment, not only increased the number of workers performing work outside the narrower notion of the employment contract, but also further blurred the distinction between an 'employee' and 'independent contractor'. Furthermore, regarding 'employees', different forms of non-standard employees, such as; part-time workers, temporary workers, casual workers, home workers and those in a triangular employment relationship, have been increasingly in use in the world. These kind of atypical employments are also already in use in Ethiopia though not as prevalent as they are in developed nations.

Vulnerability, precariousness, lesser employment tenure and poor working conditions are among the common traits of these different forms of atypical employment. As a result these new class of workers constitute an underclass workforce all over the world.

The constitution entrenches some 'floor of rights' to all workers- both standard and non-standard and even to those who are in the informal sector alike. The constitution uses the term worker and this word is capable of broad interpretation to cover all who need the protection of the law owing to the real nature of their relationship with the person for whom they work though they do not have a contract of employment.

Under the Ethiopian labour proclamation the existence of control by the person for whom the work is done is given central position, leaving all scenarios, where a person performs work

without being under the control of the employer, outside of the regulatory frame work of labour law. Moreover, by making wage another defining element it totally excludes all unpaid workers from its ambit.

In addition, the Ethiopian labour proclamation does not provide for a presumption in favour of the existence of employment, up on demonstration of some factors which would have made it easier for some of non-standard employees easier to seek the protections of the law, as is the case under the ILOs' employment relationship recommendation.

It is not also clear, under the Ethiopian labour proclamation, whether courts should simply rely on what the contract purports to be or can go beyond and look into the real nature of the relationship in determining whether a relationship is that of employment or independent contractor.

The Ethiopian labour proclamation excludes home workers.

Another major problem with respect to non-standard employees has to do with the inability of the collective bargaining system, which is designed to fit the standard employment relationship, to fully address the needs of non-standard employees.

Under the Ethiopian labour proclamation, non-standard employees, who are included within the definition of 'employee', have the right to form trade union and engage in collective bargaining. However, trade unions can only be formed in an undertaking that employees at least ten workers and they must have at least ten members. In addition in cases where there are multiple trade unions at a workplace only the one having 50+1 majority membership of the total workers of that undertaking can engage in collective bargaining. This, it is submitted, makes it difficult for non-standard employees to form trade unions and bargain collectively.

In addition to the legal impediments there are also practical difficulties in organizing most non-standard employees. This includes amongst others trade unions perception that their power mainly lies on permanent full-time employees and their perception of non-standard employee as a threat to job security and minimum conditions. Moreover, the insecure and unstable nature of the employment of most of the atypical employees makes it difficult to organize them.

Regarding workers placed by PEA the proclamation designates the PEA as the employer regardless of the fact the employee is placed for long and the 'client' is the one actually making important decisions affecting the terms and conditions of employment and the continuity of the employment. There is also no time limit, on the expiry of which the employee becomes an employee of the 'client enterprise'. It does not also matter that the agency's role is just not more than 'pay rolling' and the actual determination of all aspects of the work is made by the 'client'. The joint and several liability of the 'client' do not extend to instances of contravention of the labour proclamation. Rather the shared responsibility of the client is limited to instances of contravention of the contract of employment of the worker by the agency.

The Ethiopian labour proclamation provides an exhaustive list of circumstances under which employment for a definite period is permissible. In all other cases a contract of employment shall be for an indefinite period of time. There is no general time limit upon the expiry of which an employee must be regarded as a permanent employee. However, in case where the reason for employing an employee on a fixed-term contract is either to replace a permanent employee who suddenly and permanently vacated his post or temporary placement to fill a vacant position in the period between the study of the organizational structure and its implementation, the contract must not be for more than 45 days and can only be done once. There is again no protection against non-renewal of the contract by the employer in case of seasonal workers.

Concerning minimum conditions of employment in Ethiopia minimum conditions are also regulated by the same proclamation and as such, except for the problem associated with the meaning of 'employee' to accommodate some categories of non-standard employees, are applicable to all employees(as defined under the proclamation) standard and non-standard alike.

Based on the problems identified above, I recommend the following to strengthen the protection of atypical employees in Ethiopia;

- A test, which is primarily based on the economic reality of the relationship between the parties, should be adopted to distinguish an employee from an independent contractor. The definition of an employee, under the Ethiopian proclamation, should also be expanded to include unpaid workers who are really in need of protection.

- Judges or arbitrators should primarily rely on the surrounding facts than the label attached to the contract by the parties in determining whether a person is an employee or independent contractor.

- A presumption similar to the one by the 2006 ILO's employment relationship recommendation should also be introduced to the Ethiopian labour law.

- The exclusion of home workers, under the Ethiopian labour proclamation, should be done away with for all intents and purposes.

- As regards employees placed by TEAs there should be a time limit upon the expiry of which the employees should be regarded employees of the client. In addition to this regard should also be made to the real nature of the relationship between the 'client' and the TEA. I suggest that the 'client' should be regarded an employer if the role of the TEA is not more than pay rolling. The joint liability of the 'client' should be extended to instances of contravention of the labour proclamation.

- In order to strengthen the protection of fixed-term employees I recommend that there should be a time limit upon the expiry of which an employee who is on fixed-term/temporary contract should graduate into permanent employment. There should also be protection of employee on a contract of employment for a definite period of time in instances of non renewal or renewal on less favourable terms while they have an objectively reasonable expectation of renewal on the same terms.

- I also recommend that the Ministry of Labour and Social Affairs, in Ethiopia, be enjoined with the power to make sectoral determination of minimum conditions of work including minimum wages in the sectors where atypical employment is prevalent.

- I also suggest, like the case under the EU directive on temporary agency workers, there should be a protection that at least ensures that workers supplied by PEAs do not get a less favourable treatment than they could have got had they been directly employed by the person who is in charge of the workplace, i.e. the client.

- Extension of collective agreements to non parties is totally unknown under the proclamation. It, however, can be used to enhance the protection of atypical

employees. In this regard I suggest that there should be a mechanism, in Ethiopia, to allow extension of collective agreements to non parties.

Participation of Stakeholders in Environmental Impact Assessment Process in Ethiopia: Law and Practice

Dejene Girma Janka*

Introduction

Nowadays, *environmental impact assessment* (EIA) is used as a tool by decision-makers to take environmental issues into account. In Ethiopia, too, it has been recognized since the 1990s. Thus, some decision-makers and proponents are now required to do EIA to consider the environmental impacts of their actions, whereas the duty to evaluate their EIA reports is imposed on environmental agencies. Nevertheless, for EIA to be effective, its preparation by the concerned persons and the evaluation of their reports by environmental agencies alone is not adequate. Recently, there has been a growing consensus that such efforts should involve stakeholders as well. Consequently, some legal systems have now recognized the right of stakeholders to participate in the EIA process together with the corresponding obligations of environmental agencies to ensure their participation in such process. In Ethiopia, the existing policy framework (that is, the Constitution, the EPE, the EIA Proclamation and the Guidelines) does not expressly address the issue of stakeholders' right of participation in the EIA process. This piece of writing is, therefore, an attempt to explore the extent to which stakeholders' participation in the EIA process in Ethiopia has been dealt with by the current policy framework and the extent of their participation in practice together with the problems affecting such participation. Therefore, the article is arranged in the following manner. The first part deals with EIA in general and EIA in Ethiopia (the law and theory) in particular. The second and third parts deal with stakeholders' participation in the EIA process in general and in Ethiopian in particular by considering both the law and the practice. The fifth part discusses some of the obstacles to the realization of effective stakeholders' participation in the EIA process in Ethiopian context. Moreover, it briefly considers the possible prospects that may facilitate meaningful stakeholders' participation in the EIA process in Ethiopia. The last part contains the conclusion and recommendations of the article.

I. Environmental Impact Assessment

The use of EIA as a tool for decision-making was introduced by sec 102 of the National Environmental Policy Act (NEPA) of the USA in 1969 which mandated federal agencies to prepare and consider environmental impact statement (EIS) before undertaking any major federal action likely to have significant effect on the environment.[1] Since then, this

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[1] 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

procedure has spread throughout the world and today most developed and many developing countries practice some form of EIA.[2] 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.[3] What then is EIA? It 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.[4] 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*.[5] Accordingly, the process of EIA becomes necessary not only for an impending development project but also for public instruments. Here, the notion *public instrument* refers to a policy, a strategy, a programme, a law or an international agreement.[6]

At this juncture, although EIA is necessary, there are some important issues that one has to bear in mind. Firstly, EIA does not necessarily eliminate actions that have adverse impacts on the environment.[7] Secondly, although EIA aims at enabling authorities to choose actions and make decisions thereon with full knowledge of their impacts on the

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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, *Environment: Problems and Solutions*; S. Chanda and Company LTD, India, 1998, p 336

[2] 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

[3] See John Ntambirweki, *Environmental Impact Assessment as a Tool for Industrial Planning*, included in *Industries and Enforcement of Environmental Law in Africa*, UNEP, 1997, 1997, p 75, the Rio Declaration (1992) and the Convention of Biodiversity (1992) which recognize the requirement of EIA.

[4] See D.K. Asthana and Meera Asthana, supra note 1, p 336; John Ntambirweki, supra note 3, 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.

[5] Article 2(3), Environmental Impact Assessment proclamation of Ethiopia, No. 299/2002 (emphasis added)

[6] Id., Article 2(10). EIA that is done for public instruments is called *strategic environmental assessment* (SEA) or *top level EIA*.

[7] John Ntambirweki, supra note 3, p 75

environment,[8] it is sometimes undertaken not to make decisions but to serve different purposes.[9] For example, in some countries, EIAs were prepared and used to justify environmentally degrading activities. Moreover, officials use EIAs in an attempt to postpone the duty of making decisions. Further, officials may make decisions and order EIAs to be made to determine the validity of their decisions. Lastly, EIAs have been used to hide the truth behind reams of paper. The bulkiness of some reports has been used to impress the gullible audience. However, all these are contrary to the purpose of EIA in general and the recognition of stakeholders' participation in particular. For example, letting stakeholders' participate in the EIA process of decisions that are already made would amount to asking stakeholders to comment on these decisions instead of engaging them on their making process; a practice contrary to what has come to be known as *environmental democracy*.[10]

A. Environmental Impact Assessment in Ethiopia

1. Laws

As stated before, the legal requirement of EIA is almost universally accepted in the sense that most developed and many developing countries have adopted some form of EIA. In this sense, therefore, Ethiopia is not an exception.[11] Actually, its earliest commitment to undertake EIA came into being when it ratified the Convention on Biodiversity in 1994 to protect and conserve biodiversity.[12] A year later, the 1995 FDRE Constitution came up with provisions pertinent to EIA. For example, the Constitution requires the environment to be protected; it recognizes the right of everyone to live in clean and healthy

[8] See Duard Barnard, supra note 4, p 179 and John Ntambirweki, supra note 3, p 75

[9] For detailed discussion on this point, Duard Barnard, supra note 4, p 179

[10] E*nvironmental democracy* is defined as a participatory and ecologically rational form of collective decision-making. In other words, the concept refers to a process whereby people participate in making decisions that have bearing on the environment. See generally, Michael Mason, *Environmental Democracy*, Earthscan Publications Ltd, London, 2006,p 1

[11] 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.

[12] Article 14(1)(2) of the convention requires every contracting party to introduce appropriate procedures requiring EIA of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for **public participation** in such procedures and also introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account.

environment; and, recognizes the right to sustainable development.[13] There is no doubt that EIA is vital for the full implementation of these constitutional stipulations. In 1997, Ethiopia took another step by adopting its National Environmental Policy (EPE) which recognizes, under section 4.9, the need to use EIA for the attainment of its goals.[14] Finally, in 2002, Ethiopia adopted the EIA Proclamation, the first piece of legislation on EIA. The Proclamation makes EIA applicable to projects and public instruments. Moreover, it imposes on all persons the duty to make prior EIA in relation to any actions (projects or public documents) for which prior EIA is required.[15] Further, the Proclamation strictly prohibits the commencement of any project requiring EIA before *appropriate assessment* is made. Besides, the Proclamation entrusts the power to ensure that EIA is done and evaluate same to the Federal EPA and regional environmental organs.[16]

Nonetheless, the EIA Proclamation has two problems, which have strong bearing on stakeholders' participation. Firstly, the EIA Proclamation is not comprehensive. Secondly, although the EIA Proclamation envisages, under article 19, the issuance of regulations for its implementation, no such regulations have been made so far. Likewise, the EPA which is authorized under article 20 of the Proclamation to issue directives to implement the Proclamation does not have a working directive so far. Of course, it issued such directives very late (in 2008). However, the directives still have two major problems. Firstly, they deal only with projects requiring EIA, not public instruments. Thus, the provisions of the EIA proclamations pertaining to public instruments cannot be enforced since at the moment no one knows which public instruments are subject to EIA and which are not. As a result, it is not possible to talk about stakeholders' participation in the EIA process of public instruments. Secondly, and more importantly, these directives which are claimed to be approved do not have force of law for two reasons. To

[13] 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 everyone's right to live in clean and healthy environment.

[14] As stated under paragraph 2.1, the overall policy goal of the EPE is to realize the right of Ethiopians to live in clean and healthy environment and to bring about sustainable development.

[15] See articles 7 and 11 together with article 3 of the EIA Proclamation, supra note 5.

[16] Id., articles 3 and 14

begin with, the directives have not been signed by the chairperson of the environmental council; that is, the Prime Minister. Thus, its making process is not completed. On top of that, 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.* When we come to the directives, as the law of the Federal Government, they have not been published in Negarit Gazeta. This means, no one is supposed to take judicial notice of its existence or its provisions. This can be taken to argue that the making of the directives is not yet consummated. After all, in our system law-making has five stages: initiation, discussion, approval, signature, and publication, whereas the directives are two steps short of consummation. Eventually, and legally speaking, what this means is that Ethiopia does not have a law telling us which actions (projects or public instruments) are subject to EIA and which are not. This has bearing on stakeholders' participation because proponents can refuse, legally speaking, doing EIA as there is no law, as required by the EIA Proclamation, listing projects and public instruments subject to EIA.[17] However, the practice shows somewhat a different scenario, as we will see later on. In any case, these and other factors have made the EIA Proclamation ineffective. In this regard, Ato Solomon Kebede, head of the EIA Department at the EPA, described the Proclamation as a skeleton without/with little flesh. According to him, although the EIA Proclamation was made years ago, it is as if it was never made because its desired outcomes are not being produced. He mentions the absence of implementing laws (particularly regulations) as a basic reason for the failure of the Proclamation to serve its purposes.[18]

At this juncture, one may wonder why the absence of laws implementing the EIA Proclamation is taken as a serious problem. This issue will be considered later on but for a moment we can say that some of the provisions of the Proclamation are too general and not susceptible to immediate consumption. For example, the Proclamation recognizes the

[17] Articles 5 and 9 of the EIA Proclamation require the EPA to issue directives (which is a law) specifying projects and public instruments that are subject to EIA.

[18] Interview with Ato Solomon Kebede, Head of the EIA Department of the Federal EPA, 7 and 8 September 2009

participation of the public in the EIA process. However, it does not tell us the mode, stage, and language, among others, of such participation. These are all relevant issues that could be resolved by subsidiary laws. Of course, the EPA has procedural guidelines pertaining to the EIA process.[19] However, there are problems with the guidelines, too. Firstly, they are not binding but set of 'rules' that show what should be done in the EIA process. Secondly, they have gaps in themselves. For example, they do not tell us whether stakeholders have the right to participate in the EIA or not rather than providing for the non-binding 'obligations' of proponents and environmental agencies to involve them in the process. Thirdly, there are no such guidelines pertaining to top level EIA (SEA). Therefore, the existence of the guidelines does not relive the government of its need to have subsidiary law(s) to implement the EIA Proclamation thereby facilitating stakeholders' participation in the EIA process.

2. Practice

As we have seen before, however inadequate it is, Ethiopia has some kind of policy framework requiring the use of EIA as a tool for decision-making. Moreover, it has established institutional framework such as the Federal EPA to put this policy framework into effect.[20] Of course, the Federal EPA bears the primary responsibility of ensuring environmental protection because it is authorized to issue directives necessary for the effective implementation of the EIA Proclamation, set environmental standards against which the impact of an action on the environment should be assessed, decide on actions that require EIA, ensure that EIA is done and give, after evaluation, authorization to project owners to implement their projects if they require EIA, etc.[21] The question then is whether EIA is done in practice and the EPA is ensuring that it is done, when so required, in accordance with the necessary requirements such as stakeholders' participation.

[19] There have been two Procedural Guidelines so far: Environmental Impact Assessment Guideline Document issued in 2000 and Environmental Impact Assessment Procedural Guidelines Series 1 issued in 2003. According to Ato Solomon Kebede and Ato Wondosen Sintayehu, speaking as guests to the Class of LL.M and PhD Programme, At Akaki Campus, AAU, on 17 November 2009, the later Guidelines have replaced the former.

[20] Environmental organs refer to the Federal EPA and regional environmental agencies. The Federal EPA was established in 1995 and re-established in 2002 by virtue of article 3(1) of the Environmental Protection Organs Establishment Proclamation, Proclamation No. 295/2002, which also requires the establishment of Regional Environmental Agencies.

[21] See articles 3(1), 6(7), 9 and 19, EIA Proclamation, supra note 5.

According to Dr. Tewolde Berhan Gebre Egziabher, EIA is actually done in relation to activities requiring EIA regardless of who is undertaking it, government agencies or private actors. Besides, he indicated that the Federal EPA plays a primary role in ensuring that it is done properly before issuing a permit.[22] Ato Solomon Kebede, also indicated that EIA is in fact done in practice although there are projects for which EIA have not been done even if they are subject to it according to their guidelines. Yet, Ato Solomon stated that no EIA has ever been done for public instrument.[23] Further, Ato Abraham Hailemelekot[24] and Ato Wondosen Sintayehu[25] confirmed that EIA is done in practice at least in relation to certain projects. Moreover, they indicated that the issue of public participation is considered at evaluation stage. Therefore, one can conclude that the EIA process in Ethiopia is working at least in relation to certain projects and there is a room for ensuring stakeholders' participation in the process. All the personnel I interviewed at the EPA mentioned that EIA is done by proponents[26] and the EPA evaluates their reports.

[22] On one occasion, I had the chance to attend a public lecture given by the Director of the Federal EPA where I was able to raise the following question: *we know that Ethiopia is undertaking different development activities. On the other hand, our EIA Proclamation requires that EIA must be done in respect of activities requiring prior EIA. So, is EIA really done in practice? If so, who ensures that it is done properly?* The Director then responded that EIA is actually done in relation to activities requiring EIA the EPA plays primary role in ensuring that it is done properly before issuing a go ahead permit with a project. Tewolde Berhan Gebre Egziabher, Director General, Ethiopian Environmental Protection Authority, Public Lecture on 7 May 2009.

[23] Interview with Ato Solomon Kebede, supra note 18

[24] Interview with Ato Abraham Hailemelekot, EIA Expert, Federal EPA, 24 August 2009

[25] Interview with Ato Wondosen Sintayehu, Acting Head, Environmental Policies and Legislation Department, Federal EPA, 24 August 2009

[26] Although this is a common practice in many countries, some doubt the objectivity of EIS conducted by proponents and argue that such approach is flawed. The underlying reason is the fact that companies will only start the EIS/EIA process after they have formulated a specific proposal that needs government's approval. Since most companies will act in their own self-interest most of the time, one can be confident that the EIS will focus primarily on what the proponent wants to do, not on, for example, alternative course of actions. See William L. Andreen, *Environmental Law and International Assistance: The Challenges of Strengthening Environmental Law in Developing World*, Columbia Journal of Environmental Law, V 25, No 17, 2000, p 48. Therefore, we can find places where EIA is not done by proponents but by government organs. For example, in the USA, the duty to conduct EIS is imposed on federal agencies, not proponents (unless the agencies themselves are the proponents). See sec 102 of NEPA (1969) and CEQ Regulations 1606.5 of 1999. Such position might be good because, it can be presumed, government organs are more sensitive to environmental needs than private actors and also avoid the problems professor Andreen raises. However, on the other side of the fence, one can also argue that these agencies may at times be in dilemma since they represent conflicting interests. Thus, speaking particularly from the perspective of developing or least developed countries, government organs may not be that sensitive to the environment than they are to the achievement of their primary objectives.

Now, if we know that EIA is done in practice we can consider the participation of stakeholders in the process of EIA. For the sake of convenience, we will consider such participation at two stages-when EIA is done by proponents and when it is evaluated by environmental agencies especially the Federal EPA after a brief introduction to stakeholders' participation in the EIA process.

II. Participation of Stakeholders in Environmental Impact Assessment Process

A. Who are the EIA 'stakeholders'?

As mentioned before, today, there is a growing consensus that timely and broad-based stakeholder involvement[27] in the EIA process is a vital ingredient for effective environmental assessment (EA). In fact, it is said that, experience shows that EIA that successfully involved broad range of stakeholders tended to lead to more influential EA and, consequently to development and delivered more environmental and social benefits whereas, conversely, EIA that failed to be inclusive tended to have less influence over planning and implementation, and consequently resulted in higher social and environmental costs. Thus, the vitality of stakeholders' participation in the EIA process seems unquestionable. However, who are *stakeholders*? They may be defined as all the people and institutions that have an interest in the successful design, implementation and sustainability of the project including those we may be affected by a project either positively and/or negatively. Thus, *stakeholders' participation* in the process of EIA may be defined as a process whereby all those with a stake in the outcome of a project can actively participate in decisions on planning and management to share information and

[27] Some people argue that terms stakeholders' 'involvement', 'consultation' and 'participation', which are used in the EIA guideline literature interchangeably, have certain differences. For example, according to Hughes, *stakeholder involvement* may be taken to encompass the full spectrum of interaction between stakeholders and the decision making process. As such, the term encompasses both consultation and participation. On the other hand, *participation* may be used to refer to a process by which stakeholders influence decisions which affect them. Thus, it may be distinguished from *consultation* by the degree to which stakeholders are allowed to influence, share or control decision-making process. Consultation implies a process with little share or control over the process by the consultees. See Ross Hughes, *Environmental Impact Assessment and Stakeholder Involvement*, included in Annie Donelly, Barry Dalal-Crayton, Ross Hughes, *A Directory of Impact Assessment Guidelines*, 2nd ed, International Institute for Environment and Development, 1998, p 22. In this writing, I will use the term *participation* to refers to the meanings Hughes gives to *participation* and *consultation*.

knowledge and to contribute to the project and its success to ultimately enhance their own interests. In this sense, the notion *stakeholders* includes, inter alia, government agencies, citizens groups, NGOs, recreational interest groups, expert groups, business affiliations and academic organizations. Some countries have adopted EIA guidelines in which they list stakeholder groups that should be considered contributors to the EIA.[28]

B. Relevance of stakeholders Participation in the EIA process

Generally, as we have seen in the preceding section, broad-based stakeholders' involvement in the EIA process is of paramount importance. Particularly, it is believed that different types of stakeholders can contribute to the EIA process in different ways. For instance, stakeholders' participation enables the EIA process to address relevant issues including those perceived as being important by other sectoral agencies, public bodies, local communities, affected groups, and others; harness traditional knowledge which conventional approaches often overlook; improve information flow between proponents and different stakeholder groups, improving the understanding and 'ownership' of a project; and ensure that the magnitude and significance of impacts has been properly assessed. Moreover, it enables project proponents to better respond to different stakeholders' needs, helps them identify important environmental characteristics or mitigation opportunities that might be overlooked; and also improves the acceptability and quality of mitigation and monitoring processes. Further, placing sufficient emphasis on stakeholders' participation in the EIA process can improve the predictive quality of environmental assessments since the prediction of impacts using EIA often requires multi-year information and good quality baseline which can be obtained form stakeholders groups, including those in local communities, who have greater potential to access a wider information resource-base and in some cases generations of cumulative knowledge of their local environment.[29] Therefore, in light of the above advantages, the participation of stakeholders in the EIA process is something which any system of environmental law cannot afford to omit. Such participation is not only environmentally beneficial but also political wise as it makes decision-making participatory; a good manifestation of democratic process particularly environmental democracy.

[28] For the discussion in this paragraph, see generally, Ross Hughes, Id., p 21-22
[29] Ibid

C. Constraints to Stakeholder Participation in EIA

Despite its paramount importance, the participation of stakeholders in the EIA process is constrained by myriad of factors which include time and money, literacy and language, low level education, cultural differences, gender, physical remoteness, political and institutional culture of decision-making, pressure imposed by the project cycle, mistrust and elitism, ambiguity in legislation and guidelines, and project size.[30] For example, many stakeholders lack the time or financial resources to engage in EIA processes. Non-literate groups are marginalized from EIA by the use of written media to communicate information. Materials necessary for stakeholders' participation are lacking in local languages. In many countries and regions, there is little or no culture of 'public' participation in decision-making whereas in some cases, public participation is perceived as a threat to authority and is viewed defensively by many government agencies and project proponents. Elitism or patriarchal approach is another constraint as many agencies and proponents adopt '*we know better approaches'*, and do not accept that stakeholders' involvement can improve the quality of development initiatives. Ambiguity of legislation and guidelines is also another important constraint to managing and encouraging more participatory environmental assessment processes. Further, achieving effective stakeholder involvement can be much more difficult for large scale projects. Finally, low level of education affects the meaningful participation of stakeholders in the EIA process. In this regard, mentioning what one villager in Bangladesh said is imperative. When he was asked whether he had 'participated' in the EIA process of a major flood control and irrigation projects that would radically alter his livelihood prospects, he responded: "if I were to be consulted, what would I say? You see, I'm just an ordinary man. I don't know anything. All I know is that one has to have meals everyday." Therefore, we can say that the innumerable benefits stakeholders' participation in the EIA process is capable of producing are countered by countless constraints.

[30] For detailed discussion on how these and other factors affecting the effective involvement of stakeholders in the EIA process, see Id, p 24-26

III. Participation of stakeholders in Environmental Impact Assessment in Ethiopia

A. Policy Framework

1. FDRE Constitution

The first place to look for the right of stakeholders to participate on matters affecting their interests is the supreme law of the land, a Constitution. In this regard, article 43(2) of the FDRE Constitution, which is the most pertinent provision to the issue at hand, stipulates that *nationals* have the right to participate in national development and, in particular, to be *consulted* with respect to policies and projects affecting *their community*.[31] There are few points worth emphasising here. Firstly, the Constitution deals with the right of *nationals*, not of stakeholders like people on the other side of a boarder (foreigners), citizen groups, NGOs or agencies. Thus, while all stakeholders are not granted the right to be consulted by the Constitution, the fact that nationals can be stakeholders in relation to matters affecting their community is clear. Thus, we can say that nationals, as stakeholders, have the right to engage in the EIA processes of policies or projects. Secondly, this right of nationals exists only in relation to policies and projects affecting *their community*. Some countries provide for the duty of a proponent to consult not only the community likely to be affected but others including members of the public, interested bodies and organizations with the mechanisms for consultation including scoping meetings, structured interviews, key informant interviews and written submissions.[32] For example, in USA, agencies undertaking EIS are supposed to involve the public or those persons and agencies who may be *interested* or *affected* by a given action.[33] Under our Constitution, however, the duty of a proponent pertains only to the community likely to be affected, not to any interested party. Thus, article 43(1) of the Constitution is too narrow to serve as a basis for claiming stakeholders' participation in the EIA process in general but that of nationals whose communities are likely to be affected by policies and projects.

[31] Emphases added
[32] Section 11(9) of the EPA law of the Guyana, See Mark Lancelot Bynoe, supra note 2, p 44
[33] See Sec 1506.6 of the 1999 CEQ Regulations on Public Involvement. Emphasis added. The Regulations also provide for ways of involving the public like NEPA-related hearings, public meetings, mailing information to those who request it, etc.

2. Environmental Policy of Ethiopia (EPE)

The 1997 EPE simply states that public consultation is an integral part of the EIA process. Accordingly, unless one interprets the term *public* to include all stakeholders, the Policy does not expressly recognize the right of stakeholders to participate in the EIA process.

3. EIA Proclamation

The other appropriate place to look for the right of stakeholders to participate in the EIA process is the EIA Proclamation. First of all, it should be noted that whether this Proclamation recognizes the right of nationals to be consulted with respect to policies and projects affecting their community or not, it should be read *into* it because that right is constitutionally guaranteed. Thus, the effort here is to look for something more with respect to the right of stakeholders to participate in the EIA process. In this regard, although the Proclamation does not contain any express stipulation, there are certain provisions which deal with public participation.

Article 6 Trans-Regional Impact Assessment

1. A proponent shall carry out the environmental impact assessment of a project that is likely to produce a trans-regional impact in consultation with the communities likely to be affected in any region.
2. ……
3. The Authority shall, prior to embarking on the evaluation of an environmental impact study report of a project with likely trans-regional impact, ensure that the communities likely to be affected in each region have been consulted and their views incorporated.

Article 9 Review of Environmental Impact Study Report

1. ……
2. The Authority and regional environmental agencies shall, after evaluating an environmental impact study report by taking into account any *public comments and expert opinions*, within 15 working days: (Emphasis added)
    a. approve the project without conditions and issue authorization […]
    b. approve the project and issue authorization with conditions […]
    c. refuse implementation of the project […]

Article 15 Public participation

1. The Authority and regional environmental agencies shall make any environmental impact study report accessible to the *public* and solicit comments on it.
2. The Authority and regional environmental agencies shall ensure that the comments made by the *public and in particular by the communities likely to be affected* by the implementation of a project are incorporated into the environmental impact study report as well as in its evaluation.

The above-mentioned three articles from the EIA Proclamation do have something to tell about the participation of stakeholders in the EIA process. First, article 6 imposes on proponents the duty to conduct EIA in *consultation* with the communities likely to be affected in any region. However, this duty exists only in relation to a project that is likely to produce trans-regional impacts. Besides, the duty of a proponent is limited to consultation of communities likely to be affected by this project in any region. Thus, a proponent may claim that it does not have the duty to involve stakeholders other than those belonging to the concerned communities. With regard to these communities, the Federal EPA is obliged to ensure that they have been consulted and their views incorporated prior to embarking on the evaluation of EIA report.[34] Therefore, we can now say that proponents do have the obligation to engage, through consultation, the communities that are likely to be affected by their projects when they do EIA. Nevertheless, it must be born in mind that article 6 does not recognize the right of these communities but the obligation of proponents although one may argue that the flip side of the proponent's obligation shows the right of the communities. Moreover, the article does not tell us the stage at which the proponent must consult the public; that is, at the preliminary assessment or preparation of the study, or both.

The other two articles, article 9 and article 15, provide for the role of 'stakeholders' at EIA report evaluation stage. Article 15(1) obliges the Federal EPA and regional environmental agencies to make EIA report accessible to the *public* and solicit comments

[34] At this juncture, a question whether the term *communities* includes communities in another country where a project is to be implemented around a boarder is not clear. Moreover, there are no guidelines adopted by the Federal EPA to clarify this point. But, as practice shows, the term is used to refer only to local communities, not those in another country.

on it. Then, article 15(2) obliges these organs to ensure that the comments made by the *public and in particular by the communities likely to be affected* by the implementation of a project are incorporated into the EIS report as well as in its evaluation.[35] Finally, article 9 obliges the Federal EPA and regional environmental agencies to take action on EIA reports, within 15 working days, after evaluating them by taking into account any *public comments and expert opinions*.

An interesting scenario here is the fact that, unlike article 6, articles 9 and 15 use the term *public*, not *communities likely to be affected*. Nevertheless, the EPA, according to Ato Solomon, has not yet come up with any legal or technical definition of the term *public*.[36] As a result, we do not know whether the term includes all stakeholders or only the people who may have special interest in EIA. However, the closer look at the provisions of the Proclamation conveys the message that the term *public* under these provisions refers to something more than the communities that are likely to be affected by a course of action. For example, while article 15(1) obliges the Federal EPA and regional environmental agencies to make EIA reports accessible to the public, article 15(2) obliges them to ensure the incorporation of the comments of the public *particularly* that of the communities likely to be affected. The term *particularly* shows that the *communities likely to be affected* are just one of the examples of what the term *public* intends to include. For example, article 9(2) makes the consideration *expert* opinions necessary for the evaluation of EIA reports. Thus, the term *public* under article 15(1) may be taken to include experts as part of stakeholders. Moreover, it is possible to get support from the existing literature in the field that the term *public* consists of not only the communities likely to be affected but also other stakeholders. For example, some writers define *public involvement* in the EIA process as *a process through which the views of all interested parties are integrated into project decision-making.*[37] From this definition, we can understand that the term *public* includes all interested parties or stakeholders.

[35] In this sense, one can argue that *consultation* seems similar to *participation* because the inclusion of the comments obtained through consultation shows that the public can influence decision-making.
[36] Interview with Ato Solomon Kebede, supra note 18
[37] *Public Involvement: Guidelines for Natural Resource Development Projects*, by Environment and Sustainable Development Division (ESDD), UNESCAP, 1997, p 4. This material is available online.

Therefore, unlike at the preparation stage, though less clear, we can conclude that the EIA Proclamation recognizes the participation of stakeholders in the EIA process at EIA report evaluation stage. However, this still is problematic to enforce because there are no binding instruments (such as regulations or directives) on how stakeholders or the public, in its broad sense, can participate on EIA through commenting on EIA reports. For instance, it is not known how the Federal EPA and regional environmental agencies should make EIA reports accessible to the *public* and solicit comments on them. Should they use TV, radio, public meetings, or make copies of EIA reports available to those who want to comment on them? Moreover, it is not known for how long these organs need to solicit comments on EIA reports. Yet, we know that once submitted, environmental organs must take action on EIA reports within 15 working days. This period is extremely short and it makes stakeholders participation at this stage extremely difficult. For example, in Guyana, the developer and the EIA consultant are required to publish a notice in a daily newspaper confirming that the EIA has been submitted to its EPA and members of the public have sixty days within which to make submissions.[38] In the US, usually 45-days comment period is given with the possibility of reduction or extension as the case may be.[39] Hence, even if the EIA Proclamation is somewhat broader than the Constitution in relation to the issue of stakeholders' participation in the EIA process, it is still plagued with inadequacies, something that could be rectified through subsidiary laws.[40]

[38] Section 11(9) of the EPA of the Guyana, See Mark Lancelot Bynoe, supra note 2, p 47
[39] Steven Ferry, supra note 1, p 86
[40] At this juncture, one may be tempted to conclude that the lack of subsidiary laws issued by the Council of Ministers and/or the Federal EPA for the effective implementation of the EIA Proclamation shows the absence of political commitment on the side of the government to implement the EIA law to the fullest extent possible. To clarify this point more, considering the implementation of a peer law in the filed of investment (means to development, the concept normally associated with environment) seems in line. In 2002, Investment Proclamation No. 280/2002 was made. This Proclamation was amended by Proclamation No.373/2003. To facilitate the implementation of the Investment Proclamation, the Council of Ministers issued Regulations No. 84/2003 which was amended by Regulation No. 146/2008. Now, the frequent enactment of laws in the field of investment implies that the government is paying attention to investment and its commitment to see to it that everything goes well in this field. However, when we see the EIA Proclamation which was made in the same year (2002) with the Investment Proclamation, it has never been amended; nor it has ever been supported by implementing regulations. The absence of instruments specifically designed to implement the EIA Proclamation makes it difficult for the Proclamation to produce the 'desired' result. It also makes things complicated for environmental organs and even proponents to discharge their duties under the Proclamation.

4. EIA Guidelines

The Federal EPA has had two procedural guidelines to facilitate the effective use of EIA. The first of such guidelines was issued in 2000. These guidelines, recognizing that the participation of stakeholders (interested and affected parties (IAPs))[41] at different stages in the EIA process is necessary, provide for the participation of stakeholders at the scoping, EIA performance, and review stages.[42] They also deal with the ways of involving stakeholders in the EIA process.[43] In 2003, the EPA issued the EIA Procedural Guidelines Series 1 of 2003 replacing the 2000 guidelines.[44] Like its predecessor, these guidelines also recognize that the participation of stakeholders (IAPs) in the EIA process at various stages is necessary. However, unlike the 2000 guidelines, the 2003 guidelines are less clear on the stages at which stakeholders can participate in the EIA process. Of course, the guidelines stipulate that scoping should involve stakeholders. But, with regard to the participation of stakeholders at the other stages, we need to relay on interpretation. For example, when EIA is done, proponents should involve stakeholders even if the guidelines do not expressly require this for two reasons. First, the evaluating authority is supposed to consider the extent of stakeholders' participation in the EIA process for approval. This forces proponents to engage stakeholders in the EIA process. Moreover, since the EIA proclamation requires consultation at least for the communities concerned, then we can read this element into the guidelines. The other lack of clarity in the latter guidelines pertains to the review/evaluation stage. They do not impose duty on evaluating agencies to involve stakeholders in their evaluation process. Yet, it stipulates that its decisions should be *consultative* and *participatory*, an expression that is likely to be understood as referring to consulting and participating stakeholders. Moreover, since the

[41] Both guidelines define *interested and affected parties* as individuals or groups concerned with or affected by an activity or its consequence including local communities, work force, consumers, customers, environmental interested groups and the general public. Thus, the term IAPs can be equivalent to stakeholders. See the definitional parts of both guidelines.

[42] See Federal Democratic Republic of Ethiopia Environmental Protection Authority Environmental Impact Assessment Procedural Guidelines Document, Addis Ababa, May 2000, Paragraphs 3.1.3, 3.4, and 3.5

[43] Paragraph 3.4 of the Guidelines Document lists, among others, public meetings; telephonic surveys; exhibits, displays and "open days"; newspaper advertisements; written information; surveys, interviews and questionnaires; working with established groups; and workshops and seminars as methods of ensuring stakeholders' participation in the EIA process.

[44] See Federal Democratic Republic of Ethiopia Environmental Protection Authority Environmental Impact Assessment Procedural Guidelines Series 1, Addis Ababa, November 2003. The relevant paragraphs of these guidelines include paragraphs 5.2.3, 5.2.6, 6.3, and 6.4.

EIA proclamation requires gathering comments from the public and experts, stakeholders (may not be all of them, though) can participate in the EIA process at this stage as well. In any case, the guidelines we have in place provide for stakeholders' participation in the EIA process. However, two points ought to be borne in mind at this juncture. Firstly, the guidelines do not make stakeholders' participation necessary at every state of EIA although they clearly state that their participation at various stages is relevant. Secondly, these guidelines do not have the status of law. This means, they can only be taken as soft rules governing the conducts of concerned parties such as proponents, consultants, and the EPA. However, the EPA can give these guidelines force of law either by changing them to directive or by denying proponents environmental clearance if they do not follow the principles/rules set out in the guidelines like the ones relating to stakeholders' participation.

B. Practice

As we tried to see before, EIA is done in Ethiopia at least in relation to certain projects. Moreover, we have considered that the involvement of stakeholders in the EIA process is indispensable for its effectiveness. Further, we have also considered that, although they do not make exactly the same stipulations, the Constitution, EPE, EIA Proclamation, and the guidelines create policy frameworks for stakeholders' participation in the EIA process in Ethiopia. Therefore, we will now see whether such participation has been taking place in practice, too.

1. At performance stage

Although proponents should involve stakeholders particularly the communities that are likely to be affected when they do EIA, according to Ato Solomon, it is extremely difficult to conclude that such participation exists in practice. In this regard, he mentioned the absence of binding instrument pertaining to stakeholders' participation in the EIA. For example, issues on how proponents should communicate with stakeholders, for how long, at what stage, what language to use, etc could be resolved in a binding instrument (directive or regulations) specifically dealing with stakeholders' participation.[45]

[45] Although the existing guidelines deal with some of these issues, they don't deal with them comprehensively. Moreover, they are not binding.

Moreover, he indicated that many EIA reports are fictitious on the participation of the concerned communities. For instance, he indicated that there have been instances where comments, names, signatures, etc of supposed communities were forged. At times, he stated that EIA is done by a single person who sits in his/her office and ticks in a checklist table. In this case, there is no way, let alone for stakeholders in general, even for the communities likely to be affected, to participate in such EIA process, if there is an EIA process after all! Further, Ato Solomon indicated that regional environmental agencies do not ensure the participation of the public (stakeholders) in the EIA process for various reasons such as lack of independence and fear not to be treated as anti-development agents. As far as the participation of the communities that will be affected by the implementation of public instruments is concerned, that has never happened before since no EIA has ever been done for such instruments because the EPA has not yet indicated which public instrument is subject to EIA and which is not.[46]

2. At evaluation stage

As stated before, the EIA Proclamation obliges the EPA and regional environmental agencies to make EIA reports accessible to the public and solicit comments thereon. However, the EPA has not yet clarified what this term *public* includes. But as we have tried to see before, the sane interpretation of the Proclamation on this point conveys the message that all stakeholders-communities likely to be affected, experts, NGOs, agencies, etc-are included. The practice also shows that the EPA is involving entities like NGOs and agencies which may have stakes in a given EIA. In this regard, Ato Solomon said that EIA reports are sent out to stakeholders including NGOs.[47] Moreover, I have interviewed officials from two government agencies which are very much interested in participating in the evaluation of EIA reports. These agencies are the Ethiopian Institute of Biodiversity Conservation (IBC) and the Ethiopian Wildlife Development and Conservation Authority (EWDPA). The two agencies are highly interested in having EIAs done because development activities not preceded by proper EIA will jeopardized

[46] Interview with Ato Solomon Kebede, supra note 18.
[47] Public Lecture, Ato Solomon Kebede and Ato Wondosen Sintayehu, at Akaki Campus, AAU, 17 November 2009

the accomplishment of their missions. Accordingly Ato Yeneheh Teka[48] said that sometimes the EPA sends EIA reports to EWDCA for comments and this usually happens when the areas where proposed projects are to be implemented concern EWDPA. Moreover, Ato Fanuel Kebede[49] stated that EWDCA sometimes gets that chance to participate on the evaluation of EIA reports and this happens usually when the EPA seeks its comments on EIA reports thinking that the interest of EWDCA is at stake. In this regard, the EPA thinks that EIA evaluation should involve EWDCA when a project is to be implemented in protected areas such as wildlife sanctuaries, parks, and reserves. Moreover, some IBC personnel[50] believe that the IBC is a stakeholder in the EIA process of projects that are likely to affect biodiversity. Thus, they argue that the IBC should take part in the evaluation of EIA reports of such projects. Fortunately, the EPA sometimes sends to the IBC some EIA reports for comments before it acts upon them. However, they have indicated that often times the EPA marginalizes the IBC thinking that it would comment on EIA reports negatively.

Therefore, we now know that EIA at evaluation stage is to some extent participatory because at least some agencies and NGOs are taking part in the process. However, according to Ato Solomon, there are still problems as far as engaging broad-based stakeholders in the EIA process at this stage is concerned.

I. Problems and Prospects

A. Problems

Ethiopia is a country with a very long way to go to bring about development. This requires making countless decisions and undertaking numerous projects. However, such measures must not be counterproductive. In this regard, EIA helps in avoiding their counter-productivity, whereas effective EIA requires the meaningful participation of stakeholders in the process. Nevertheless, such participation is countered by many constraints, some of which are highlighted below.

[48] Interview with Ato Yeneneh Teka, Director, Wildlife Development and Protection Authority, 31 August 2009

[49] Interview with Ato Fanuel Kebede, Senor Wildlife Expert, Ethiopian Wildlife Development and Protection Authority, 31 August 2009

[50] Interview with some people at the IBC, who demanded anonymity, on 1 September 2009

1. Lack of Subsidiary Laws

As stated repeatedly, due to lack of *binding* subsidiary laws, the provisions of the Constitution and the EIA Proclamation relating to 'stakeholders' participation in the EIA process could not effectively be implemented. The EPA by itself sees the absence of such laws as a major blow to the system of effective EIA in the country.

2. Level of Education

This applies to the public in particular. Large part of our public is not aware of what EIA is worth. Moreover, we do not know whether we can claim participation in the EIA process. Thus, the public is not making, firstly, claims, and secondly, meaningful participation in the EIA process thereby denying our system of EIA the benefit of stakeholders' participation.

3. Mistrust

It was claimed by some stakeholders that the EPA does not trust some stakeholders. Firstly, it thinks that they are predisposed; they are going to say no to the EIA reports. For example, IBC and EWDCA think that EPA does not trust them. Secondly, according to Ato Solomon, the EPA does not think that stakeholders will give their comments on EIA reports timely which leads the EPA to prefer deciding on such matters without sending them to stakeholders. These factors will eventually have a negative impact on the EIA because it will widen the gap between the EPA and stakeholders rather than bridging it.

4. Lack of independence and wrong perception about the relationship between EIA and Development

Regional environmental authorities are expected to ensure that EIA is done and it is done in accordance with all the procedural requirements. Thus, they have to check whether there was stakeholders' participation in the process or not before they approve of EIA reports. However, according to Ato Solomon, there are two problems here. Firstly, these authorities are not independent. Thus, they have to do what their bosses expect them to do, which is approving EIA reports. Secondly, they fear that if they say no to EIA reports, they will be treated as *anti-development agent*. This shows that there is a mistaken

understanding that EIA is an obstacle to development endeavours although the ultimate effect of EIA is the opposite; viz, making development sustainable.

5. Non-publication of EIA reports for comments

It was also said that EIA reports are not published. This is basically so because there are no guidelines on how to making them public. The EPA is supposed to gather the comments of the public and experts. However, there is nothing said in the law as to how to do this.

B .Prospects

Although the system of EIA in Ethiopia is plagued by constraint, there is no reason to be absolutely pessimistic about it. A look at what is happening shows that there are glimmers of hope that things may get better. According to Ato Solomon, the following prospects can be mentioned as signs of hopes. Firstly, sectoral agencies' attitudes towards EIA are changing as they have started appreciating the purpose of EIA. Secondly, civic societies are taking EIA seriously. For example, they participate in the evaluation of EIA. Moreover, NGOs such as *Melkea Mehiber* have, after showing through study that EIA in Ethiopia is not effective so far, prepared a draft amendment to the EIA Proclamation and submitted it to the EPA with the view to avoiding the inadequacies in the Proclamation. Thirdly, the public is gaining awareness about the environment in general and EIA in particular. Fourthly, some local financial institutions have shown interest to use EIA as a requirement for the relation they establish with investors.[51] Therefore, if these and other prospects come true, without any doubt, Ethiopia will have a better system of EIA.

Conclusion and recommendations

As we have tried to see, although there is no express provision on the right of stakeholders (in its broader sense) to participate in the EIA process, the FDRE Constitution, the EIA Proclamation, the EPE and the Guidelines provide for some possibilities for them to participate in such process. As a result, stakeholders are participating in the EIA process in practice. However, such participation is limited due to

[51] Interview with Ato Solomon Kebede, supra note 18 and Public Lecture by Ato Solomon Kebede et al, supra note 50

problems such as the absence of laws implementing the EIA Proclamation. For example, there has not been law which lists actions which are subject to EIA and which are not. Moreover, no EIA has ever been done in relation to public instruments. Further, the role of stakeholders in the EIA process is not clearly spelt out. All these could be done in implementing laws such as regulations and directives.

To have effective stakeholders' participation in the EIA process in the country, the following recommendations should be taken into account. Firstly, subordinate laws such as Regulations and Directives spelling out the rights and duties of stakeholders, the methods of their participation and the corresponding obligations of proponents and environment agencies to ensure their participation at various stages should be made. Secondly, the EPA should revise its guidelines so as to clearly provide for the right of stakeholders to participate in the EIA process at every stage. Besides, it must make these guidelines mandatory code of conduct either by changing them to directives or by invariably using them to grant environmental clearance. Third, the EPA proclamation should be amended so as to create conducive environment for stakeholders' participation. For instance, article 9 of the Proclamation which requires the EPA to take action on EIA reports within 15 days should be amended as this is a very short time to engage stakeholders on EIA evaluation. Fourthly, the EPA should have a real commitment to engage stakeholders in practice as well. Finally, NOGs should raise stakeholders' awareness so that they can make meaningful participation in and contribution to the EIA process.

The Human Rights Discourse in Perspective: Cultural Relativism and Women's Vulnerability to HIV/AIDS

Mizane Abate*

Introduction

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution)[1] is unparalleled by its predecessors in terms of recognizing the right of ethnic groups (nations, nationalities and peoples) to develop their cultures. The position taken by the Constitution is highly laudable in view of the past history of assimilation that threatened the very identity of different cultural groups. Not only does the FDRE Constitution recognize cultural rights, it also incorporates provisions on the rights of women that are instrumental to emancipate them from their historical subordinate position in society. The rights of women is also given an important place in international and African regional human rights treaties which Ethiopia has ratified and which are made part and parcel of the law of the country.

While no one can legitimately challenge the necessity of the commitment of the Ethiopian Government to protect and promote the rights of ethnic groups to develop their cultures and the rights of women, human rights activists fear that cultural rights may undermine the rights of women, if not judiciously exercised. This article shares the same concern. Relying on empirical and quantitative researches undertaken by other authors, this article critically examines how subscription to cultural relativism (giving precedence to cultural practices over human rights) may exacerbate women's vulnerability to HIV/AIDS.

The article consists of five sections. The first section gives an overview of the position of universalists and cultural relativists in the human rights debate. Section two highlights the downsides of cultural relativism. Chapter three, then, indentifies the different gender specific factors that put women in higher risks of HIV infection in Sub-Saharan African including Ethiopia. The Fourth section, drawing data from different sources, shows how the different

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[1] Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazeta*, 1st Year, No.1.(Herein after referred to as the FDRE Constitution).

cultural practices whose continuous existence is defended by cultural relativism aggravate women's vulnerability to HIV/AIDS. Finally, the fifth section figures out the conflict between Ethiopian commitment to the protection of the rights of women and rights of ethnic groups to develop of their culture. The article concludes by unfolding that cultural rights in Ethiopia have, to some extent, been abused to promote cultural relativism stances at different levels.

I. The Universalism vs. Cultural Relativism Discourse: An Overview

The old debate between those who advocate for the universality of human rights (universalists) and those of who promote cultural relativism (cultural relativists) continue even today in politics and academic world. Universalists argue that human rights apply to everyone and, therefore, that the norms contained in various international and regional human rights instruments must be applied consistently despite cultural, religious, or other differences across countries. Cultural relativists reject the universal application of human rights and posit that since human rights are based on Western political tradition, they are extraneous to other societies. The rationales for each position are discussed below.

A. Universalism

Universalists claim that human rights have universal significance and are the equal property of all human beings. This claim rests on the premise that human nature is universal. From this premise, Universalists go on to argue that since human rights belong to individuals by virtue of simply being human and since humanity or human nature is universal, then logically so should human rights.[2] From this, it follows that birth into a particular, religious, cultural and social group is tonally immaterial to his or her entitlement to fundamental rights and freedoms. Every human being is entitled to the equal enjoyment of human rights. Another aspect of the universality of human rights is that 'since being human cannot be renounced, lost, forfeited or impaired, human rights are inalienable'.[3]

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[2] J Donnelly, *International Human Rights*, Westview Press, Boulder, 1998, P.18. See also B G Ramcharan *Contemporary Human Rights Ideas* (2008) 54; F Spagnoli, *Making Human Rights Real*, Algora Publishing, New York, 2007, p. 11; and R Pannikar, *Is the Notion of Human Rights a Western Concept?*, Diogenes, Vol.120, 1982, P. 75; and B Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, Human Rights Quarterly, Vol.22, 2002, p. 839.

[3] Ibid.

Universalists do not purport to deny the West as an origin of human rights. Although they originated in the West, they are still relevant to other parts of the world because, they argue, the human rights regime is developed as a response to experiences of gross human rights violations by modern states that in way or another affected all human beings.[4]

The universality of human rights is nowadays accepted by a great majority of states of the world albeit ideological and levels of economic development.[5] This is evident from two facts. Firstly, the international human rights instruments themselves unequivocally stipulate the universality of human rights norms. For example, the Vienna Declaration and Programme of Action (Vienna Declaration) in no uncertain terms declares that '[t]he universal nature of these rights and freedoms is beyond question'.[6] The Universal Declaration of Human Rights (UDHR), on its part, states that the Declaration is 'a common standard of achievement for all peoples and all nations'.[7]

Secondly, the universal acceptance of human rights can be deduced from the nearly universal ratification that the major international human rights treaties enjoyed.[8] While the wide ratification of international human rights treaties may be a plain evidence of the universality of human rights, their actual effective implementation, in some cases, has been greatly hindered by the sweeping reservations entered by states.[9] To take the Convention on the Elimination of

[4] R Afshari, *Human Rights in Iran*, University of Pennsylvania Press , Philadelphia, 2001, p.10.
[5] J Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, 2002, p. 1.
[6] The Vienna Declaration and Programme of Action (1993) para.1. The Vienna Declaration was the products of the 1993 Second World Conference on Human Rights which was attended by 171 states.
[7] Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, preamble. A considerable number of government and scholars nowadays contend that many of the provisions of the Universal Declaration of Human Rights has attained the status of *jus cogens*, norms which secured universal acceptance and from which derogation is not allowed. See M Sepulveda, *Human Rights Reference Handbook*, University for Peace, 2004, P.14.
[8] For example, United Nations Convention on the Rights of Child, the International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights are ratified by 193, 165 and160 states respectively. For ratification status of international human rights instruments, visit http://treaties.un.org/Pages/ Treaties.aspx?id=4&subid=A&lang=en.
[9] L A Hoq, *The Women's Convention and Its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights*, Columbia Human Rights Law Review,Vol.32, 2001, p. 689. A reservation is 'a unilateral statement... made by a State, when signing, ratifying... or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.' Vienna Convention on the Law of Treaties of 1969, entered into force on 27 January 1980, art.2 (d).

Discrimination Against Women (CEDAW) as an example, more than 90 percent of the world's states, one hundred eighty six states, have ratified the Convention.[10] This is nearly a universal ratification. It is achieved, however, at a great cost. More than half of the States Parties to the Convention have entered reservations which limit the scope of the application of the Convention.[11] What is more worrying is not just the number or scope of the reservations that states entered, rather the reasons states have given for their reservations. Many states enter reservations to protect religious and cultural beliefs and practices of their communities.[12] As will be discussed later, religious and cultural practices are the major impediments to the universal application of human rights.

Even in states that do not enter reservations, recognition and giving effect to autonomy to cultural groups in multicultural and multiethnic states is increasingly challenging the universal application of human rights norms.[13] These countries, on the one hand, enter into obligations to prompt and protect human rights within their jurisdiction, but legalize, or at least condone, in their domestic laws, practices and customary laws that infringe human rights under the cover of respecting cultural rights of different ethnic groups, on the other hand. In Ethiopia, for example, the FDRE Constitution approves the adjudication of disputes relating to personal or family matters in accordance with customary and religious laws.[14]

B. Cultural Relativism

The main challenge against the universal relevancy of human rights comes from cultural relativists. While cultural relativists have variants, Brems identified their typical line of argument

[10] Convention on the Elimination of All Forms of Discrimination against Women, adopted and open for signature, ratification, and accession by General Assembly resolution 34/180 of 18 December 1979, entered into force on 3 September 1981. For ratification status of CEDAW, visit http://treaties.un.org/Pages/ViewDetails.aspx?src =TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

[11] For specific reservations, visit http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/309/97 /PDF/N0630997 .pdf?OpenElement.

[12] For example, the following counties made reservation invoking the Shari'ah either directly or indirectly: Bangladesh, Egypt; Iraq, Kuwait, Libya, Malaysia, Maldives, Mauritania, Morocco, Saudia Arabia, Syrian Arab Republic, United Arab Emirates, Pakistan, Tunisia, and Niger. Other countries enter reservations invoking cultural and other beliefs of distinct communities. See, for example, the reservations entered by Singapore and India. The whole reservation is available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/ 309/97/PDF/N0630997.pdf? OpenElement .

[13] D O Sullivan, *Is the Declaration of Human Rights Universal?*, Journal of Human Rights, Vol.4, 2000, P. 25.

[14] FDRE Constitution, supra note 1, art.34 (5).

as follows.[15] In a first step, cultural relativists put a premise that shows how human rights historically and conceptually reflect western values. [16] At this step, they venture to explain the fact that an autonomous individual is at the heart of the Western conception of human rights with minimal or no attention to group rights. From historical perspective, they claim that human rights were crafted by the victorious states, mainly Western states, at the conclusion of World War II. In the second step, cultural relativists highlight and compare some particulars of a non-Western culture with those Western concepts. The conclusion from these two premises is rejection of human rights.[17] For example, African cultural relativists posit that rights as conceived in the west have no significance in Africa precisely because their philosophical basis is not only different but indeed opposite. They contend that autonomous and rational individual on the basis of which the Western constructed human rights rests is unknown in Africa. Pollis argues that:[18]

> Traditional cultures [in Africa] did not view the individual as an autonomous and possessed of rights above and prior to the society. The basic unit of traditional society has varied the kinship system, the clan, the tribe, the local community-but not the individual. Who and what an individual has been conceptualized in terms of the kinship system, the clan, the tribe, the village, whatever the specific cultural manifestations of the underlying prevailing worldview.

Although cultural relativists take the same stance in terms of rejecting human rights, they exhibit variations with respect to their level of rejections.[19] Some cultural relativists reject human rights in their totality as foreign to and unsuited with a certain non-Western Culture. This position has very few proponents. In most cases, cultural relativists either refuse the specific content or interpretation of human rights.[20] For instance, members of a certain culture might object to its

[15]Eva Brems, *Enemies or Allies: Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 Human Rights Quarterly, Vol.19, 1997, P.142.
[16] Eva Brems, supra note 15, p.143. See also, C M Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, Human Rights Quarterly, Vol.16, 1994, p.741.
[17] Ibid.
[18] A Pollis 'Liberal, Socialist and Third World Perspectives of Human Rights', In P Schwab and A Pollis (eds.) *Toward a Human Rights Framework*, Praeger Publishers, New York, 1982, p.1.
[19] Eva Brems, supra note 15, P.143. Similar sub-divisions are made by: J Donnelly, *Cultural Relativism and Universal Human Rights*, Human Rights Quarterly, Vol.6, 1984, pp.400-401; and D L Donoho, *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*, Stanford Journal of International Law, Vol.27, 1991, p.345.
[20] Eva Brems, supra note 15, pp.143-144.

encompassing the freedom to change one's religion.[21] For example, when the General Assembly of the United Nations had to decide on the UDHR, in 1948, the Saudi Arabian representative rejected religious liberty, particularly to the right to change one's religion, a right explicitly stipulated under article 18 of the UDHR.[22] Finally, while cultural relativists accept a certain right with all its elements, they might insist arguing a particular cultural practice does not amount to a violation of human rights.[23] To take an example, cultural relativists might argue that female genital mutilation (FGM) does not violate the right to be free from torture.

C. Is Cultural Relativism Plausible?

Basically, cultural relativists reject human rights on the ground that human rights are the reflection of Western culture and, hence, they are alien to non-Western cultures. Is this argument sustainable?

As I have pointed out earlier on, although human rights are the construct of the West, their emergence and development was a response to abuses of the modern state in treating its nationals and aliens. In particular in the aftermath of World War II, human rights came out as a 'revulsion against Nazism and the horrors that could emanate from a positivist system in which the individual counted for nothing'.[24] One can say that the United Nations Charter, the UDHR and other human rights documents have been put in place with a view to 'search for immutable principles to protect human dignity and worth of human person against such brutality.[25] In other words, human rights aim at protecting human dignity and worth of human person. In Africa, 'the concept of human rights as it is used today has strong roots in the struggle against colonialism and the vestiges of colonialism'.[26] The acceptance of the African Charter on Human and Peoples' Rights (ACHPR) in 1981 by the Organization of African Unity (OAU) was partly a reaction specifically to the abuses of human rights in Uganda, Equatorial Guinea and the Central African Republic.[27] If human rights were invented as reaction to abuse of power by states and

[21] Ibid.
[22] H Bielefeldt, *Muslim Voices in the Human Rights Debate*, Human Rights Quarterly, Vol.17, 1995, p. 587.
[23] Eva Brems, supra note 15, P.144.
[24] JJ Shestack, *Philosophical Foundations of Human Rights*, Human Rights Quarterly, Vol.20, 1998, p.210.
[25] Ibid.
[26] C Heyns 'A Struggle Approach to Human Rights', In Heyns and Stefiszyn (eds.) *Human Rights, Peace and Justice in Africa: A Reader*, Pretoria University Law Press, Cape Town, 2006, p.19.
[27] Id., p.20.

their purpose is to protect human dignity and the worth of human person, the argument that human rights are not relevant for the non-Western word does not hold water.

Moreover, given the fact that the recognition of the basic personal rights, such as the right to life and body integrity of the person; and protections against slavery, arbitrary arrest, detention, and torture, inhumane or degrading treatment are connected to the dignity of every human being alike, it is nearly impossible to raise cultural arguments against them.[28]

With respect to the claim that human rights are an imposition of the culture of the West on the non-West, this can hold true if human rights are totally strange to other non-Western cultures.[29] This is not, however, true. As Spagnoli rightly put it, 'all cultures have values and principles that reflect the values embedded in human rights'.[30] In any customary law in Ethiopia and elsewhere, for instance, homicide is forbidden and entails serious penalties, albeit the penalties may vary from one culture to another. This is in recognition of the right to life, one of the rights strongly protected in human rights instruments.

The rejection of human rights as a Western culture seems to be funny in view of the widespread of real Western culture in many parts of the world. I am not here advocating Western culture as the best culture. The point I am trying to make is that while the Western culture has been a dominant culture and set a standard in many respects, why do cultural relativists single out human rights and reject as a Western culture, which actually are not? Culture 'encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs'.[31] If culture includes the lifestyle of a given community, the Non-West has copied many of the aspects of the Western culture. Traditional African communities, for instance, used domestic animals like donkeys, mules and horses to travel long distances. Nowadays, they use cars that are originally produced in the West at least in urban areas. Not only does the West contributes modern means of transportation to the other parts of the world, it also affects the non-

[28] J Donnelly, supra note 19,P.417.
[29] F Spagnoli, supra note 2, p.17.
[30] Ibid.
[31] UNESCO's Universal Declaration on Cultural Diversity (2001), Preamble. It is approved by 190 member states. It defines culture as '[t]he set of distinctive spiritual, material, intellectual and emotional features of society or a social group'.

West in dressing style, music, language and other ways life. Thus, it seems absurd to reject human rights while emulating the Western culture in many respects.

Another unfounded claim made against the application of human rights in non-Western societies is that application of human rights means loss of culture of these societies.[32] In the first place, it must be clear that the protection and promotion of human rights does not entail the abandonment of the entire culture and indentify of a given community. In the second place, why do cultural relativists insist that any aspect of culture including those cultures that demean human rights must not change? The problem with cultural relativists is that they always take for granted that culture is static. This stance is, not, however, supported by the reality. Cultures are undergoing substantial transformation in the case of much of the Third World. [33] If it is inevitable that cultures may change, it is better to guide the change in the direction that benefits human beings more.[34]

The inescapability of cultural transformation is evident from the way cultures are initially constructed. In most cases, cultures are developed and perpetuated by members of a given society that benefit from it. To take African customary law as an example, Chanock portrayed it as 'a masculinist construct reflective of a masculinist state and protecting male interests'. [35] As long as cultures are constructed by the dominant members of a community to their benefit, the other members of the community who are subject to cultural repression will always push towards transforming the oppressive culture.

The argument that human rights threaten cultures becomes more unacceptable when one realizes that cultures benefit from human rights protection than losing therefrom.[36] Rights, such as freedom of association, rights of indigenous peoples, freedom of religion, the rights of

[32] Hoekema, for example, argues that '[m]atters of polygamy, arranged marriages and dowry, inheritance patterns, adoption practices and such like are often identity-related and figure as central features of a community's way of life. Put in other way, not protecting these features would amount to forcing the community to assimilate and give up party of its cultural identity'. See A J Hoekema, *Aspects of Legal Pluralism in the Federal Set-up of the Ethiopian State*, Ethiopian Journal of Development Research, Vol.24, Number 2, 2002, p.23.
[33] J Donnelly, supra note 19, p.418.
[34] F Spagnoli, supra note 2, p.15.
[35] M Chanock, *Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform*, International Journal of Law and Family, Vol.3, 1989, *p.*72.
[36] F Spagnoli, supra note 2, p.16.

minorities, the right to non–discrimination, freedom of thought and expression create a conducive environment for the protection and promotion of cultures.

II. Women's Gender-Specific Vulnerability to HIV/AIDS in Sub-Saharan Africa

AIDS continues to be a major global health problem. AIDS-related illnesses remain one of the leading causes of death.[37] Its effect is not, however, uniform among the different members of the society. It disproportionally affects Women and girls in sub-Saharan Africa.[38] Women's vulnerability to HIV in Sub-Saharan Africa stems from a mix of physiological, social and human rights factors.[39]

Most African women become infected with HIV through unprotected sexual intercourse. Studies made it clear that male-to-female sexual transmission of HIV is much greater than female-to-male transmission.[40] The major factors that account for this greater variation in transmission 'are the large mucosal surface area exposed to the virus in women, and the greater viral concentration in semen compared with vaginal secretions'.[41]

The biologic realities that expose women more to the virus are surpassed by social and human rights factors that increase women's vulnerability to HIV infection. [42] These factors include: harmful traditional practices, sexual violence, such as rape, and other socio-economic factors which limit women's capacity to protect themselves.[43] Rape and other forms of sexual assault diminish the power of women to control when, with whom, and how they perform sex, which in turn considerably increase their HIV infection.[44] Lack of economic independence of women also

[37]AIDS Epidemic Update, 2009, p.8, available at: http://data.unaids.org/pub/Report/2009/JC1700_Epi_Update_2009_en.pdf .
[38] Id., p.21.
[39] Amnesty International, *Women, HIV/AIDS and human rights*, 2004, available at: http://www.amnesty.org/en/library/asset/ ACT77/084/2004/en/dom-ACT770842004en.pdf.
[40] Ibid.
[41] S D Tlou 'Gender and HIV/AIDS', In Max Essex *et al* (eds.) *AIDS in Africa*, : Kluwer Academic Publishers, New York, Boston, Dordrecht, London, & Moscow, 2002, p.654.
[42] Ibid.
[43] Amnesty International, supra note 39. See also S D Tlou, supra note 41, p.655.
[44] World Health Organization, *Violence against Women and HIV/AIDS: Setting the Research Agenda*, World Health Organization, Geneva, 2000, p. 6.

fuels their susceptibility to HIV/AIDS. It is an obvious fact that women are generally economically dependent than men particularly in Sub-Saharan Africa. Consequently, economically dependent women will be more submissive to their spouses' sexual request even in risky situations; for fear that they will be abandoned by their spouses.[45] Moreover, poverty may compel women to change sex for food or other needs.[46]

Cultural practices that fuel women's special vulnerability to HIV, which is the main concern of this article, are intensely and separately treated in the next section.

A. Cultural Practices that fuel Women's Vulnerability to HIV/AIDS

There are several cultural practices that abuse the rights of women and significantly increase their vulnerability to HIV/AIDS. These practices, whose never-ending prevalence is upheld by cultural relativism, are briefly discussed in the following sub-sections.[47]

1. Polygamy

Polygamy, a practice that has existed for ages, allows a man to marry more than one wife. It is widely practiced in many countries, particularly in Africa.[48] In Ethiopia, around 15 percent of Proportion of women aged 15–49 live in polygamous unions.[49]

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[45] J L Andreeff, *The Power Imbalance between Men and Women and its Effects on the Rampant Spread of HIV/AIDS among Women*, Human Rights Brief, Vol.9, 2001, p. 24. See also, Human Rights Watch, *Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda*, 2003, available at: http://www.-hrw.org/reports/ 2003/uganda0803/index.htm.

[46] Facing the Future Together, *Report of the United Nation Secretary General's Taskforce on Women, Girls and HIV/AIDS in Southern Africa*, 2004, p.9.

[47] The subsequent discussion does not make an exhaustive analysis of all traditional practices that exposes women to HIV/AIDS. It only explores those practices that are practiced in Ethiopia as well. Traditional practices that are not covered include the following. "Dry sex", which also increases the likelihood of abrasion and thereby of HIV infection and virginity testing. See, Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya*, 2003, available at: http://www.sarpn.org.za/documents/d0000333/P313_Kenya_Report.pdf.

[48] United Nations Children's Fund, *Early Marriage: a Harmful Traditional Practice: a Statistical Exploration*, 2005, p.18.

[49] Id., p.19. Polygamous marriages still exist in Oromia, Somali and other regions of Ethiopia. During community conversation in Yabelloo, Boorana Oromo, polygamy was one some of the risky cultural practices indentified in the area along with -Lover- Mistress relationships *(Jaala-Jaalto)* and Widow inheritance *(Dhaala).* The Boorana Oromo, one of the pastoral communities in Ethiopia and are still largely governed by their traditional institutions, uses an innovative tool to enable traditional communities to reflect on their socio-cultural dynamics and social capital formation to deal with issues of HIV/AIDS and other community needs driven agendas. See I A Elemo, *HIV/AIDS, Gender and Reproductive Health Promotion: The Role of Traditional Institutions Among the Borana Oromo, Southern Ethiopia,* Artistic Printing Enterprise, Finfinne, 2005, p. 81.

In old times, polygamy was justified by 'sexual abstinence during pregnancy in societies where sexual intercourse' was a 'taboo during periods of pregnancy, menses, lactation, mourning, and ritual ceremony periods';[50] and giving 'security to childless women'. [51] It served as an instrument of sexual abstinence during the said times as the husband would have sex with one of his other wives. It also gives sterile women some sort of security because their husbands can marry additional wife instead of divorcing them.[52]

Polygamous marriages are, nevertheless, less acceptable these days. This is because as compared to monogamous marriages, they are more risky from HIV/AIDS transmission perspective. Women are subservient in such kind of marriage than monogamous marriage. [53] Since the husband may have several wives, he can divorce one of them in case of refusal to blindly obey him. The inferior position of the women in this relationship will decrease her bargaining power over when and how to have sex.[54]

2. Female Genital Mutilation (FGM)

FGM is 'an umbrella term for a number of culturally motivated practices that involve partial or complete cutting of female genitals, usually performed in childhood or adolescence'.[55] Studies disclosed that FGM is practiced by approximately 73 percent of Ethiopians.[56] The Ethiopian Demographic and Health Survey 2005[57] indicate that 74 percent of girls and women nationwide have been subjected to FGM. The Survey also indicated that the practice is almost universal in Somali and Affar regions and Dire Dawa City Administration. More than 80 percent of girls and women in Oromo and Harari are victims of FGM.

[50] G Mwale *et al, Women and AIDS in Rural Africa: Rural Women's Views of AIDS in Zambia*, Avebury,1992, pp.39-40
[51] Ibid.
[52] Id., p.39.
[53] See Human Rights Watch, supra note 45, p.32.
[54] G Mwale, supra note 50, pp.39-40. See also J L Andreeff, supra note 45, p.24.
[55] Center for Reproductive Rights, *Female Genital Mutilation (FGM): Legal prohibitions worldwide*, Fact Sheet, 2009, available at: http://reproductiverights.org/en/document/female-genital-mutilation-fgm-legal-prohibitions-worldwide.
[56] M Ashenafi, *Harmful Traditional Practices Affecting the Health and Rights of Women-Law Reform as a Strategy for Change*, A Report Sponsored by the National Committee on Harmful Traditional Practices, 2000, p. 27, as cited in Kumsa Mekonnen, *Women's Vulnerability to HIV/AIDS: The Need for Legislation*, Berchi: The Annual Journal of Ethiopian Women Lawyers Association, Vol.5, 2004, p. 61.
[57] The Ethiopian Demographic and Health Survey, 2005. For similar statistics, see also M Ashenafi, supra note 56.

Apart from causing physical and psychological injuries to the women undergoing FGM, 'the use of unsterilized instruments, unhealed or open wounds or other complications arising in the process facilitates entry of the HIV virus into the body'.[58]

3. Early marriage

Early marriage of women, marriage before the age of 18, is prevalent in many countries. Although the reasons for early marriage may vary from one place to another, studies disclose that parents opt for the early marriage of their children hoping 'that the marriage will benefit them both financially and socially, while also relieving financial burdens on the family'.[59] Protection from HIV/AIDS is another reason for child marriage. However, a survey conducted in India shows that 75 per cent of people living with HIV in India are married.[60]

A study carried out by the United Nations Children Fund (UNICEF) unfolded that child marriage rate is higher in regions and countries that have customary or religious laws that condone the practice which is the case in South Asia, Africa and the Caribbean. Accordingly, among women aged 15–24, 48 percent were married before the age of 18 in South Asia, 42 percent in Africa, and 29 percent in Latin America and the Caribbean.[61] In Ethiopia, 19 percent of girls are married at the age of 15 and, in some regions, such as Amhara Region, the proportion goes as high as 50 percent.[62]

As mentioned above taking the situation of India as an example, early marriage cannot protect women from HIV infection. To the contrary, it may aggravate their vulnerability. Married girls will not be in a position to implement mechanisms of HIV/AIDS control. They will be in difficulty to apply 'abstinence, partner change or reduction, condom use (which is not possible for married girls seeking pregnancy), and having mutually monogamous sex with an uninfected

[58] Human Rights Watch, supra note, p.4.
[59] United Nations Children's Fund, supra note 48, p.1.
[60] G Bhattacharya, *Socio-cultural and Behavioral Contexts of Condom Use in Heterosexual Married Couples in India: Challenges to HIV Prevention Programs*, Health Education & Behavior, Vol.31, 2004, pp.101–117.
[61] United Nations Children's Fund, supra note 48, p.4.
[62] Population Council, *Child Marriage Briefing-Ethiopia*, 2005, available at: http://www.popcouncil.org/pdfs/ briefingsheets/ ETHIOPIA_2005.pdf.

partner whose HIV status has been discerned'.[63] Consequently, in developing countries in particular, 'married adolescents tend to have higher rates of HIV infection than their peers'.[64]

4 . Marriage by Abduction

Marriage by abduction is widely practiced in Ethiopia. It is put in to practice in approximately 70 percent of the country.[65] According to surveys conducted by the National Committee on Traditional Practices of Ethiopia, marriage by abduction is in its highest rate in Oromia and Southern Nations Nationalities and Peoples regions with 80 percent and 92 percent respectively.[66]

Marriage by abduction involves a wide-range of activities. One common way of doing it is that:

> *The girl [is] carried away by a group of which one member is the would-be husband. The girl is taken to a hideout where she is raped and kept hidden. Family members on both sides meet and discuss marriage between the victim girl and the perpetrator man.*[67]

Studies indicated that the rate of marriage by abduction is increasing nowadays than before owing to rising socio-economic problems, such as poverty. [68] As people are getting financially weak to organize wedding ceremonies and pay dowries, they resort to marriage abduction, particularly in rural areas. While marriage by abduction is currently widely practiced for economic reasons, 'the root causes are still enshrined in the patriarchal attitudes of the community, emphasized by the inferiority of women'.[69]

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[63] J Bruce, *Child Marriage in the Context of the HIV Epidemic, 2007, available at: http://www.popcouncil.org /pdfs/ TABriefs/PGY_Brief11_ChildMarriageHIV.pdf*..

[64] Population Council, *The Implications of Early Marriage for HIV/AIDS Policy, 2004, available at:* http://www.popcouncil.org/pdfs/CM.pdf.

[65] L Sadiwa *et al,* Ending Harmful Traditional Practices against Girls and Young Women , 2007, p. 4.

[66] UNICEF, *UNICEF Supports Fight to End Marriage by Abduction in Ethiopia*, available at*:* http://www.unicef.org/ ethiopia/ET_real_abduction.pdf.

[67] L Sadiwa, supra note 65, p.19.See an lso W Z Negash, *Ethiopia: Official License for Abduction and Rape*, *Equality Now, Vol.22, 2002*, available at: http://www.kulturpolitik.spoe.at/bilder/d27/EQUALITY_NOW1.pdf?PHPSESSID =29ba938add7874e74dc5904f919486c3.

[68] L Sadiwa, supra note 65, pp.19-20.

[69] Ibid.

Marriage by abduction violates the rights of girls to conclude marriage with their free and full consent, the right to body integrity, the right to be free from gender-based violence and the right to education (as the girls subject to abduction will be compelled to drop out of school). Furthermore, as marriage by abduction involves violence and sexual inter course in a situation where the girl does not know the HIV status of a man with whom she will be forced to have sex, it encourages the transmission of HIV/AIDS.[70]

5. Widow Inheritance

Another tradition, the practice of widow inheritance, commonly requires a woman to marry her husband's brother or another family member after he dies.[71] In the past, the practice was justified by taking care of the widow and the children of the deceased.[72] In the era of HIV/AIDS, however, 'this practice exposes women both to greater violence and to a greater chance of being infected with HIV/AIDS'.[73] Owing to economic necessities, the widow may be forced to remarry several men who may be HIV Positive.[74]

Although its rate is decreasing owing to pressures from the government, widow inheritance is still practiced in some areas in Ethiopia.[75] Historically, the practice used to be done with out any consent. But nowadays, there is a move towards requiring consent of the women.[76] According to a research done in Arsi zone, Oromia Regional State, widow inheritance is a key factor in the spread of HIV. [77] As the practice is performed with out due regard to the HIV status of the 'parties involved and the principles of safe sex', it can cause transmission of HIV virus.[78]

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[70] UNICEF, supra note, p. 66.
[71] Human Rights Watch, supra note 45, p.34.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] A Aschenaki, *Assessment of Sexual Behavior Related to HIV/AIDS in a Community Practicing Widow Inheritance in Digalu Tijo, Arsi zone, Oromia Regional State, Ethiopia,* A Thesis submitted to the School of Graduate Studies, Addis Ababa University in Partial Fulfillment of The Requirements for the Degree of Master of Public Health, Addis Ababa University, Medical Faculty, Department of Community Health, 2006, p.40.
[76] Id., p.38.
[77] Id., p.39.
[78] Ibid.

II. Cultural Diversity Vs. the Rights of Women in Ethiopia

Ethiopia has recognized both the rights of women and cultural diversity in its different laws. Although the recognition of both is not always mutually exclusive, the recognition of one may be at odds with the other in some cases. This section discusses the laws that are put in place with a view to recognizing both cultural diversity and rights of women and put forward recommendations to resolve some areas of conflict between the two, particularly from the view point of reducing women's vulnerability to HIV/AIDS.

A. Legal Recognition of Cultural Diversity in Ethiopia

Ethiopia is home to more than 80 nations, nationalities and peoples with distinct cultures. Unlike other African countries whose culture has been highly contaminated with Western cultures in the aftermath of colonization, the cultures of different groups in Ethiopia is almost untouched by colonization.

Historically, Ethiopia has been a centralized state. As a result, ethnic groups were given little autonomy to develop their culture and language. Their customary laws were suppressed by laws imported from abroad, and were supposed to be applicable in areas where the matters could not be governed by 'modern law'.[79] In reality, however, many ethnic groups had their cases adjudicated and disputes settled through customary institutions and laws.[80]

The defeat of the Derg Military Regime in 1991, however, was a landmark in terms of ending the unitary state and leveling the foundation of a decentralized federal state that recognizes ethnic diversity in the country. The new regime based its government on principle of self-determination for federated regional units which themselves are based on ethnic lines.[81] With this attitude towards ethnicity, Ethiopia deviates from what is usual in African countries. Most African leaders are reluctant towards the incorporation of the ethnic diversity of their societies in the

[79] Art. 3347 of the Civil Code Provides that '[u]nless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this code shall be replaced by this code and are hereby repealed'.
[80] G Krzeczunowicz, *Code and Custom in Ethiopia*, Journal of Ethiopian Law, Vol.2, 1965, p. 438.
[81] This is provided in article 46(2) of the FDRE Constitution. It provides that 'States shall be delimited on the basis of the settlement patterns, language, identity and consent of the people concerned.'

state structure. They fear that the constitutional recognition and accommodation of ethnic diversity will lead to endless inter-ethnic clashes that may lead to the failure of the country itself.[82]

The FDRE Constitution, reflecting the shift in paradigm, has allowed a greater space for self determination of ethnic groups in its widest manifestations. Article 39 (1) of the FDRE Constitution is an important provision recognizing the rights to self-determination of ethnic groups (nations, nationalities and peoples). Sub-article two of article 39, in particular, entitle each ethnic group 'the right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history.' As an aspect of the right to develop their cultures, the Constitution permits 'the adjudication of disputes relating to the personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute'.[83] The Constitution also allows the federal and regional parliaments to 'establish or give official recognition to religious and customary courts' which adjudicate cases in the basis of religious and customary laws in personal and family matters.[84] The Constitution, not only recognizes the application of customary law, but also gives the power of enacting family laws and other personal laws to regional states. That is why states have put in place different family laws which, to some extent, reflect the cultures of ethnic groups inhabiting them.

The rights of individuals and ethnic groups to promote their culture is also given due recognition in human rights treaties to which Ethiopia is a party. To begin with, the International Covenant on Civil and Political Rights (ICCPR) gives ethic groups the right 'to enjoy their own culture, to profess and practice their own religion, or to use their own language'.[85] The International Covenant on Economic, Social and Cultural Rights (ICESCR), on its part, guarantees everyone's right 'to take part in cultural life'.[86] The ACHPR imposes on State Parties the obligation to promote and protect the 'morals and traditional values recognized by the community'.[87] Article

[82] C V Bekken, 'Ethiopian Constitutions and the Accommodation of Ethnic Diversity: The Limits of Territorial Approach, In Tsegaye Regassa (ed.) *Issues of Federalism in Ethiopia*, Towards an Inventory 'Ethiopian Constitutional Law Series, Faculty of Law, Addis Ababa , Vol.2, 2008, p. 218.
[83] FDRE Constitution, supra note 1, art.34 (5).
[84] Id., art.78(5).
[85] Art. 27 of the ICCPR.
[86] Art.15 of the ICESCR. The same right is guaranteed in art. 17 (2) of the ACHPR.
[87] Art. 17 (3) of the ACHPR.

22 of the ACHPR also provides that '[a]ll peoples shall have the right to their…cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'.

B. The Legal Framework Proscribing Cultural Practices that Worsens Women's Vulnerability to HIV/AIDS in Ethiopia

In section 4 of this article, the major cultural traditions that exacerbate women's vulnerability to HIV/AIDS have been outlined. This section is concerned with discussing the main laws that outlaws those customs.

To begin with the FDRE Constitution, the highest law of the country, although it incorporates several rights of women, article 35(4) is exceedingly pertinent from the perspective of protecting women from customs that expose them to HIV/AIDS, such as polygamy, FGM, early marriage, widow inheritance and marriage by abduction. It states that '[t]he State shall enforce the right of women to eliminate the influences of harmful customs'. Thus, this article guarantees women's rights to be free from customs that are prejudicial to their health and life and imposes obligation on the part of the state to work to that effect. Being a constitutional provision, this article doesn't, however, specify those harmful customs against women.

Among the laws that are put in place in order to give effect to the aforementioned constitutional provisions, one can take the Family Law and the Criminal Law as an example. Echoing article 34 (2) of the FDRE Constitution, article 6 of the Federal Revised Family Code[88] denounces marriage concluded without the free and full consent of the prospective spouses and thereby reject marriage by abduction. Moreover, the Family Code prohibits conclusion of marriage: as long as the man is bound by bonds of a preceding marriage;[89] without the attainment of the full age of eighteen for both sexes (at least in principle);[90] and between a woman and the brother of her husband.[91] By so doing, the RFC outlaws polygamy, early marriage and widow inheritance respectively. The violation of these legal prohibitions entails civil sanction in the form of

[88] The Revised Family Code, Proclamation No. 213/2000, *Federal Negarit Gazetta*, Extra Ordinary Issue No. 1/2000.
[89] Id., art.11.
[90] Id., art.7(1).
[91] Id., art. 9(2).

dissolution of the marriage[92] and criminal sanctions in the relevant provisions of the Criminal Code of the Federal Democratic Republic of Ethiopia (with the exception of widow inheritance which is not criminally punishable). Harmful traditional practices are criminalized in article 567. Specific types of Harmful traditional practices, such as abduction, FGM, early marriage and bigamy are criminalized under articles 587-590, 565-566, 648 and 650 respectively. Bigamy is not, however, an offence where it 'is committed in conformity with religious or traditional practices recognized by law'.[93] This is so where one of the regional family codes legalize bigamy or polygamy. For example, the Family Code of Hareri Region exceptionally permits polygamous marriages where they are authorized by religious rules.[94]

Women's rights to be free from harmful customs that aggravate their vulnerability to HIV/AIDS are also give due recognition in human rights treaties which Ethiopia has ratified including the ICCPR, ICESCR, CEDAW, ACHPR, United Nations Convention On the Rights of the Child (UNCRC), and African Charter on the Rights and Welfare of the Child (ACRWC). Article 9(4) of the FDRE Constitution gives these ratified treaties the status of the law of the land. This means that the beneficiaries of these individuals can invoke these treaties directly before domestic courts to enforce their rights. The human rights treaties which Ethiopia has accepted can also serve as guidelines to interpret fundamental rights and freedoms integrated in chapter three of Constitution.[95] Given the fact that human rights provisions of the Constitution are hardly interpreted by courts and the House of Federation,[96] the human rights treaties ratified by Ethiopia and their authoritative interpretation by their treaty monitoring bodies are the only available options to interpret them.

Article 5 (a) of CEDAW obliges State Parties 'to modify the social and cultural patterns of conduct of men and women', with the purpose of eliminating customary practices that are hurtful to women. Likewise, the CRC and ACRWC oblige member states, which include Ethiopia, to take effective measures to abolish traditional practices that are prejudicial to the health and life

[92] Id., arts. 31-39.
[93] The Criminal Code of the Federal Democratic Republic of Ethiopia, 2005, art.651.
[94] Hareri Region Family Code, Proclamation No. 80/2000, *Hareri People Regional Government Negaret Gezetta*, 13th Year, Special Publication No.1/2000, art.11 (2).
[95] FDRE Constitution,supra note 1, art.13(2).
[96] The House of Federation is an organ constitutionally empowered to interpret the Constitution. See, article 62 of the FDRE Constitution.

of the girl child.[97] The measures that states are supposed to take could be legislative, judicial, administrative or other measures as long as they are effective in terms of eliminating the customary practices that are injurious to women including, polygamy, FGM, early marriage, marriage by abduction and widow inheritance. Apart from requiring states to eliminate harmful traditional practices in more general terms, the treaties make explicit reference to certain customary practices, such as the case of article 35 of the CRC that requires states to 'take all appropriate measures to prevent the abduction of children for any purposes'; article 23 of the ICCPR that requires free and full consent of parties intending to enter marriage thereby reject marriage by abduction; and article 16 of CEDAW that protects the girl child against child marriage.

C. Areas of Conflict between the Rights of Women and Customary Practices

As I have endeavored to show, on the one hand, the FDRE Constitution, human rights instruments ratified by Ethiopia and other domestic legislation give due recognition to the rights of women including those rights that can be applied to reduce women's HIV infections. On the other hand, the Constitution confers ethnic groups the right to enjoy their cultures. This is a commendable measure in view of rectifying the hitherto legacy of assimilation policies of the Military Regime and its predecessors which posed a threat against the very indentify of cultural groups. The recognition of cultural rights does not necessarily entail a violation of women's rights. To the contrary, customary rules and practices may reinforce the protection and promotion of the rights of women. To take one example, the codified customary law of the Guraghe (Kicha) [98] contains provisions that prohibit customary practices that violate women's rights and expose to HIV/AIDS. It, *inter alia*, prescribes HIV testing a prerequisite to the conclusion of marriage;[99] makes intentional transmission of HIV/AIDS punishable in the same manner as homicide;[100] prohibits abduction;[101] and harmful traditional practices, Such as FGM.[102]

[97] See, article 24(3) of the CRC and article 21 of the ACRWC.
[98] Kicha (Guraghe Customary Law), Revised Version, Guraghe People's Self-Help Development Organization, September 2000 E.C.
[99] Id., art.4(3).
[100] Id., art.44.
[101] Id., art.46.
[102] Id., art.47 (3).

In Some cases, however, the enjoyment of cultural rights may erode the rights of women that may be used a weapon to reduce their vulnerability to HIV/AIDS. In other words, the tension between universalism and cultural relativism do exist in Ethiopia. The tension may arise at two levels. At one level, the parliament of a certain regional (state) government may decide to put in place a law that recognizes a customary practice that erodes women's rights in the region and expose them to HIV infection on the ground that the legalized practice is an aspect of their rights to self –determination and develop their culture. For example, as I have mentioned earlier on, the Hareri Family Code allows the conclusion of bigamous marriage on religious rationale. At another level, members of a particular ethnic community may exercise a traditional practice despite prohibitions by domestic laws and human rights instruments arguing that they have the rights to exercise their culture as stipulated under the FDRE Constitution.

The question is: how can the Ethiopian Government mediate this tension? To put the question in other words, how can Ethiopia live up to its international human rights obligation while at the same time respecting the customary practices and laws of different ethnic groups?

Article 9(1) of he FDRE Constitution gives us part of the answer to the afore-pondered question. It declares that customary practices that contravene the Constitution shall be invalid. This, in other words, means that in the even of conflict between human rights standards recognized in the Constitution and customary practices, the former has precedence over the latter. It does not matter whether the customary practice is recognized in either state constitution or legislation. This is because the Federal Constitution is supreme over any regional legislation. Article 9(1), thus, sends a message that the different ethnic groups and their members are entitled to enjoy and exercise their customary practices in so far as they do not offend individual or collective human rights that are recognized in the Constitution. If the cultural practices undermine fundamental rights and freedoms, they are denied constitutional approval.

An assessment of the reality can easily show that article 9 (1) is a tiger on paper. Customary practices which are incongruous with human rights of women, such as polygamy, FGM, early marriage, marriage by abduction and widow inheritance are still being practiced. If so, where does the problem lie? What need to be done to resolve the problem?

Three reasons may be cited for lack of full implementation of the rights of women on the ground. Firstly, the resource constraint does not let the state extend human rights in every locality within its jurisdiction, particularly in remote areas.[103] Secondly, the abstract rules which are supposed to be applicable are mostly simply imposed without raising the awareness of law enforcement local officials and the people on the ground. Such kind of imposition is far from success in communities in which cultures are deeply embedded. Thirdly, some local law enforcement officials, clan elders and even some communities, even if they know state laws, feel that they are more loyal to customary laws than state laws.[104] One possible reason for rejection of state laws, particularly human rights, is that that might take the position that human rights are Western constructs that are an enemy to their culture.[105]

In order to improve the implementation of the rights of women in Ethiopia across different cultures, a centralist approach of legal change should be reconsidered. What we see in Ethiopia and elsewhere is that abstract rules including human rights are crafted and approved at national or regional level with little or no consultation the people on the ground. However, the customary practices and the corresponding customary rules that are meant to be changed are widely practiced and obeyed. Given the customary practices and customary rules governing them are embedded in the identity of the people, they are shielded by the communities at local level, most of whom believe that the customs are indispensable to the communities.[106]

Thus, to purge harmful practices through legal change, it is a must that community dialogue should be conducted on various practices before or after the law becomes effective.[107] In the discourse, it is important to raise the awareness of communities and leaders about the negative sides of he practices and the indispensability of human rights in eradicating these practices. Such awareness raising scheme will enable communities to decide by themselves to stop the practices.

[103] D A Donovan and G Assefa, *Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism,* American Journal of Comparative Law, Vol.51, 2003, p. 505.
[104] Id., p. 533.
[105] Ibid.
[106] L Smith 'Is Ethnic Federalism Bad for Ethiopian Women?', In T Regassa (ed.) *Issues of Federalism in Ethiopia* Towards an Inventory 'Ethiopian Constitutional Law Series, Faculty of Law, Addis Ababa Faculty of Law, Addis Ababa, Vol. 2, 2008, p.336.
[107] Ibid.

In default of such community dialogue, human rights will have limited impacts in view of autonomous customs operating in different parts of the country.

Conclusion

The discourse between universalists, who claim that human rights must be universally applicable worldwide regardless of cultural, religious and other differences, and cultural relativists, who argue that human rights are the construct of the West and thus have limited or no relevance to the other parts of the world, still continues. Although, in reality, the vast majority of states accept the universality of human rights, a close look at of the reservation made by states in the ratification of human rights treaties on cultural and religious grounds shows that cultural relativism is not totally devoid of support. The increasing trend of recognizing the rights of minorities and indigenous people to cultural development in multicultural and multiethnic states has also its own contribution towards undermining universalism and encouraging cultural relativism.

At the state level, Ethiopia subscribes neither to universalism nor to cultural relativism. It takes something from both. On the one hand, Ethiopia has accepted a number of international human rights documents that incorporate a host of human rights that must be applicable to everyone without due regard to individual differences. To this extent, Ethiopia subscribes to universalism. It, on the other hand, under its Constitution, respects and commits itself for the protection of the rights of nations, nationalities and peoples to develop their culture. Availing themselves of this constitutional guarantee, regions (states) enact laws on personal and family matters, such as family laws. The family laws of some regions, such Hareri Region, contain provisions that legalize polygamy on religious and/or cultural rationales. Moreover, cultural practices which compromise the rights of women are being exercised in different communities raising, in some cases, the right to exercise one's culture as a defense. Be it by legalization of polygamy or condoning practices that undermine women rights, Ethiopia subscribes, to some extent, to cultural relativism. The problem associated with cultural relativism is that it opens a Pandora's Box for the proliferation of customary practices and laws that increase women's susceptibility to the HIV/AIDS epidemic.

In order to minimize the negative aftermath of cultural relativism on women's susceptibility to HIV/AIDS in Ethiopia, a strict enforcement of article 9(1) of the FDRE Constitution is imperative. Those customary practices and laws that contravene human rights standards need to be reformed. Indeed, it seems that an attempt to change harmful customary practices and laws is a utopian exercise as they are entrenched in to the identity of the people who exercise them. However, it is possible to change cultures by engaging communities in dialogue and by raising their level of awareness.

Process-Based Trade Related Environmental Measures under the GATT/WTO Rules and Effects on Least Developed Countries (LDC)

Ermias Ayalew *

Introduction

The interaction between the GATT[1] rules and environmental protection is one of the most argued topics.[2] The trade-environment debate can be made in different contexts. One of the most argued topics is the issue of process-based measures under the GATT/WTO rules.[3] Two extreme views are reflected in respect of PPMs.[4] One of the extremes, to which many developing countries adhere, is that process-based environmental measures do not have support from the text of the GATT.[5] The ruling in the Tuna/Dolphin case, where the panel decided that measures based on PPMs were GATT-inconsistent, lent support for this line of argument.[6] On the other side of the debate we can find those who argue that neither the texts nor the GATT jurisprudence support any distinction between measures based on product or process.[7] This line of thinking is strongly reinforced by the Appellate body's decision in the Shrimp/Turtle case.[8] According to the Appellate body's ruling, the US trade measure which targeted the method of production or harvest was not *a priori* inconsistent with the GATT rules, although it was found to be inconsistent with the preambular requirements of article XX, which is generally known as chapeau.[9]

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[1] Unless expressly provided otherwise, GATT, in this paper, refers to the General Agreement on Tariffs & Trade 1994, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994).

[2] Howse & Regan "The Product/ Process Distinction: An Illusory Basis for Disciplining "Unilateralism" In trade Policy" (2000) *11European Journal of International Law (EJIL)* 249 at 250.

[3] Potts *The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Development* (2008) available at <http://www.iisd.org/pdf/2008/ppms_gatt.pdf > (accessed 17 March 2008) 1-3.

[4] PPM refers to process and production methods; a PPM measure refers to trade measures imposed by members based on process and production methods utilized to manufacture or to harvest products; and it is usually used interchangeably with the phrase process-based measure.

[5] Howse & Regan, *supra* note 2.

[6] Howse & Regan, *supra* note 2, at 249-50.

[7] *Ibid*; see also Charnovitz "The Law of Environmental 'PPMs' in to the WTO: Debunking the Myth of Illegality" (2002) 27 *Yale Journal of International Law (Yale J. Int'l L)* 59 at 60.

[8] House & Regan, *supra* note 2, at 249.

[9] The Appellate body in the *shrimp/turtle* case is said to come up with a decision which contradicts the conventional view that the GATT rules do not support trade measures based on PPMs. See *United States* –

Whether or not the GATT rules lend support to process-based environmental measure, it has positive or negative implications on efforts of environmental protection and trade liberalisation. For environmentalists, destructive PPMs are root causes of most environmental problems.[10] Lobbyists of environmental protection emphasised the need to impose process-based trade measures for the purpose of promoting environmentally sound PPMs.[11] On the other hand, proponents of free trade argue that process-based environmental measures encourage unilateral trade protectionism, which defeats the overriding objective of multi-lateral trading system.[12] The negative effect of this measure is high on developing countries, particularly on Least Developed Countries (LDCs), as they have no means to adopt environmental friendly production process.[13]

In this paper, I will argue that process-based trade measures are not *a priori* inconsistent with the text of the relevant articles of the GATT. The writer recognises that process-based measures have negative effects on the trade and development interests of developing countries, particularly LDCs. I will argue that there are mechanisms which can help to reconcile the trade and environment interests in the context of PPMs. For this purpose, the paper is divided in to four major parts. Part one will provide general background about the concepts of PPM and the arguments towards it. Part two will focus on the relevant provisions of the GATT in relation to which the issue of PPM may arise. This part will also examine several case laws to substantiate arguments. Part three will deal with global efforts, both with in and outside the WTO system, to bring about solutions that can reconcile the development and trade interests of developing countries, particularly LDCs, on the one hand, and the environmental interests of developed countries on the other. The paper will end with conclusion.

Import Prohibition of Shrimp and Shrimp Products, Appellate Body report (WT/DS58/R/AB) adopted November 6 1998(here in after Shrimp-Turtle (AB)) para 121 & 176; See also Howse & Regan, *supra* note 2, at 249-50.

[10] Snap & Lefkovitz "Searching for GATT's Environmental Miranda: Are "process standards" getting "due process?"(1994) *27 Cornell International Law Journal (Cornell Int'l L. J.)* 777 at 779.

[11] International Institute for Sustainable Development & Center for International Environmental Law (IISD & CIEL): *The State of Trade Law and the Environment: Key issues for the next Decades* working paper, 2003.

[12] *Ibid*.

[13] Potts, *supra* note 3, at 1-2.

I. Overview of PPMs

A. What are PPMs?

In the context of trade and environment relationship, PPMs becomes one of the most controversial issues in the international trade regime.[14] Generally applied in the international trade context, PPM refers to the way in which a certain product is produced or a natural resource is exploited.[15] The broad understanding of PPM, therefore, encompasses the issue of environment, labour and human rights during the manufacturing or harvesting stage of a product.[16] With in the specific context of trade-environment debate, PPMs reflects the adverse effect on the environment of a certain production method. PPM rules, regardless of their context in environment, labour or human rights, regulate the production or harvesting stage of products before they are distributed to sale. [17]

A paper prepared by the Organization for Economic Cooperation and Development (here in after the OECD) classified PPMs into two broad categories depending on the point at which the environmental effect of a product manifests itself.[18] These categories are: product related PPMs and Non-Product Related PPMs (NPR-PPMs).[19] The classification is meant to identify weather the environmental effect of a certain PPM manifests itself during consumption or manufacturing stage.[20] In other words, the classification is a

[14] Tetarwal & Mehta Process and production methods (PPMs)-Implications for developing countries (2000) CUTS BRIEFING PAPER No. 7 at 1.
[15] *Ibid*.
[16] Tetarwal & Mehta, *supra note* 14, at 5.
[17] PPM standards can be formulated in a variety of ways. A country may follow a positive list approach in which it sets out specific process and production methods which demands manufacturers to adopt those methods in their production of commodities. The other approach is a negative list approach by which a PPM regulation forbids the use of specific methods of production and allows all other methods. Countries may still specify emission or performance effects that need to be avoided. In some circumstances, it happens to be difficult to make clear demarcation between these different methods as some regulations lie at the boundary of one and another. See OECD Secretariat: *Process and Production Methods (PPMs): Conceptual framework and Considerations on Use of PPM-based trade measure* (OECD/GD (97)137) 1997.
[18] *Ibid.*
[19] Following the OECD's model, several writers adopt the product related PPMs and non-product related PPMs distinction; See, for example, Bernasconi-Osterwalder *et al Environment and Trade: A guide to WTO Jurisprudence* (2006) 204; Gains "process and production methods: How to produce sound policy for Environmental PPM-Based trade measure?" (2002) 27 *Columbia Journal of Environmental Law* (*Colum. J. Envtl. L.)* 383 at 396-399.
[20]OECD Secretariat, *supra* note 17.

means to make distinction between a PPM requirement that deals with consumption externalities and those that address production externalities.[21] Accordingly, a product related PPM-based measure exclusively deals with production method that has a negative impact on the final product.[22] Product related PPM measure is used to ensure the safety, quality and usability of products.[23] For example, a PPM requirement which regulates the residue level of pesticides added to fruit during the production stage is purely a product-related PPM.[24]

There are PPM requirements that have nothing to do with the physical characteristics or chemical property of the final product. The product, which the PPM regulation meant to govern, serves the same purpose or assures the same quality as like products produced in a different and environmentally-friendly manner.[25] Nevertheless, social or ecological policies make a government to put a regulatory regime on those PPMs.[26] These PPMs are referred as NPR-PPMs as they have nothing to do with the usability and quality of the final output.[27] These PPM requirements address production externality in the form of restriction on input use in the production or cultivation of product, or requirement to adopt a specified technology.[28]

The OECD paper further classified NPR-PPMs into three categories based on the jurisdictional scope within which certain PPM may cause adverse environmental

[21] PPM requirements which address consumption externality concern about the environmental effects of production methods which manifest themselves at the latter stage of the products' life cycle-at distribution or consumption stage, or when goods are consumed or disposed of after consumption. These requirements deal with physical or chemical characteristics of the product (affected by the method of production adopted) to be offered to the market. On the other hand, a PPM standard which purports to regulate production externalities deals with the environmental effects of production methods which manifest themselves at the production stage of the product before it is offered to the market. See *Ibid*; See also United Nations Environmental Programme & International institute for Sustainable Development(UNEP & IISD): *Environment and Trade*: *A Hand Book* 2000, available at <www.**iisd.org**/trade/handbook/5_1.htm > accessed on March 16, 2008.

[22] Bernasconi-Osterwalder, *supra* note 19, at 204.

[23] Charnovitz, *supra* note 7, at 65.

[24] The typical characteristics of product related PPM is that the production methods utilized can be directly detectible in the final product. See UNEP & IISD, supra note 21; see also Bernasconi-Osterwalder, *supra* note 19, at 204.

[25] OECD Secretariat, *supra* note 17.

[26] *Ibid*.

[27] The typical characteristic of NPR-PPM is that the method of production used can not be directly detected from the final product. See. Bernasconi-Osterwalder, *supra* note 19, at 204; see also the *Ibid*.

[28] Bernasconi-Osterwalder , *supra* note 19, at 204

effects.[29] Certain PPMs, thought not discernable in the final product through sale, distribution, conception and disposal, may still have environmental spillover beyond the country where the product is produced. Thus, the adverse environmental effect may be global, transboundary or national.[30] In some instances, a PPM may be used in a place where no country exercise jurisdiction under international law, such as the high sea.[31]

B. Controversies over PPM

Trade measures that purport to discipline patterns of production have become the primary focus of international policy debate that threatens trade interest and environmental protection antagonistic.[32] Environmentalists claim that most environmental problems trace their root-causes to environmentally destructive PPMs.[33] Environmentalists underscore the need to regulate PPMs for two principal reasons. First, environmentally unsustainable production methods add to environmental stress which may be irreversible.[34] Second, in the absence of regulatory regime that ensures imported products are subject to high environmental standard, the effort to apply high environmental standard to domestic products will be hindered.[35] Higher environmental standards most likely add to cost of production to producers. In a situation where only domestic producers are subjected to higher standards, they may not be able to equally compete with foreign producers that may offer their products with relatively cheaper price. It is logical to assume that no country wants to make its producers less competitive by imposing higher environmental standards without ensuring that producers in exporting countries are subjected to comparable standards. Lobbyists of environmental protection

[29] OECD Secretariat, *supra* note 17.
[30] The spillover of PPM is said to have transboundary effects where it affects, directly or indirectly, plant, animal, human health and life, soil, water, forest etc of the physically adjacent countries or shared geographical region. A PPM is said to pose global environmental adverse effect where it affects global commons or resources which are shared by all countries. This latter environmental problem includes ozone layer depletion, climatic change, and harm to biodiversity.[30] When the environmental effect of a certain PPM is limited to a country where it situates, it is said to be national. It may include resource depletion, air, water soil pollution and loss of biodiversity. See *Ibid.*
[31] *Ibid.*
[32] Snap & Lefkovitz, *supra* note 10, at 779. The issue of PPM proves to be difficulty not only in the context of GATT/WTO but also in the NAFTA and other trade negotiations. See Houseman "the North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment" (1994) 30 *Stanford Journal of International Law (Stan. J. Int'l L.)* 379 at 406
[33] *Ibid*.
[34] IISD & CIEL, *supra* note 11.
[35] *Ibid*.

argue that efforts to protect environment can not be realised without successfully regulating PPMs.[36] Snap and Lefkovitz suggested that trade measures are the most effective tools to deal with the environmental externalities of destructive PPMs.[37] Environmentalists often criticise the multilateral trading system for not allowing a clear distinction between products produced in a sustainable manner and those produced in unsustainable manner.[38]

The other side of the debate saw opposite view, especially motivated by development concerns. Many developing countries and small trading powers argue that making environmental conditionality on trade will create additional barrier to trade that will, in turn, erode the development objectives of trade liberalization.[39] These countries perceive environmental conditions through PPM measures as systematic and "veiled" "protectionism" devised by developed countries in order to protect their industries from increased competition due to other changes in trade law.[40] For developing countries and LDCs, the issue of PPM is closely associated with the question of market access.[41] Developing countries also expressed concern that developed countries can use their commercial power to impose their environmental standards on other nations without their consent to those standards.[42] Some environmental standards may not reflect the social, economic and environmental realities of developing countries.[43] Many developing countries worry that allowing PPM-based trade measures may serve a precedent for consideration of other social programmes, such as labour standards and human rights.[44] Besides, sovereignty argument is raised, especially in relation to environmental externalities limited to exporting country.[45] The decision as to the method of production must be left to the discretion of the exporting country where the adverse effect of PPM is

[36] Snap & Lefkovitz, *supra* note 10, at 779.
[37] *Ibid.*
[38] Tetarwal & Mehta, *supra* note 14, at 4.
[39] IISD & CIEL, *supra* note 11.
[40] *Ibid*; See also Tetarwal & Mehta, *supra* note 14, at 1.
[41] By demanding exporters to adopt a certain production methods, countries may make it burdensome and expensive for exporters of economically poor countries to sell in importing countries' market. Bernasconi-Osterwalder, *supra* note 19, at 204; Pots, *supra* note 3, at 1-2; see also Tetarwal & Mehta, *supra* note 14, at 1
[42] Tetarwal & Mehta, *supra* note 14, at 5
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*

limited to that country alone. An expression of state sovereignty under general international law includes the authority of a state to decide on matters exclusively within its territory.

A number of countries developed policies to reduce the various negative effects that PPMs have on environment.[46] These measures may, directly or indirectly, affect international trade.[47] These measures, referred generally as trade-affecting PPM measures, include import ban of products produced in environmentally-unfriendly manner, tax schemes based on production methods, border tax adjustment to offset PPM based domestic taxation etc.[48] The following part will deal with the GATT/WTO compatibility of process based trade measures in light of the major principles of the trading system and of the general exceptions.

II. The GATT Provisions in the Context of which PPMs may arise

A. Overview

The GATT possesses key provisions which are pillars of this agreement. Two of these provisions, article I and III, create the very important principle of the trading system, non-discrimination.[49] The other equally important principle is found under article XI which forbids import and export ban and quantitative restriction on goods. The issue of PPM may arise in relation to one or more of those principles.[50] In the context of these three principles, a PPM measure may be found either GATT compatible or otherwise. If a PPM measure is found to be GATT-inconsistent owing to those principles, a member

[46] Bernasconi-Osterwalder , *supra* note 19, at 203.
[47] *Ibid.*
[48] *Ibid*.
[49] Article I provides for the most favoured nations treatment by which products of a member shall be accorded equal treatment with like products of any other trading partner in respect of custom duties and charges, the method of levying such duties and charges and all rules and formalities in connection with importation and exportation. Article III provides for national treatment principle by which products of any member shall be treated equally with like domestic products of importing member in relation to internal taxes and other internal charges, laws, regulations and requirements affecting internal sale, purchase, transportation, distribution or use of products. The meaning of 'like product' in the GATT rules vary depending on a number of considerations, some of which will be dealt with in this part of the paper. See *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report (WT/DS135/AB/R) / adopted April 5, 2001 (here in after EC-Asbestos (AB)) at papa 88.
[50] Depending on the specific PPM issue, overlap of those principles may occur while determining the GATT compatibility of a PPM-based trade measure. The number and nature of issues vary based on which principle we are relaying to resolve the PPM question.

may still justify its action under the general exceptions of article XX depending on the nature and purpose of the measure it takes.[51]

The following subtopics will deal with the issues of PPM in the context of article I and III of the GATT. On the basis of its degree of relevance to the PPM issue, article III is discussed before article I. Since article XX (b) and (g) have immense importance in connection with the issue of PPMs, the discussions of their provisions are treated separately.

B. Article III

The provisions of Article III provides for the national treatment principle which obliges WTO members to treat imported products not less favourably than domestic like products.[52] The logical construction of this principle is that members may treat imported products less favourably than domestic products if the two products are not "like products". Determination of whether two products, in respect of which different treatments are accorded, are like products is crucial in deciding whether a member violates its obligation of non-discrimination under article III of GATT. When an imported product is found to be unlike with a domestic product in dispute, different treatment, by a member, of those products may not be challenged under article III. The issue of "like product", therefore, plays a central role in deciding whether a less favourable treatment to imported products violate the non-discrimination obligation of a member under article III.

In the context of article III, a process-based trade measure may pose the issue of likeness in a number of ways. This interrelation exists principally based on the fact that many domestic environmental measures differentiate between products which are, on face or use, similar, but differ in the environmental effect of their PPMs.[53]For example, a member's regulation may prohibit sale of a product unless at least a certain proportion of its weight has come from raw materials exploited in environmentally friendly manner.

[51]Charnovitz, *supra* note 7, at 92.
[52] See *infra* note 70 for the relevant paragraphs of article III.
[53] Bernasconi-Osterwalder , *supra* note 19, at 8.

Or, a member may impose import prohibition on certain products which are produced in environmentally unsustainable manner. These measures violates article III only if sustainable and unsustainable products are considered as like products. Determination of whether these two categories of products are like or not depend on whether we should stick only to the physical nature or end-use of the two products or some additional factors totally extraneous to physical characteristics of the products. If environmental considerations are taken in the interpretation of likeness, two products, which are like with respect to their physical characteristics and end-use, may be unlike with in the meaning of article III owning to differences in their process and production methods.[54] Some times, however, the application of article III to a process-based trade measure is controversial as two pre-WTO panels decided that the scope of application of this article may not extend to non-product based measures.[55]

The Tuna-Dolphin I involved the US measure that imposed trade embargo on imports of commercial yellow fin tuna and yellow fin tuna products harvested with purse-seine nets.[56] The panel explicitly pointed out that the US measure regulated the harvesting techniques, not tuna as a product.[57] The panel noted that article III.4 applies only in relation to those measures that regulate product as product, not process and production methods.[58] Accordingly, the panel directly applied article XI and found the US measure

[54] Howse & Regan, *supra* note2, at 61.
[55] See *United States – Restrictions on Imports of Tuna*, panel report (DS21/R) 3 September 1991 (not adopted) (here in after Tuna-Dolphin I) at para 5.14; see also *United States – Restrictions on Imports of Tuna* panel report (DS29/R) 16 June 1994 (not adopted) (here in after Tuna-Dolphin II), at para 5.9.
[56] The ruling of the Tuna-Dolphin I panel has important implications on the issue of PPM because of two reasons. First, the panel generally excluded application of article III for PPM measure, and chose article XI as an appropriate provision to PPM issues. An important question in this connection is what would be the application of article XI if a PPM measure was different from import ban or quantitative restriction? Clearly, article XI would not apply. Since the panel generally excluded article III from PPM analysis, and article XI has limited application for the above reason, the solution to the issue whether a process based measure that differentiates between domestic and similar imported products is a *per se* violation of GATT-obligations would remain uncertain. Logically, a measure can be found to be GATT-inconsistent or otherwise only if it falls under one of the relevant provisions of the agreement. Secondly, the panel incidentally touched up on the issue of likeness and found that method of harvest, or process of production may not affect a certain product as a product. In the view of the panel, US must have accorded Mexican tuna treatment not less favourably than that it accorded to domestic tuna regardless of differences in the harvesting methods. This, in effect, means that Mexican tuna is like product with US tuna. In other words, PPM may not be taken in to account in determining whether two products are "like".
[57] Tuna-Dolphin I, *supra* note 55.
[58] *Ibid.*

as GATT- inconsistent.[59] However, the panel incidentally touched the issue of likeness. The panel noted that the United States measure would violate article III.4 even if the article was applicable. The panel reasoned out that:

> "…article III: 4 calls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product… Article III: 4 therefore obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels."[60]

Again, in the *Tuna/Dolphin II*, the panel made article III inapplicable, as the US trade embargo distinguished between tuna products according to harvesting practice.[61] The panel repeatedly underscored the fact that difference in harvesting techniques may not affect products as products. Therefore, any measure targeting against certain production process method is outside the scope of article III.[62]

The US-Gasoline case dealt with the issue of likeness, although not directly in the context of environmental PPM. [63] The panel, in determining whether imported and domestic gasoline are like products, found that chemically identical domestic and imported gasoline are "like products" under article III.4.[64] More importantly, the panel pointed out that determination of likeness in article III.4 should be done "on the objective basis of likeness as products…not based on extraneous factors".[65] If applied in the context of environmental PPM, the panel's decision in the US-Gasoline case would mean that differences in the method of production may not be considered as factor to determine two products as "unlike" products. The panel's ruling in the US gasoline case limited the

[59] Tuna-Dolphin I, *supra* note 55, at para 5.18.
[60] Tuna-Dolphin I, *supra* note 55, at para 5.15.
[61] See Tuna-Dolphin II, *supra* note 55.
[62] See Tuna-Dolphin II, *supra* note 55, at para 5.7-5.9.
[63] The US clean air act set out rules for establishing baselines figure for gasoline sold on the US market. The gasoline rule came up with different types of baselines for domestic and imported gasoline with the purpose of regulating the composition and emission effects of gasoline. See *United States – Standards for Reformulated and Conventional Gasoline, panel* report (WT/DS2/R) Adopted 20 May 1996(here in after US-gasoline), para 2.1-2.13.
[64] US-Gasoline, *supra* note 63, at Para 6.7-9.
[65] US-Gasoline, *supra* note 63, at Para 6.12.

possibility that determination of likeness may go beyond the physical characteristics of products.

The issue of likeness may arise in relation to consumers' tastes and habits in a given market. Differences in consumers' choice and preference between domestic and imported products based on factors extraneous to the products' physical property, chemical components and end-use may be invoked as a factor in determining the likeness of products. For example, consumers in a give market may prefer products produced in environmentally friendly manner to those similar products produced in unsustainable manner. The very important issue is, however, whether the willingness of consumers to choose one product instead of another is relevant to determine likeness under article III.

In the EC-Asbestos case, the Appellate Body pointed out that the issue of like product is concerned with competitive relationships between and among products.[66] It is, therefore, necessary to evaluate whether and to what extent the products involved are in a competitive relationship in the given market place.[67] In the view of the Appellate Body, one of the elements to determine whether there is a competitive relationship lies on consumers' tastes and habits in a given market.[68] The existence of preference by consumers towards one product instead of the other may be taken as a factor to determine the products as not like products.[69] What is still left to be decided is whether consumers' preference can be affected based on the difference in the methods in which products are

[66] EC-Asbestos, *supra* note 55, at para 103.

[67] See Ibid. The appellate body's focus on "competitiveness" criterion seems to be reinforced by the overall purpose of article III. This article in meant to oblige members not to treat domestic products more favourably than competitive imported products for protectionist purpose. In the absence of competitive relationship between domestic and imported products a countries regulation can not be applied for protectionist policy.

[68] The appellate body made reference to the criteria set out by the working group on border tax adjustment. It was established in 28 March 1968 to examine the provisions of the general agreement relevant to border tax adjustments and to come up with proposal in light of such examination. The working party proposed some criteria for determining, on a case by case basis, of likeness. These criteria are: the product's end uses in a given market; consumer's taste and habits, which change from country to country; the product's properties, nature and quality. See Border tax adjustment, Report of the working party adopted on 2 December 1970, L/3464; see also EC-Asbestos, *supra* note 49, at para 109,117-123.

[69] The existence of difference in preference between chrysotile asbestos and PCG fibres was among the reasons why the Appellate Body considered the two products as unlike. See EC-Asbestos (AB), *supra* note 49, at para 122& 126.

produced. This is a question of fact that differs from one country to another, and to be decided on a case-by-case basis.

The issue of likeness may also arise in relation to the "aim" of a process-based trade measure.[70] Some panels and the Appellate Body dealt with the issue as to whether two products should be considered like when they are identical with respect to all factors, except some elements totally extraneous to the products' physical characteristics or use, and when the purpose of different measures is based on *bona fide* policy considerations. In the US-Malt Beverages case, the panel added the "aim" test to the "traditional" elements which have been taken in to account in determining the likeness of two products.[71] In order to determine whether a product is like product with in the meaning of article III.2, the panel emphasised on the purpose behind a disputed trade measure. [72] The panel considered that the like product determination under article III.2 should take consideration of the purpose of the article.[73] The panel noted that the purpose of article III is emphasised in its first paragraph.[74] The Panel considered that the limited purpose of Article III has to be taken into account in interpreting the term "like products" in this

[70] This kind of issue is inspired by the phraseology of paragraphs of article III. The relevant parts of this paragraphs read as follows: paragraph 1, "The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, ….*should not be applied to imported or domestic products so as to afford protection to domestic production"*. /emphasis added/; Paragraph 2, "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. *Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph.[70]* /Emphasis added/; Paragraph 4, "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use....." Paragraph (1) provides the general policy objective for national treatment. To what extent this paragraph can influence application of subsequent paragraphs is a subject of debate. See *United States – Measures Affecting Alcoholic and Malt Beverages* panel report (BISD 39S/206) adopted 19 June 1992*(*here in after US-Malt Beverages), at para 5.27.

[71] The traditional elements are the product's end use in a given market, consumers' tests and habits, which change from country to country; the product's properties, nature and quality. See Cottier & Mavroidis (eds) *Regulatory Barriers and the Principle of Non-Discrimination in the World Trade Law* (2000) 119-122.

[72] US-Malt Beverage, *supra* note 70, at para 5.24.

[73] *Ibid.*

[74]The panel report in the relevant part stated that "The purpose of Article III is... not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. Specifically, the purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production''. See US-Malt Beverage, *supra* note 70, at para 5.25.

Article. In the panel's view, in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made "so as to afford protection to domestic production". [75]

The panel in the US-Auto case approached the issue of likeness in the same way as the previous panel. This panel decided that determination of likeness under article III.2 has to include examination of the aim and effect of the particular measure.[76] In the context of PPMs, the panels' ruling in the above two cases can be taken to mean that a country's process based measure may not be necessarily inconsistent with article III, even if it results in different treatment of domestic and identical imported products. The reason for this construction lies on the fact that two products may be considered as not like products based on the difference in their PPMs, provided that the measure is not taken "so as to afford" protection to domestic products.

Subsequent panels and Appellate Body decisions rejected the line of argument adopted by the above two panels. In the Japanese-Alcoholic beverages, the panel explicitly noted that determination of likeness may not include examination of the aim of a measure which differentiates between imported and domestic products.[77] The panel was limited only to the "traditional" elements of like products determination.[78] On appeal, the Appellate body affirmed the panel's finding that determination of likeness under article III.2 may not take into account whether the measure was meant to afford protection to domestic products.[79] The Appellate body in the EC-Banana case rejected the "aim" test as an incorrect application of the like product determination under III.4.

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[75] See *Ibid.* The panel underscored that the "aim" of a measure is important only at the stage of diterminatin of likeness. In the panel's view, if products are designated as like products, " a regulatory product differentiation, e.g.for standardization or environmental purposes, become inconsistant with article III even if the regulation is not applied so as to afford protection to domestic products." See US-Malt Beverage, *supra* note 70, at para 5.72; Following US malts beverage case, proponents of aim-and effect test propose panels to consider whether a disputed tax or regulation has a protective aim or effect in determining products' likeness. See, Charnovitz, *supra* note 7, at 89-90.

[76] See *United States-Tax on Automobiles*, Panel Report (DS31/R) (here in after US-Auto) October 11, 19 94 (not adopted) para 5.9-15.

[77] See *Japan - Taxes on Alcoholic Beverages Panel Report* (WT/DS8, 10, 11/R), Adopted November 1, 1996(here in after Japanese-Alcoholic Beverages), at para 6.17-18.

[78] See supra note 71 for explanation of the traditional elements.

[79] *Japan - Taxes on Alcoholic Beverages* Appellate Body Report (WT/DS8,10,11/AB/R), Adopted November 1, 1996(here in after Japanese-Alcoholic Beverage (AB)),at para 40.

In summery, the jurisprudence in the GATT/WTO does not indicate that extraneous and non-economic factors, such as PPMs, are relevant for determining whether products are like. It is only in the context of consumers' tastes and habits that the Appellate Body's ruling dictate that difference in PPM may be relevant in determining likeness. Even in that scenario, a case by case analysis of the existence of consumers' preference to one product instead of the other in a given market is necessary. It can also be inferred from the WTO case laws that the purpose behind a policy objective, such as environmental protection, may not be considered in determining whether products are "like".[80]

C. Article I

Article I.1 of the GATT provides the general most-favoured nations treatment. According to this principle,

> "…any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded *immediately and unconditionally* to the like product originated in or destined for the territories of all other contracting parties."[81]

The equal treatment of products under article 1.1 applies as between like products. The important issue is whether differences in PPM are considered to determine the likeness of products. In the Spain-Unroasted Coffee case, the panel pointed out that differences resulting from cultivation and processing methods are not relevant in determining whether products are like.[82] Apart from this panel's decision, the case law on the issue of

[80] Howse and Regan strongly argue that any construction of like product language in article III that excludes consideration of processed based measures in determining like products is "superficially plausible". However, it has to be noted that if PPMs are to be considered in determining like products under article III, it will promote disguised protectionism as members may discriminate imported products merely based on the methods of production. It is also important to note that consideration of "aim" or "purpose" of a measure, such as environmental protection, may not be consistent with the structure and purpose of the GATT because of two reasons. Firstly, the list of exceptions in GATT Article XX would become redundant if the "aims" specified there were taken into account under an Article III analysis. Secondly, the trade liberalisation objective of the GATT would be hindered as the bulk of the members are developing countries and LDCS which may not be able to afford to adopt methods of productions required by some of the trading partners. Even if the different treatment owing to PPM is intended for genuine environmental protection objectives, developing countries and LDCs will be denied of benefits that they would have acquired from the trade liberalisation. See Howse & Regan, *supra* note 2, at 252.

[81] Emphasis added.

[82] *Spain- Tariff Treatment of Unroasted Coffee* Panel Report (L/5135-28S/102) adopted June 11, 1981, at para 4.6.

likeness within the context of PPM under article I is limited. It is important to note that the issue of likeness in relation to article III may have important bearing on the same issue under article I. However, the scope of the concept of likeness differs in these two articles.[83]

In the context of PPM the most relevant issue under article I is whether advantages, immunities and privileges may be conditioned based on PPMs, without being considered *per se* inconsistent with the members' obligation.[84] The words "immediately" and "unconditionally" in article I.1 are likely to pose the issue of PPM. The panel's decision in the Belgian family allowance case provides an important bearing on the issue under article I, although the case did not directly involve PPMs.[85] In the context of "conditionality" test, the panel pointed out that the Belgian law which exempted countries with a "family allowance plan" similar to Belgium's family allowance scheme was inconsistent with article I, as it took consideration totally unrelated to the product.[86]

In the Indonesia automotives case, the panel dealt with an Indonesian import duty based on Indonesian content levels in imported cars, and found that Indonesia's measure was inconsistent with GATT article I.[87] The panel noted that advantages under article I "cannot be made conditional on any criterion that is not related to the imported product itself". [88] Although the import duty was not origin neutral, the panel's statement generalized all "criteria" as an illegal basis for conditioning an advantage under Article I.[89]

The panel in the Canada-auto case modified the generalization made by the previous panel.[90] In this case, Canada subjected an advantage and duty exemption conditional

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[83] See EC-Asbestos (AB), *supra* note 49, at para 88; see also Japanese-Alcoholic Beverage (AB), *supra* note 79, at para 46.
[84] Potts, *supra* note 3, at 19.
[85] See *Belgium – Family Allowances*, panel report (BISD 1S/59) *adopted* November 7, 1952, at para 3.
[86] *Ibid.*
[87] *Indonesia - Certain Measures Affecting the Automobile Industry* Panel Report (WT/DS54, 55, 59, 64/R) adopted July 23, 1998(here in after Indonesia -Automobile), at para 14.143.
[88] *Ibid.*
[89] Potts, *supra* note 3, at 20.
[90] *Canada - Certain Measures Affecting the Automotive Industry*, Panel Report (WT/DS139, 142/R) adopted June 19, 2000(here in after Canada-Automotive), at para 10.23-30.

upon meeting a condition which Japan argued was unrelated to the products themselves. The panel rejected Japanese argument, stating that the word "unconditionally" must be interpreted in light of the object and purpose of article I. The panel pointed out that "unconditionally" does not pertain to the advantage *per se*, but must be seen in the context of whether the measure involves discrimination between like products of different countries. In the panel's view, only advantages that are not granted "unconditionally" to the like products of all members will be found to be inconsistent with Article I.1.[91] In relevant part, the panel stated,

> "We do not…believe that the word unconditionally in article I.1 must be interpreted to mean that making an advantage conditional on criteria not related to the imported product itself is *per se* inconsistent with article I.1, irrespective of whether and how such criteria relate to the origin of the imported products."[92]

The panel's decision in the Canada automotive case shows that origin neutral non-product conditions, such as PPMs, are not *per se* violation of Article I.[93] In the context of PPM, the decision by the Canada-Auto panel can be taken to mean that a country may condition an advantage on the adoption of a certain process and production methods. The appellate body did not address this point when the case was taken on appeal.

D. Article XX Exceptions

Article XX of GATT is central to the discussion of PPMs, as the justifiability of a process-based measure under the general provisions of GATT, such as the non-discrimination provisions, has been addressed in the negative in the GATT/WTO jurisprudence in the majority of cases. Article XX provides ten specific instances in which a trade measure, otherwise inconsistent with one of the provisions of GATT, may be justified. Although it failed to specifically mention "environmental protection" in

[91] *Ibid*.
[92] Canada-Automotive, *supra* note 90, at para 10.24.
[93] The panel stated that, "there is an important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other hand, whether, an advantage, once it has been granted to the products of any country, is accorded 'unconditionally' to the like product of all other Members. An advantage can be granted subject to conditions without necessarily implying that it is not accorded 'unconditionally' to the like products of other Members. See Canada-Automotive, *supra* note 90, at para 10.24; see also Potts, *supra* note 3, at 20.

those exceptions, two paragraphs, (b) and (g), address environment based trade measures.[94] According to these exceptions, members may adopt or enforce measures necessary to protect human, animal or plant life or health; or relating to the conservation of exhaustible natural resources if the measures are made in conjunction with restrictions on domestic production or consumption.

Several issues, relevant to the discussion of PPM, may be raised in relation to article XX (b) and (g). The issues, more or less, include the following:

i. when is a measure presumed to be necessary in relation to paragraph (b);
ii. what is the jurisdictional scope of these exceptions;
iii. Whether a unilateral trade measure can be justified under these exceptions; and,
iv. When a measure is presumed to constitute arbitrary or unjustified discrimination, or disguised restriction on international trade.

The following part deals with these issues separately. However, the issues under ii and iii above will be discussed together.

1. The Necessity Test

A trade measure that a member wants to take, under article XX (b), must be "necessary" to protect human, animal or plant life or health. When is a measure deemed to be necessary is an important issue often being raised in the GATT and WTO panels and the Appellate Body. In the Tuna-dolphin I, the panel rejected the US import ban as not necessary with in the meaning of XX (b).95 In the panel's view, a measure is necessary if a member, raising article XX (b) exception, demonstrates that it had exhausted all options reasonably available to it to pursue its policy objective through measures consistent with

[94] These two paragraphs, together with the Chapeau, read: "subject to the requirements that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination between countries...or a disguised restriction on international trade, nothing in this greement shall be construed to prevent the adoption or enforcement by any contracting party of measures:..(b) necessary to protect human, animalor plant life or health; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption..." See Snap & Lefkovitz, *supra* note 10, at 796.
[95] Tuna-dolphin I, *supra* note 55, at para 5.24-5.29.

the General Agreement.96 The Tuna-dolphin II panel also rejected the US measure as not necessary.97 The panel noted that "necessary" means "no alternative" is available.98 In the EC-Asbestos case, the panel endorsed the criterion set out in previous pane decisions. 99 The EC-asbestos panel pointed out that a measure is necessary only where there is no an alternative measure consistent with the GATT, or a less inconsistent with it, which could reasonably be expected to achieve the policy objective at issue.100

The GATT/WTO case laws show that there is a consistent jurisprudence in relation to what measure is "necessary" with in the meaning of article XX (b). The fact that other alternative measure, which is consistent with the GATT or less inconsistent with it, can reasonably achieve the policy objective at issue makes a more GATT inconsistent measure unnecessary. The "no other alternative measure" in the interpretation of the word "necessary" under article XX (b) maintains a proper balance between environmental objectives and free trade interests. It does not forbid taking GATT-inconsistent measures for legitimate policy objectives. However, the otherwise GATT-inconsistent measure must be the last option.

2. Jurisdictional Scope of the Exceptions

Trade-affecting PPM measures often aim at protecting natural resources, environment, human, animal, plant, etc that are located, at least in part, outside of the boundaries of a member taking the measures.101 This is mainly because most PPMs focus on the way in which a product is produced or harvested, rather than on the effect of the product per se.102 A unilateral Process-based measures are often criticised for being extraterritorial

[96] Tuna-dolphin I, *supra* note 55, at para 5.28.
[97] Tuna-dolphin II, *supra* note 55, at para 5.39; In this dispute, the US agued that "necessary" means "needed", where as the EEC insisted that "a measure otherwise inconsistent with the General Agreement could only be justified as necessary under Article XX (b) if no other consistent measure, or more consistent measure, were reasonably available to fulfill the policy objective." See Tuna-dolphin II, *supra* note 55, at para 5.34.
[98] Tuna-dolphin II, *supra* note 55, at para 5.35.
[99] *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products,* Panel Report (WT/DS135/R) / adopted April 5, 2001(here in after EC-Asbestos), at papa 8.198-199.
[100] *Ibid*.
[101] Bernasconi-Osterwalder, *supra* note 19, at 205.
[102] *Ibid*.

and violating the principle of "sovereignty".103 It can be argued that the home country should decide which methods of production or harvesting procedures must be utilised. Under customary international law, a state is presumed to be in excess of its jurisdiction when it regulates acts outside its territory by person who is not national to it, or the act has no effect within its territory.104 However, it can be argued that a member, which takes a unilateral process-based measure, does not directly regulate the behaviour that foreign producers may adopt, as the latter are not in any ways forbidden to proceed with their unsustainable production process with out incurring civil or criminal liability.105 What the importing country does, through its measure, is refusing the importation of those products produced in environmentally unfriendly manner.106 Besides, the regulation, which creates the measure, is enforced within the territory of the member which takes such measure.107 On the other hand, it may be argued that the member unilaterally restricts foreign producers from importing their products into its territory and is, therefore, extraterritorial.108 Although the application of the measure is not extraterritorial, the effect of the measure, nevertheless, is extraterritorial.109

In Tuna-Dolphin I, Mexico argued that article XX (b) exception may not apply for a measure imposed to protect the life and health of human and animals outside the jurisdiction of the countries taking such measure.[110] The panel pointed out that the text of article XX does not explicitly indicate the jurisdictional scope of the exceptions.[111] However, the panel decided that a measure is justified under article XX (b) and (g) exception to the extent that it targets to the protection of human, animal or plant life or health, or to the conservation of exhaustible natural resources within the territory of the

[103] The term "extraterritorial" is usually used with out sufficient legal precision. It is arguable whether there is an "extraterritorial" measure when a country unilaterally imposed import ban on some products which are produced in environmentally-unsustainable manner. See Bernasconi-Osterwalder, *supra* note 19, at 236; see also Howse & Regan, *supra* note 2, at 274.
[104] Brownlie *Principles of Public International Law* (1973) 299-303.
[105] Howse & Regan, *supra* note 2, at 274.
[106] *Ibid*.
[107] *Ibid*.
[108] Bernasconi-Osterwarder, *supra* note 19, at 238.
[109] *Ibid*.
[110] Tuna-dolphin I, *supra* note 55, at para 5.24.
[111] Tuna-dolphin I, *supra* note 55, at para 5.25.

member taking the measure.[112] The Tuna-Dolphin II panel modified the decision made by the Tuna-dolphin I panel by stating that "the Panel could see no valid reason supporting the conclusion that the provisions of Article XX (g) apply only to policies…located within the territory of the contracting party invoking the provision."[113] However, the panel pointed out that such extraterritorial measure is valid only in relation to nationals of the member enacting it.[114] After these panels' decision, many people view the trading system as hostile to values other than that of free trade.[115]

In the Shrimp-Turtle case, the Appellate Body did not give a comprehensive guidance for the issue whether there is an implied "jurisdictional limitation" in article XX exceptions.[116] The appellate body chose to decide the issue in the context of the specific circumstance of the case in dispute. The appellate body found that the migratory nature of see turtle create a sufficient nexus between the endangered marine population involved and the US for the purpose of article XX (g).[117] The appellate body's ruling is taken as an express recognition of states' interest to protect natural recourses outside of their jurisdiction if there is a sufficient nexus between the natural recourses being protected and the states purporting to take a trade measure.[118] Neither the Appellate Body in the Shrimp turtle case nor panels in other cases, except the first Tuna-Dolphin panel, addressed the issue of "extraterritoriality" when there is no sufficient nexus between the resources to be protected and the country which purports to take measure.[119]

In the absence of comprehensive guidelines as to the jurisdictional scope of article XX exceptions, the issue must be approached in light of other international rules and

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[112] See Tuna-dolphin I, *supra* note 55, at para 5.26-27, 5.32. In rejecting the US argument, the panel stated that, "if the broad interpretation of Article XX (b)…were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.'' See Tuna-dolphin I, *supra* note 55, at para 5.27.

[113] Tuna-dolphin II, *supra* note 55, at para 5.20.

[114] *Ibid.*

[115] Howse & Regan, *supra* note 2, at 250.

[116] The appellate body explicitly stated that, "We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX (g), and if so, the nature or extent of that limitation." See Shrimp-Turtle (AB), *supra* note 9, at para133.

[117] *Ibid*.

[118] Condon *Trade, Environment and Sovereignty: Developing coherence between WTO Law and General international law* (PhD dissertation 2005 Born University) 145.

[119] Condon, *supra* note 118, at 147.

principles.[120] The WTO rules must be seen as part of the wider body of public international law.[121] States, under general international law, must demonstrate that a conduct, which it purports to regulate, has sufficient nexus with the state.[122] It is only in relation to transboundary and global environmental challenges that states may justify their measures.[123]

The Appellate Body's ruling in the Shrimp-Turtle case gives clear guidance with respect to the issue of whether unilateral measures may be justified under article XX exceptions.[124] The Appellate Body, in rejecting the panel's finding[125], stated that:

> "It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies … prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile…"[126]

It is made clear that some unilateral measures can survive article XX (g) exception.[127] The Appellate Body implicitly addressed the issue as to the circumstance in which a unilateral trade measure is justified. The Appellate body made reference to several multilateral agreements and international law principles which urge countries to look for multilateral solution to environmental challenges beyond the national territory of a

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[120] Condon, *supra* note 118, at 148.
[121] *Ibid*.
[122] Bernasconi-Osterwalder, *supra* note 19, at 239.
[123] Condon, *supra* note 124, at 148.
[124] Shrimp-Turtle (AB), *supra* note 9, at para 121.
[125] The panel noted that allowing members to condition market access on the adoption of certain policy, including environmental protection, will degrade the multilateral framework of the general agreement. The panel found out that the US unilateral measure could not be justified under the general exceptions. See *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Panel Report (WT/DS58/R) Adopted November 6, 1998(here in after Shrimp-Turtle), at para 7.46.
[126] Shrimp-Turtle (AB), *supra* note 9, at para 121.
[127] The appellate body went further and stated that, "It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character." See Shrimp-Turtle (AB), *supra* note 9, at para 121; see also Condon, *supra* note 118, at 150.

member which purports to take measure.[128] The Appellate Body found that the US measure, though provisionally justified under article XX (g) exception, it failed to pass the requirement of the chapeau due to the fact that US did not make serious efforts to negotiate a treaty with affected countries before imposing the import ban.[129] It can be understood that a unilateral trade measure may be justified under article XX exceptions only after a reasonable effort towards multilateral solution fails.

3. The Chapeau

A measure, which is found to be consistent with one or more of the paragraphs from (a)-(j), has to pass further requirements in the Chapeau.130 The requirements under the chapeau are devised to check that members do not use article XX exceptions arbitrarily.131 Each of the exceptions from paragraphs (a)-(j) are limited and conditional exceptions from the substantive obligations of members under GATT-1994.132 The appellate body in the Shrimp-Turtle case stated that the chapeau of article XX is "one expression of the principle of good faith" under general international law. 133 This principle "controls the exercise of rights by states".134 The Appellate body expressed the chapeau as a means to "maintain a balance of rights and obligations between the right of a member to invoke one or another of the exceptions of Article XX…, on the one hand, and the substantive rights of the other members…"135 The principle, therefore, prohibits the "abusive" exercise of rights by states.136

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[128] The Appellate body made reference to Principle 12 of the Rio declaration; paragraph 2.22 (i) of agenda 21; article 5 of convention on biodiversity; annex I of the convention on species of wild animals. All of these declarations and conventions oppose unilateral measure in relation to environmental challenge out side of the jurisdiction of a state which purports to take the measure. Besides, all of them urge countries to seek for multilateral solution to transboundary and global environmental problems. See Shrimp-Turtle (AB), *supra* note 9, at para 168-69.

[129] Shrimp-Turtle (AB), *supra* note 9, at para 166.

[130] See Shrimp-Turtle (AB), *supra* note 9, at para 147, where the AB stated that although the US measure provisionally justified under article XX (g), it must also satisfy the requirement of the chapeau in order to be justified under article XX exceptions.

[131] Birnie & Boyel *International Law and the Environment* (2002) 711.

[132] Shrimp-Turtle (AB), *supra* note 9, at para 157.

[133] Shrimp-Turtle (AB), *supra* note 9, at para 158.

[134] *Ibid*.

[135] Shrimp-Turtle (AB), *supra* note 9, at para 156; see also *United States - Standards for Reformulated and Conventional Gasoline* Appellate Body Report (WT/DS2/AB/R) adopted May 20, 1998(here in after US-Gasoline (AB)), at para 23.

[136] Shrimp-Turtle (AB), *supra* note 9, at para 158; See also US-Gasoline (AB), *supra* note 135, at para 22.

The chapeau of article XX provides that a measure should not be applied in a manner which constitutes arbitrary and unjustified discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. A discriminatory application of a measure, which is provisionally justified under one of the specific paragraph of article XX, may not necessarily be inconsistent with the requirements of the chapeau. There is a possibility that a country may provide an acceptable rational for discriminatory application of its measure. In the Brazil-Tyres case, the discriminatory application of Brazil's measure was not an issue both before the Panel and the Appellate Body.[137] Rather, the European community argued that Brazil's discriminatory measure was arbitrary and unjustified.[138] The Appellate Body dealt with the issue as to what makes a discriminatory treatment unjustified and arbitrary. The Appellate Body stated that, "…whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination."[139]

The Appellate Body examined whether the rational behind Brazil's discriminatory application of the measure was related to the policy objective it wanted to achieve. The Appellate Body stated that:

> "…there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner…and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective" [140]

In the view of the Appellate body, therefore, determination of the existence of arbitrary or unjustified discrimination requires an examination of the rational behind a discriminatory measure in light of the objective to which a measure is meant to be taken. If the rational

[137] The case involves Brazil's import ban on retreaded and used tyres. Among other arguments, Brazil asserted that retreaded and used tyres can cause health risks to animal, plant and human. However, Brazil put exemption from the import ban of imports from some countries, commonly known as MERCOSUR with which Brazil formed the Southern Common market. See *Brazil- Measure Affecting Imports of Tyres* Appellate Body Report (WT/332/AB/R) December 3, 2007(here in after Brazil-Tyres (AB)), at para 121-122.
[138] Brazil-Tyres(AB), *supra* note 137, at para 220.
[139] Brazil-Tyres(AB), *supra* note 137, at para 225.
[140] Brazil-Tyres(AB), *supra* note 137, at para 227.

for a discriminatory measure is found to be unjustified, or unrelated to the objective of the measure, there will be arbitrary and unjustified discrimination.

In the Shrimp-Turtle case, the Appellate Body found the US discriminatory measure arbitrary and unjustifiable, as countries using identical methods to the US to exclude incidental mortality of see turtles were denied of access to the US market merely because shrimps were caught in the waters of countries which were not certified by the US.[141] The US measure, according to the Appellate Body, targeted not at the end that its policy should achieve, rather it focused on influencing other members to adopt the same regulatory regime as that of US.[142] In other words, the US discriminatory application of the measure was not justified, or not related to the policy objective that it purported to achieve. The policy objectives that US purported to achieve was to reduce the incidental mortality of sea turtles during shrimp harvests which could have been also achieved by recognizing identical methods of harvesting devices.

The Appellate Body, both in the Shrimp-Turtle and the Brazil-Tyres cases, failed to give detailed analysis on the issue of disguised restriction on international trade. In the Shrimp-Turtle case, since the US measure was found to be applied in a manner that constituted arbitrary and unjustified discrimination, where the same conditions prevailed, the Appellate Body found that it was not necessary to examine whether the measure was "a disguised restriction on international trade".[143] It is not clear whether the Appellate Body ignored this latter issue only because of judicial economy. In the US gasoline case, however, the Appellate Body explicitly noted that "unjustified discrimination", "arbitrary discrimination" and "disguised restriction on international trade" may be seen side by side and "impart meaning to one another".[144] The Appellate Body found that "disguised restriction" subsumes "arbitrary discrimination" and "unjustified discrimination".[145] However, it has to be noted that a country's measure, though not discriminatory in any ways among exporting countries or between foreign and domestic like products, can still

[141] Shrimp-Turtle (AB), *supra* note 9, at para 165.
[142] *Ibid*
[143] Shrimp-Turtle (AB), *supra* note 9, at para184.
[144] US-Gasoline (AB), *supra* note 135, at para125.
[145] *Ibid.*

be motivated by protectionist policy. For example, a country in which there is no particular environmentally unsustainable PPM may prohibit the import or domestic production of a product produced in a certain manner. In this hypothetical case, it is clear that there is no discrimination. The hidden purpose behind the measure can, however, be protectionist to favour domestic industries. In some instances, therefore, disguised restriction may not necessarily subsume arbitrary and unjustified discrimination. The real purpose of a measure purported to be taken under one of the exceptions of article XX must be examined in order to decide whether there is a disguised restriction on international trade.

In summery, the Appellate Body's decision in the shrimp-Turtle cast light on the debate whether a process based measure can be justified under the GATT.[146] It is viewed as recognition of unilateral process-based trade measure.[147] However, it balanced between interests of trade and environment and not as "favourable to unilateral action as either the trade or environmental community perceive".[148] Generally, it is safe to conclude that neither the text of the GATT nor the WTO jurisprudence supports the conclusion that process-based trade measures are *a priori* inconsistent with the GATT rules, at least in light of article XX exceptions.

III. Reconciling the Trade Environment Debate

A. Overview

It is far from being disputed that certain process and production methods have negative effects on environment. The spillover of some production methods can sometimes be felt

[146] Appeleton "Shrimp/Turtle: Untangling the Nets" (1999) 2 *Journal of International Economic Law* (*J. Int'l Eco. L*) 477 at 491-92.
[147] *Ibid.*
[148] *Ibid*; see also Lowenfeld *International Economic Law* (2002) 323. The GATT community has expressed deep concern that the appellate body's decision apparently allows the use of process-based measures. The appellate body's finding in the Shrimp turtle case has been seen as a reversal of a longstanding jurisprudence which viewed process based measure as *a priori* inconsistent to the trading rules. See Chang "Towards a Greening GATT: Environmental Trade measures and the Shrimp-Turtle case"(2000-2001)74 *South California Law Review (S. Cal. L. Rev.)* 31; see also Bhagwati , After Seattle: Free trade and the WTO (2001), 77 *International Affair*(Int'l Aff), Available at <http://web.nps.navy.mil/~relooney/IntAffairs_1.pdf> (accessed April 15 2008) 28

beyond the country where the PPM is utilized.[149] Some countries may opt to take trade measures in order to discourage other countries which use environmentally unsound process and production methods. The ultimate objective of the country taking the measure may genuinely be motivated by environmental protection. The very important issue, in light of the economic and other realities of LDCs and developing countries, is whether trade measures are the most effective alternative to cope with PPM-related environmental problems.

A genuine and non-protectionist environmental policy measure must target at the effectiveness of trade measures to correct environmental wrongs committed out side of the territory. The overt reality associated with developing countries, especially LDCs, is lack of skills and technologies to utilize modern production methods with the least environmental externalities.[150] In these countries, poverty eradication is a major policy preoccupation.[151] Process based trade measures can potentially deny them market access, which thereby exacerbate the already impoverished economic, social and environmental conditions in those countries.[152] Besides, poverty can be one of the root causes of environmental problems in poor countries.[153] Since many environmental problems may not be confined where they are originally caused, they may have repercussions beyond national territory of a country or region. Creating economic capacity to developing countries can help them contribute the global effort towards environmental protection.[154] This fact indicates that there is a need to think about other alternative solution which can reconcile the development or trade need of poor countries and environmental concerns.

Some global efforts have been made to reconcile the ongoing debate on trade and environments. Some of these efforts are made outside the WTO system while others are

[149] OECD Secretariat, *supra* note 17.
[150] Tetarwal & Mehta, *supra* note 14, at 5.
[151] See Agenda 21, U.N. Conference on Environment and Development (UNCED), Annex II, U.N. Doc. A/CONF. 151/26/Rev.1 (1992) (here in after Agenda 21).
[152] Since process-based trade measures some times take the form of import ban, LDCs could not get financial resource from international trade necessary to alleviate their social, economic and environmental problems.
[153] In an impoverished society where there is no alternative way of supporting life, people highly depend on the environment for survival, in one way or another, this in turn adversely affect the environment.
[154] Agenda 21, *supra* note151, at 2.19; see also Fijalkowski & Cameron (eds) *Trade and the Environment: Bridging the Gap* (1998) 125.

within the WTO. These efforts indicate alternative solutions to trade measures in order to alleviate global environmental problems. The following part will examine these efforts.

B. Out side the WTO

The UNCED[155] summit forwarded a number of policy recommendations related to trade and environment in a way that addressed the interests of both developed and developing countries.[156] One of the significant achievements of the UNCED may be explained in terms of the fact that it came up with the Rio-declaration.[157] The declaration provides momentum for reconciling the environment-development debates.[158] The declaration provides several provisions which directly deal with the issues of trade and environment. Principle 12 of this declaration recognises trade measures for the purpose of environmental protection. However, it makes sure that such measures are not taken for protectionist purpose. The principle reads:

> "Trade policy measures should not constitute a means of arbitrary or unjustified discrimination or a disguised restriction on international trade. Unilateral actions to deal with the environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.[159]

This principle reinforces the "sufficient nexus" approach to take a trade measure for protection of environment. Besides, it recognises a multilateral approach to deal with transboundary and global environmental problems to which the Appellate Body in the Shrimp turtle case make reference.[160]

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[155] UNCED refers to the United Nations Conference on Environment and Development that was held from June 3 through June 14, 1992, in Rio de Janeiro, Brazil.

[156] Vaughan "Trade and Environment: some North South Considerations" (1994) 27 *Cornell International Law Journal (Cornell. Int'l L. J)* 591 at 595.

[157] The Rio declaration is adopted in the UNCED by consensus, and constitutes the most significant statement of universally accepted general rights and obligation of states in the field of environment and development. It is partly a restatement of existing customary international law on matters of transboundary nature, and partly constitutes emerging principles of law in relation to the protection of the global environment; see Rio declaration on Environment and development, June 14, 1992, U.N. Doc. A/CONF. 151/5/Rev.1 (1992) (here in after Rio declaration); See also Birnie & Boyel, *supra* note 131, at 82.

[158] Vaughan, *supra* note 156, at 595.

[159] Rio declaration, *supra* note 157, at principle 12.

[160] Shrimp-Turtle (AB), *supra* note 9, at para 154.

The Rio-declaration recognises that some environmental standards set by countries may have unwarranted and inappropriate economic and social repercussion on other countries, especially developing countries.[161] The declaration emphasises on the need of environmental standard, management objectives and priorities to reflect the environmental and developmental context to which they apply.[162] It recognises the special situation and needs of developing countries, more particularly LDCs, and call for special priorities to be given to them.[163] It calls for cooperation between states towards capacity building for sustainable development, and technology transfer to alleviate environmental problems.[164]

Agenda 21 restated most principles of the Rio declaration which are relevant to reconcile trade and environment debates. It focused on possible mechanisms that can bring about significant out come in the effort to make trade and development mutually supportive through international trade.[165] An open international trading system can help to achieve efficient allocation and use of resources and thereby help to increase income and production and reduce demand on the environment.[166] A more liberal trade helps to provide additional economic resources for growth and development and improves environmental protection.[167] In addition to explicit recognition to the need to take trade measures to reinforce environmental objectives, Agenda 21 takes cognizance of the fact that environmental standards valid for developed countries may have unwarranted social and economic costs in developing countries.[168] It calls for consideration of special factors affecting environmental and trade policies of developing countries in the application of environmental standards and the use of trade measures.[169] Besides, it calls for avoidance of unilateral trade measures to deal with environmental challenges outside the jurisdiction

[161] Rio declaration, *supra* note 157, at Principle 11.
[162] *Ibid.*
[163] Rio declaration, *supra* note 157, at principle 6.
[164] *Ibid*.
[165] Agenda 21, *supra* note 151, at Para 2.19.
[166] *Ibid*.
[167] *Ibid.*
[168] Agenda 21, *supra* note 151, at Para 2.20.
[169] Agenda 21, *supra* note 151, at Para 2.22 (g).

of importing country.[170] In relation to transboundary and global environmental problems, agenda 21 encourages multilateral solutions through consensus.[171]

Agenda 21 proposes an integrated approach towards alleviating transboundary and global environmental challenges. Agenda 21 takes cognizance that the actions that developing countries should undertake to deal with global environmental problems entails costs that they may not be able to afford.[172] It calls for a substantial flow of new and additional financial resources to developing countries.[173] The need for transfer of environmentally sound know-how and technology to developing countries is emphasised in order to protect the global environment from repercussions caused during production, consumption and disposal.[174] In summery, Agenda 21 gives the massage that trade measure for environmental policy objective may not, in and of itself, achieve its purpose. Global environmental challenges can best be tackled through mutually supportive global efforts.

C. Within the WTO

At the Doha Ministerial conference, members recognise the fact that protection of the environment and promotion of sustainable development can and must be mutually supportive.[175] Numerous issues have been raised in the Doha ministerial conference, and agreement has been reached to embark on a new round of negotiation, including on certain aspects of linkage between trade and environment.[176] The declaration instructed the Committee on Trade and Environment (CET) to give particular attention to the effect of environmental measures on market access, in relation to developing countries, especially LDCs, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development.[177]

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[170] Agenda 21, *supra* note 151, at Para 2.22(i).
[171] *Ibid.*
[172] Agenda 21, *supra* note 151, at Para 1.4.
[173] *Ibid*.
[174] Agenda 21, *supra* note 151, at Para 34.4.
[175] *Ministerial Declaration, Fourth Ministerial Conference*, Doha, Qatar, adopted 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001(here in after Doha Declaration), para 6.
[176] World Trade Organization *Trade and environment in the WTO* (2004) available at <http://www.wto.org/English/tratop_e/envir_e/envir_wto2004_e.pdf > (Accessed 17 March 2008) 9.
[177] Doha declaration, *supra* note 175, at para 32(i).

Members also recognise the importance of technical assistance and capacity building in the field of trade and environment to developing countries, especially LDCs.[178] The declaration instructs the CTE to prepare a report on these activities for the fifth session, and to make recommendations, where appropriate, with respect to future action, including the desirability of negotiations.[179] The declaration also instructs that the out come of the trade-environment mandates of the CTE should take into account the needs of developing countries and LDCs.[180]

It is reflected in the CTE report that improved market access is a key to achieve sustainable development.[181] It also confirms principle 11 of the Rio declaration that environmental measures adopted by some countries could be inappropriate and of unwarranted social and economic cost to others, especially developing countries.[182] It is acknowledged that environmental standards could adversely affect exports.[183] It is recommended that striking a proper balance between safeguarding access to market and environmental protection requires the importing country to examine how environmental measures could be designed in a manner that (i) is consistent with the WTO rules; (ii.) is inclusive; (iii.) takes consideration of capability of developing countries; and, (iv.) meets the legitimate objectives of importing country.[184] The report shows proposal which highlights the importance of involving developing countries in the design and development of environmental measures to reduce the negative effects of those measures.[185] Once it is developed, flexibility of the application of measures, by way of exceptions in favour of developing countries, is also proposed.[186] Technical assistance, capacity building and transfer of technology are emphasised as key to help developing country exporters to meet environmental requirements.[187] It is believed to help

[178] Doha declaration, *supra* note 175, at para 33.
[179] See Doha declaration, *supra* note 175, at para 32 and 33.
[180] Doha declaration, *supra* note 175, at para 32.
[181] Committee on Trade and Environment: *report to the 5th session of the WTO Ministerial Conference in Cancun, WT/CTE/8, 11 July 2003*(here in after CET Report), Para 32(4).
[182] *Ibid.*
[183] CET Report, *supra* note 181, at para 32(5).
[184] CET Report, *supra* note 181, at para 32(6).
[185] CET Report, *supra* note 181, at para 32(7).
[186] *Ibid*.
[187] *Ibid.*

developing countries to generate resources that can be utilized to implement sound environmental policies.[188]

Although considerable efforts have been made to address the legal, economic and other issues related to trade and environment, developing countries remain deeply wary of the appropriateness and effectiveness of "greening of the trade rules" without practical implementation of the commitments that developed countries made in the UNCED to provide tangible assistance to developing countries through additional financing, technology transfer, and other development assistances.[189] Denying market access to poor countries through process-based trade measures tantamount to making them to pay the cost to correct wrongs done to the global environment. The reality of LDCs and most developing countries reflect that they can not afford to pay the cost. At this stage, it is overt that environmental problems are global concerns. A global and coordinated effort is required to alleviate global environmental problems.[190] The use of process-based trade measures alone can never be an effective and logical move in dealing with environmental problems.[191]

Conclusion

Relatively recent WTO jurisprudence, especially the Appellate Body's ruling in the Tuna-dolphin case, makes clear that process-based trade measure for environmental protection objective is not *a priori* inconsistent with the GATT. WTO members can take this kind of measure under limited circumstances with out defaulting on their obligation under the GATT. The issue as to whether members can justify their process-based trade measure under the general principles of GATT is approached in the negative in WTO jurisprudence. However, a measure, otherwise inconsistent with the substantive obligations of a member, can still be justified under the general exceptions of article XX of the GATT. In order to be justified under one of the general exceptions, a measure must fulfill both the requirements of the relevant paragraph(s) under article XX, and the chapeau.

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[188] *Ibid*.
[189] Vaughan, *supra* note 156, at 605.
[190] Weiss & Jackson (eds) *Reconciling Environment and Trade* (2001) 445.
[191] Tetarwal & Mehta, *supra* note 14, at 1.

Process based environmental measure, even if utilised for genuine policy considerations, can pose the risk of depriving developing countries of market access in developed countries' market, the ultimate effect of which may be reflected more on LDCs. Developing countries have an urgent need towards economic development that can be more reinforced by increasing their export capacities in the multilateral trading system. LDCs can not easily cope with more hindrances in the international trading system through process-based trade measures. This is primarily because these countries can hardly afford to employ environmentally friendly methods of productions. It does not, however, mean that process-based environmental measures should be totally outlawed from GATT rules. Process-based trade measure, with non-protectionist policy, and together with technical assistance, capacity building and technology transfer, may assist efforts of environmental protection and sustainable development. Besides, success in the field of environmental protection and economic development requires countries' environmental regulations to take into account the special contexts and needs of developing countries, especially LDCs.

The Relevance of the Universal Declaration of Human Rights Today: Appraisal Based on Its Significance and Some Contemporary World Realities

Yitages Alamaw M.*

Introduction

The Universal Declaration of Human Rights, 1948 (UDHR), was adopted sixty years ago under the auspices of the United Nations (UN). Since its adoption, UDHR has witnessed various changes. First, there have been a number of attempts to wane the rights it contained through cultural relativization. Second, in recent years, it is caught in the cross fire of modern challenges, which grew complex due to globalization and the 9/11 terrorist attack, the rise of new human rights and the existence of binding human rights conventions of general or specific application and content.[1] Third, two World Conference on human rights were held. And, finally, UDHR has been a catalyst for an exemplary increase in human rights instruments and commendable coverage in their contents. In the system created by such instruments, a remarkable network of binding standards of human rights and mechanisms for their implementation has been established. Therefore, the situation the world was in at the time of its adoption has been changed by now in many ways.

Due to this change, UDHR has faced a number of challenges. For instance, at times its relevance today is questioned. This article is inspired by questions that have more to do with the need to examine applicability of UDHR today that can be generally put as *'What is the Relevance of the UDHR Today?'* Hence, it appraises the contemporary relevance of the UDHR. This is done from two perspectives: from its significance (nature) and realities of the world that call for its primary application today. Thus, this article tries to show its relevance based on these perspectives unlike other works that either simply proceed with presumption of its relevance or entertain its relevance from other dimensions. In this article, I argue that UDHR is a living Declaration as it gives human rights answer(s) to current challenges of the world and, therefore, relevant today. I show also that its relevance is not limited in what it

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[1] For instance, the International Covenant on Civil and Political Rights, 1966 (ICCPR), has general application or application to all human beings in Party States. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, deals with a specific (torture) content. The Convention on the Rights of the Child, 1989, has specific application (application to children) in Party States.

contains but also in what it does. For simplicity, the work is presented in different parts. The first part gives historical background of the UDHR shortly to make the discussion complete. Then, some of the grounds that make it relevant today will be discussed. Finally, a brief conclusion will be made.

I. The UDHR: General Background

Here, I will deal with some notable facts about the UDHR under distinct sub-sections.

A. The UDHR: the first international human rights document

To reiterate the obvious, the UDHR is the first human rights instrument (IHRI) adopted at international level. Study of the history of human rights shows that before the adoption of the UDHR human rights issues were deemed to be matters of domestic laws.[2] This was based on the general and traditional understanding of international law as a law governing the relationship between and among states, not between states and the people in their territory.[3] Despite that understanding, the world community has come together to establish an international human rights system (IHRS) and this system was put in place for the first time through the UDHR.[4] In other words, the UDHR presented a turning point to the aforementioned conception in international law. It has made human rights issues among the subject matters of international law and thereby provided for the basis for IHRS, which is a special and distinct branch of contemporary international law.

B. The UDHR: Lynchpin of international human rights system

The UDHR has been regarded as a document that possesses some grand qualities the past, present and future generations may give gratitude for it and its makers. These qualities make it the milestone of IHRS. Some of these qualities are worth mentioning. First, the UDHR is praised as the first more comprehensive IHRI proclaimed by a universal international organization, the UN.[5] It is comprehensive as it contains both civil and political rights, and

[2] M Sepúlveda & et als Human Rights Reference Handbook, 3rd revised ed (2004) 5; A Eckert 'Universality by Consensus: The Evolution of Universality in the Drafting of the UDHR' (2001) 1 (2) Human Rights & Human Welfare 21

[3]T Buergenthal & etal International human rights in a nutshell, 3rd ed. (2002) 3; M Sepúlveda & et als (n 2 above) 4-5. J Crawford 'The criteria for statehood in international law' (1976-77) 48 British Y. B. International Law 98.

[4] M Sepúlveda & et als (n 2 above) 4-5.

[5]T Buergenthal & et'al (n 3 above) 35.

social, economic and cultural rights colloquially called first and second generation rights, respectively.[6] Thus, it is important and remarkable in dealing with both civil and political rights, and social, economic and cultural rights at all, international, regional and national, levels. This further buttressed the doctrine that all human rights are indivisible, interrelated and interdependent in the framework of human rights law.[7] Second, in the last six decades, the UDHR has inspired a number of human rights treaties in the world, and formed a basis of standard and primary source of IHRI and the IHRS governing them.[8] This is mainly due to its comprehensiveness, and high legal and moral standard it attained through time, among other things. Therefore, it seems possible to conclude that the UDHR forms the lynchpin of the international human rights framework.[9]

C. The UDHR: adoption

The UDHR is a result of a reaction to the horrific experience of the Second World War (WWII).[10] The countries all over the world, in general, and the west in particular, realized that WWII 'lay in Hitler's contempt for human rights and freedoms.'[11] They also noted, human rights issues should be addressed only through a change to the traditional understanding of international law on human rights matters, which left such matters to domestic arrangements in each state. Experience showed that there is a strong correlation between human rights and peace.[12] Hence, peaceful existence in this world needs respect for human rights and no peace may result if human rights are violated.[13] Therefore, as peace

[6] UDHR arts 3- 21 & 22-27 mention civil and political rights, and economic, social and cultural rights, respectively. Also see 'D Olowu 'Invigorating economic, social and cultural rights in the South Pacific: A Conceptual approach' (2007) 7 (1) QUTLJJ 74.

[7] Vienna Declaration and Programme of Action, 1993, Part I, para 5. UN Doc. A/CONF. 157/23.

[8] E Re 'The Universal Declaration of Human Rights: Effective remedies and the domestic courts' (2003) 33 California Western International Law Journal 145.

[9] Human Rights Commission, 'Relevance of human rights as strong today as ever,' available at http://www.scoop.co.nz/stories/PO0512/S00089.htm , accessed on August 20, 2008.

[10] J Morsink The Universal Declaration of Human Rights: Drafting, Origins & Intent, (2000) cited by A Eckert (n 2 above) 21. The drafters are influenced also by the women's movement, Latin American socialism, and Cold War rivalry. Ibid.

[11] A Cassese Human Rights in a Changing World, (1990) 29; F de Varennes, "The fallacies in the 'universalism versus cultural relativism' debates in human rights law" (2006) 1 Asia-Pacific Journal on Human Rights and the Law 70.

[12] F de Varennes (n 11 above) 70. Also see N Rodley 'The Universal Declaration of Human Rights: Learning from Experience' (2008) 5 (1) Essex Human Rights Review 1-6.

[13] UDHR, Preamble, para2.

loving nations, the states in the world agreed to protect human rights through international framework, among other things. This has resulted in the drafting, negotiation and, finally, adoption of the UDHR.[14] Thus, UDHR has an enduring relevance as it is a reflection of our past that helps us proceed forward. It continues to tell us for the need to respect human rights in order to live peacefully and what a failure to respect would entail.

D. The UDHR: world declaration

Due to the aforementioned reasons,[15] the UDHR has been prepared and adopted with the participation of 58 states under the umbrella of the UN in 1948.[16] UN member states from Western and Eastern Europe, North America, Latin America, Asia, and Africa have participated in the process and thus, the document was the result of works of these states.[17] In the words of Macmillan, it is 'the fruit of several ideologies: the melting point of diverse conceptions of man and society.'[18] It is a document reflecting the views and values of various parts of the world not only the western world as such.[19] This makes it the 'Bill of Rights of the World.' Therefore, it is possible to argue that the UDHR is a Declaration of the world, not of the Western world only as some claim it to be.[20] Though it seems wise to question how inclusive of values of the various states in the world the UDHR is due to the participation of limited number of states, for instance, only four African states have participated in the making,[21]it is important to note that such issue is not worth its face value for four reasons.

First, the UDHR contains human rights that are universal and that exist in the traditions and

[14]UDHR, Preamble, paras 1& 2.

[15] See 1.2.3.

[16]There were 20 states from Latin America, 14 states from Asia and 4 states from Africa. See F de Varennes (n 11 above) 71. For position of the states, see Year Book of the United Nations 1948-1949, UN Publications, Sales No. 1950 I. II, 1950, pp524-537.

[17]--- 'Universal Declaration of Human Rights,' available at http://www.un.org/rights/HRToday/declar.htm accessed on August 25, 2008.

[18]M Macmillan Paris 1919: Six months that changed the world, (2003) 37; F de Varennes (n 11 above) 72.

[19] Morsink also says that the process by which the UDHR was drafted included a variety of social, cultural, and ideological traditions and that the final document reflects this diversity. J Morsink (n 10 above) cited by A Eckert (n 2 above) 21

[20]--- 'Dignity and justice for all of us,' p. 31, available at http://www.nelsonmandela.org/images/uploads/SAHRC-Dignity-for-all.pdf accessed on August 20, 2008.

[21] Prof Y Ghai says that of the various criticisms that go against the UDHR the criticisms relating to its claims of universality and to the very utility of the rights it contained are not grounded on acceptable reasons. See Y Ghai 'The Critics of the Universal Declaration' (1998/9) 12 (1) INTERIGHTS Bulletin 45-46.

custom of various societies that are not fairly represented during its adoption.[22] First, the lack of fair representation should not be taken to conclusively argue that the UDHR does not represent the values of societies in some parts of the world as inclusion of the values of such states is possible even if there is no fair representation. Second, though there was no fair representation, the contents of the UDHR can be summarized as entitlements that exist in the societies found in all parts of the world as process by which it was drafted included a variety of social, cultural, and ideological traditions and that the best effort has been made to make the final document reflect this diversity.[23]

Furthermore, incorporation of all values is still not practically feasible as it is difficult, if not impossible, to identify and include them within such short period the UDHR was adopted. Moreover, what is intended was not to come up with an instrument that contains all values of the people in all parts of the world; rather, to prepare a document of universal application that contains only some human rights values that have a common application in all parts of the world.[24] In other language, the UDHR portrays a point of remarkable degree of consensus by governments on the principle at least that certain rights be protected under international law regardless of disputes over their conceptualisation and application. Thus, failure to incorporate all values of all states around the world cannot afford to be a good reason to argue that the UDHR does not reflect the values of the states in different parts of the world. Nor, non-incorporation of some values of some countries in certain parts of the world cannot make a good justification to hold that the UDHR does not belong to the countries in such part of the world. It would appear logically not only appealing but also strong to say that the UDHR represents only a minimum principle for such countries. The UDHR is also not claiming that it reflects all the values of all states of the world but only some of them that can be taken as common values to all human kind around the world as its preamble proclaims.[25]

Second, the UDHR was a document adopted with consensus and abstinence. No single state objected to its adoption. But six Communist states led by the USSR and South Africa for

[22] M Macmillan (n 18 above) 37; F de Varennes (n 11 above) 72; J Morsink (n 10 above) cited by A Eckert (n 2 above) 21.

[23] M Macmillan (n 18 above) 37; F de Varennes (n 11 above) 72; J Morsink (n 10 above) cited by A Eckert (n 2 above) 21

[24] See UDHR, Preamble, para8.

[25]UDHR, Preamble, para8.

political reasons, and Saudi Arabia, for religious reason abstained from voting in its favour.[26] This implies that, even these states were somehow in belief that its contents were not objectionable to societies in different parts of the world.[27]

Furthermore, the interpretation of Islamic law (by the Saudi representative in the Third Committee as a law that prohibits change of religion which is inconsistent with the assertion in Article 18 that the right to freedom of thought, conscience and religion includes the freedom to change one's religion) that was taken as a basis for abstinence of Saudi Arabia was not accepted by other Muslim participants in the debates.[28] In addition, the states that abstained from voting have played an active role in the drafting process and were instrumental in the final form of several articles.[29] Accordingly, Mickelson says that '[f]rom the point of view of human rights advocates, this abstention could almost be regarded as providential: the pariah exception that proves the rule.'[30] It is also important to note that the importance of the eight abstentions should not be downplayed at the same time the eight abstentions should not be lifted to a level they should not deserve. They are significant as they show not only the unwillingness of any state to vote against the Declaration but also the assumption that, while the Declaration itself might be flawed from some perspectives, the norms embodied therein were not rejected outright by any member of the international community.[31]

[26] K Mickelson 'How universal is the Universal Declaration?' (1998) 47 University of New Brunswick Law Journal 20-21; J Humphrey, Human Rights and the United Nations, (1984) 71-73; J Morsink (n 10 above) cited by A Eckert (n 2 above) 21. (Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, Ukrainian SSR, Union of South Africa, USSR and Yugoslavia) abstaining from the vote. The UN member states which voted in favour of the declaration were Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma (Myanmar), Canada, Chile, China, Columbia, Costa Rica, Cuba, Denmark, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Siam (Thailand), Sweden, Syria, Turkey, United Kingdom, United States, Uruguay and Venezuela.

[27] K Mickelson (n 24 above) 20; J Humphrey (n 24 above) 73; J Morsink (n 10 above) cited by A Eckert (n 2 above) 21.

[28] K Mickelson (n 24 above) 20-21; J Humphrey (n 24 above) 71-73.

[29] J Morsink (n 10 above) cited by A Eckert (n 2 above) 21.

[30] K Mickelson (n 24 above) 20.

[31] K Mickelson (n 24 above) 20.

Third, the regional human rights systems established in different regions of the world add upto the conclusion that the UDHR is a universal document as they make reference to it as to the enforcement of human rights in their systems.[32]This can also be seen from domestic laws.[33]

Fourth, the formulation of the UDHR shows also the fact that it is a document of the world. As far as the formulation of UDHR is concerned, human rights were deliberately grounded in the seemingly uncontroversial notion of human dignity.[34] This can be seen from its Preamble that refers to the 'dignity and worth of the human person' and Article 1, which proclaims, 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' The concept of human dignity and worth exists in all communities around the world despite the difference in the understanding relating to the concept in each community.[35] The UDHR is a result of identified denominators of the concept while recognizing its peculiarities. By the same token, the status of human dignity as the source of human rights is made explicit in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which state that human rights 'derive from the inherent dignity of the human person.'[36] Thus, if we say the ICCPR and ICESCR are human rights documents that reflect the human rights views of the world community as the rights they contain are grounded in notion of human dignity, then the same logic works for the UDHR.

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[32] See African Charter on Human and Peoples' Rights, 1986, Preamble para4; American Convention on Human Rights, 1978, Preamble, paras 3&4; European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953 as amended in 1998, Preamble , paras 1 & 2.

[33] For instance, Constitution of the Federal Democratic Republic of Ethiopia, 1995 (FDREC), provides that the bill of rights therein shall be interpreted in light of the UDHR among other human rights instruments. FDREC, Proclamation No. 1/1995, *Federal Negarit Gazeta*, 1st Year No. 1, Art.13 (2). To cite a practice in Africa, in Attorney General v. Unity Dow case, the Supreme Court of Botswana noted that the UDHR 'must have formed part of the backdrop of aspirations and desires against which the framers of the Constitution of Botswana formulated its provisions.' In addition, the UDHR has been referred in several African cases. See H Hannum 'The status of the Universal Declaration of Human Rights in national and international law' (1995/1996) 25 Georgia Journal of International and Comparative Law 304.

[34]K Mickelson (n 24 above) 22.

[35] K Mickelson (n 24 above) 22; J Donnelly, Universal Human Rights in Theory and Practice, (1989) 90; S Sucharitkul 'A Multi-Dimensional Concept of Human Rights in International Law' (1987) 62 Notre Dame Law Review 306-307.

[36] Preambles, paras, 1 & 2 of the ICCPR and ICSECR.

Finally, the UN World Conferences on Human Rights in Tehran and Vienna, which were marked by an unprecedented degree of support by the international community (including delegations from 171 States),[37]have made a remarkable contribution. The participants of these Conferences reaffirmed the centrality of the UDHR for human rights protection under the Proclamation of Teheran (1968) and Vienna Declaration and Programme of Action (1993).[38] This may be taken as official recognition of the fact that the UDHR is a world document, not of only the West. It can also be taken as a reaffirmation that has a retroactive effect that makes the UDHR a world document, at least after the Conference. Thus, the UDHR is no more the documents of the West for those who held such position. In addition, the Conferences also emphasized that human rights are universal, indivisible, interrelated and interdependent, and they should be promoted in equal manner.[39] This supports the argument that the UDHR reflects the understanding of human rights by the world community as it reflects such characters of human rights. Finally, the delegates in the Vienna Conference rejected arguments that some human rights were optional or subordinate to cultural traditions and practices.[40] The Vienna Conference thus has not only given high priority to preserving the integrity of the UDHR[41] but also affirmed the fact that it contains rights that are universal to the world and thereby made it a document of the world.[42]

E. The UDHR: holistic approach and aspirational beginnings

It is important to note that UDHR is a document that is holistic in approach and aspirational in nature. It is holistic in approach[43]because it includes human rights that are classified as first and second generation rights. This makes it unique and that is why it is called a

[37] ... 'A United Nations Priority' available at ...; see also H Hannum (n 31 above) 290.

[38] M Sepúlveda & et als (n 2 above) 5.

[39] ... 'A United Nations Priority' available at

[40] ... 'A United Nations Priority' available at

[41] ... 'A United Nations Priority' available at

[42] In the UN Millennium Declaration 2000, the heads of state and government have resolved '[t]o respect fully and uphold the Universal Declaration of Human Rights' under paragraph 25. See UN General Assembly Resolution 55/2. This also shows that the UDHR is no more the document of the West, but that of the world.

[43]G Alferdsson & A Eide (eds) The Universal Declaration of Human Rights: A common standard of achievement, (1999) xxx.

comprehensive document unlike other human rights treaties.[44] It is also a remarkable feature of the UDHR that it gives equal status to both civil and political rights, and economic, social and cultural rights.[45] Besides together with the other International Covenants and the Optional Protocols, it forms 'International Bill of Rights'.[46] Therefore, it is usually said that '[t]he UDHR sets forth a framework for realization of the full scope of human rights and freedoms.'[47] However, this should by no means be taken to mean that the UDHR is without any drawbacks particularly with respect to its content. It is incomplete for it does not include some of the most important rights at issue today, like the right to self determination and 'certain rights for minorities.'[48]

By the same token, the UDHR was aspirational in nature because it was adopted as a Declaration that calls countries to aspire to enable the full enjoyment of those rights.[49] It is an instrument that shows the intention of the countries that adopted it, i.e. to provide for 'a common standard of achievement for all peoples and all nations.'[50] At this juncture, one may ask whether the UDHR remained as a mere Declaration. Though it, originally, was not adopted as an instrument with a legal force, rather as a Declaration adopted through the resolution of the General Assembly of the UN, the status of the document has been significantly changed.[51] Today, it 'exerts a moral, political, and legal influence far beyond the hopes of many of its drafters.'[52] By now, its status has changed and the UDHR has commonly been regarded as an instrument with not only legal and political force but also with moral influence, at least partly.[53]

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[44]G Alferdsson & A Eide (eds) (n 43 above) xxx.

[45]G Alferdsson & A Eide (eds) (n 43 above) xxix.

[46] United Nations Human Rights Office of the High Commissioner for Human Rights (OHCHR), '2007 Report on Activities and Results,' available at http://www.ohchr.org/Documents/Press/OHCHR_Report_07_Full.pdf , accessed on August 26, 2008, p.15.

[47] --- 'Does the 50-year old UDHR adequately address current human rights dilemmas?' available athttp://www.udhr.org/history/question.htm#_Toc397930437, accessed on August 19, 2008.

[48] --- 'Does the 50-year old UDHR adequately address current human rights dilemmas?' (n 47 above).

[49] Declaration is a document with no direct or positive legal obligations on states.

[50]UDHR, Preamble, para8.

[51]T Buergenthal & et'al (n 3 above) 39.

[52] H Hannum (n 31 above) 289.

[53] See 1.3.1.4.

F. The UDHR: open-ended and forward-looking design

By design, the UDHR is 'an open-ended and forward-looking document.'[54] It is far sighted. It is designed in such a way that it can provide protection from human rights violation based on any unforeseen ground. For example, Article two provides for protection from discrimination in the enjoyment of the fundamental rights and freedoms contained under the Declaration based on various factors including 'other status.' By adding the phrase 'other status', the framers of the UDHR 'recognized that with time other kinds of discrimination might attract public attention' and they worked to anticipate the same.[55] This makes it a far sighted document. It can, therefore, conveniently address new developments with respect to discrimination in a desired manner.[56] In addition, it put first and second generation rights on equal footings showing that human rights need to addressed as indivisible, interrelated and interdependent notions, which the world has realized only recently and yet failed to act accordingly. Furthermore, it has envisioned the need to adopt comprehensive enforcement mechanisms in order to realize human rights promises.[57]

II. Significance and relevance of the UDHR

It is indisputable that the UDHR is a significant Declaration. It has brought many noticeable changes in the world since its adoption.[58]Thus, it is a document of innumerable significance. Similarly, the significance and relevance of the UDHR may be entertained from different perspectives. However, here I will deal with its relevance from the perspectives of its nature or significance and the reality on the ground, respectively.

A. Relevance of the UDHR: from its significance (nature)

I believe that the UDHR is significant and relevant today for the following reasons.

[54] --- 'Does the 50-year old UDHR adequately address current human rights dilemmas?' (n 47 above).

[55] --- 'Does the 50-year old UDHR adequately address current human rights dilemmas?' (n 47 above).

[56] See, for instance, D Catania 'The Universal Declaration of Human Rights and sodomy laws: A Federal Common law right to privacy for homosexuals based on customary international law' (Winter 1994) 31 American Criminal Law Review 289.

[57] UDHR, Preamble & Arts 28-30.

[58] G Alferdsson & A Eide (eds) (n 43 above) xxviii.

1. The UDHR: the first international recognition of human rights for all and a guide for their realization

The UDHR 'was the first international recognition that *all human beings* have fundamental rights and freedoms.'[59] This shows that human beings should be entitled to certain basic rights regardless of where they are, their race, sex, or other status.[60] This makes the UDHR relevant even today as people in some parts of the world are suffering from gross human rights violations.[61] The rights proclaimed to be entitlements for all human beings alike under the UDHR have different reality in different parts in the world today. The pledge to "promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'" will be difficult to realize without the UDHR.[62] Hence, like it was in 1948, we need the UDHR as it contains principles that can be used as guide for the protection of human rights in all corners of the world today.

2. The UDHR: its relevance to the UN Charter

The UDHR is relevant today as it is an instrument consisting of norms and principles against which the 'human rights provisions of the United Nations Charter' are interpreted and enforced.[63] It is true that the UN Charter (the Charter) contains several provisions related to human rights.[64] But it does not contain the list of these rights.[65] It only makes a general reference to human rights without the mention of these rights. The reference was necessitated by the fact that human rights were the major concerns at the time the Charter was adopted and the need to recognize these rights as enforceable under international law was pressing.[66]

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[59] OHCHR, 'Universal Declaration of Human Rights,' available at http://www.ohchr.org:80/EN/UDHR/Pages/60UDHRIntroduction.aspx accessed on August 19, 2008. Emphasis mine.

[60] UDHR, Preamble, & arts 2 & 7.

[61] OHCHR, 'Universal Declaration of Human Rights,' (n 59 above).

[62] E Re (n 8 above) 142.

[63] G Alferdsson & A Eide (eds) (n 43 above) 41. For some cases and resolutions of the UN Security Council, see E Schwelb 'An Instance of enforcing the Universal Declaration of Human Rights: Action by the Security Council' (Jan., 1973) 22 (1) The International and Comparative Law Quarterly 161-163; M Sepúlveda & et als (n 2 above) 5.

[64] See UN Charter, Arts1, 13, 55, 62, 68 & 76; E Re (n 8 above) 141.

[65] E Re (n 8 above) 141.

[66] E Re (n 8 above) 141.

The task of elaborating and coming up with the list of rights that are deemed to be fundamental human rights, 'International Bill of Rights', was entrusted to the UN Economic and Social Council (UNESC).[67] The UNESC established a Human Rights Commission (HRC) in 1946 that was mandated to carryout this task.[68] The HRC decided that the Bill of Rights would be presented in two parts,[69]the first being a declaration to be approved by States at the UN General Assembly meeting and having only a 'moral force.'[70] Though it has a mere moral force, such declaration is to be proclaimed with a view to convey a message to the people and states of the world that 'this is what we hope human rights may mean to all peoples in the years to come.'[71] The second part of the Bill of Rights would be a covenant in the form of treaty.[72] Accordingly, the HRC had come up with the UDHR as the document that serves as the first means of presenting elaboration of the fundamental human rights articulated under the Charter and the Bill of Rights in 1948. Therefore, the UDHR is 'an authoritative interpretation of the Charter of the highest order [or the UN Charter].'[73]

This truth was further buttressed by the observation of the International Law Association (ILA) made in 1994. ILA noted that the UDHR 'is universally regarded as an authoritative elaboration of the human rights provisions' of the Charter.[74] The UDHR has also been considered as a Declaration imposing obligations that emanate from the concept of human dignity as recognized by the Charter and the Declaration itself.[75] Therefore, it consists in the rights the world community has pledged to respect under the Charter.[76] From these facts, it is

[67] E Re (n 8 above) 141.

[68] M Sepúlveda & et als (n 2 above) 5; E Re (n 8 above) 141.

[69] E Re (n 8 above) 141.

[70] E Re (n 5 above) 141.

[71] The Struggle for Human Rights: Address by Mrs. Franklin D. Roosevelt, U.S. Representative to the Commission on Human Rights, Sept. 28, 1948, Dep't St. Bull., Oct. 10, 1948, at 457 quoted in E Re (n 8 above) 141.

[72] E Re (n 8 above) 141.

[73] H Hannum (n 31 above) 323.

[74] H Hannum (n 31 above) 323. H Hannum 'The status of the Universal Declaration of Human Rights in national and international law' (1998/9) 12 (1) INTERIGHTS Bulletin 3-8.

[75] H Hannum (n 31 above) 323.

[76] H Hannum (n 31 above) 319.

apparent that the UDHR has been significantly transformed from aspiration to fundamental obligations that constitute part and parcel of states' obligations under the Charter.

As part of the Charter, the UDHR is a document relevant today in the maintenance of international peace, and universal respect for human rights and fundamental freedoms. To say that the UDHR is outdated is to make the human rights provisions and concept of the Charter outdated. It is relevant today and represents the first concrete step to fulfilling the pledge to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all' under the Charter.[77] Therefore, principles of UDHR are what states have pledged to protect to people in their territory under the Charter. Accordingly, UN Member States must implement the rights under the UDHR in order to discharge their obligations under the Charter. Consequently, whether states are living up to their obligations under the Charter or not is evaluated based on the progress and achievement in light of the UDHR.

3. The UDHR: on UN human rights conventions

With respect to the UN human rights conventions (HRCs), the significance and relevance of the UDHR should be seen from two dimensions: form States parties to such conventions (MSC) and from states that are not parties to such conventions (NMSC). To begin with the first dimension, the UDHR is significant and relevant to specific HRCs and to MSC as it is a document that establishes *a minimum standard of rights* for all human beings in all parts of the world at all times.[78] It provides for the minimum standards of human rights as contained under those specific UN HRCs and ratified by MSC. As it provides for a standard which is a minimal requirement for peaceful and dignified existence of human beings, the rights under the specific UN HRCs and the obligations of MSC are to be interpreted in line with the contents of the UDHR.[79] The minimum standards of protection under UN HRCs are set out under the UDHR and MSC are required to give higher degree of protection or at least maintain the level of protection under the UDHR, but can by no means go below the standard UDHR sets out.

[77] E Re (n 8 above) 142.

[78] F de Varennes (n 11 above) 71; See also M Mutua 'Standard Setting in Human Rights: Critique and Prognosis' (2007) 29 Human Rights Quarterly 547-630.

[79] For national cases citing the UDHR, see H Hannum 'National Cases Citing the Universal Declaration of Human Rights' (1998/9) 12 (1) INTERIGHTS Bulletin 47-49. In the State versus H. Williams and others case, the Constitutional Court of South Africa has tended to say that the UDHR is the minimum standard which the bill of rights under the constitution provides for. CASE NO: CCT/20/94.

However, though the rights enshrined under the UDHR represent minimum standards of human rights, the implementation of these rights remains to be nothing but a promise on paper.[80] Looking in to the records of human rights violations and the awareness of the people all around the world about human rights, UDHR is far from realization of the protection it promised to offer to the people of the world.[81] The reality on the ground shows that the contents of the UDHR are nothing but 'a luxury or a wish-list.'[82] Therefore, it is not a document out of date, rather is a document that needs due attention even sixty years after its adoption if human beings are to live with dignity, international peace and order is to prevail, and friendly relationship among nations should be achieved. In the words of Menchu R., 'the Universal Declaration of Human Rights is a goal. It is a goal that has still not been achieved and one that we must work toward.'[83] Therefore, it is a document of contemporary importance as it is a goal that we need to achieve to make the world a place where 'the greatest fulfilment of human potential,'[84]a promise which is at the heart of the UDHR, is a reality.

Concomitant to this, with respect to MSC, the UDHR is relevant and significant as it thereby serves as a parameter of measurement for it provides a minimum standard of human rights and basis of interpretation for the same. It serves as a parameter to measure the 'performance of governments' in relation to the protection of human rights and discharge of their obligations under specific UN HRCs by relevant bodies including the UN.[85] Whether a government upholds human rights or not is adjudged based on the scores it gets in relation with the standards UDHR sets. Hence, whether MSC are living up to their obligations under

[80] Amnesty International, 'Amnesty International Report 2008 Foreword,' p.4, available at http://thereport.amnesty.org/document/47 , accessed on August 23, 2008.

[81] G Alferdsson & A Eide (eds) (n 43 above) xxv.

[82] --- 'The Universal Declaration of Human Rights: 1948-2008,' available at http://www.un.org/events/humanrights/2007/, accessed on August 29, 2008.

[83] --- 'Human rights at fifty,' available at http://www.commongroundradio.org/shows/98/9849.html, accessed on August 20, 2008.

[84] L Arbour 'Statement by High Commissioner Louise Arbour on the Occasion of Human Rights Day, 10 December 2007,' available at http://nepal.ohchr.org/en/resources/Documents/English/statements/HC/Year2007/2007_12_10_HRDAY_E.pdf , accessed on August 21, 2008.

[85] G Alferdsson & A Eide (eds) (n 43 above) xxv.

the various UN HRCs or not is evaluated based on the progress and achievement in light of the UDHR.

Coming to the second perspective, the UDHR serves as a parameter to measure the 'performance of governments' of NMSC by the UN and other relevant bodies in the same fashion as MSC.[86] Similarly, the evaluation as to whether governments in NMSC uphold human rights or not is made on the basis of the standards set out under the UDHR and resolutions on same are entered based on the score they get in relation with those standards. Like MSC, the principles under the UDHR are what NMSC have pledged to protect to the people in their territory under the Charter. Hence, whether NMSC are living up to their obligations under the Charter or not is evaluated based on the progress and achievement made in light of the contents of the UDHR.

Therefore, the UDHR provides a minimum standard of human rights for all states (MSC and NMSC) though the sources of the human rights obligations may differ. The sources of human rights obligations for MSC are the Charter, the UDHR and the various HRCs; whereas, the sources of the human rights obligations for NMSC are only the Charter and the UDHR. Regardless of this, the UDHR provides for the minimum standard of protection of human rights in all UN Member States.

Finally, the UDHR serves some other purposes with respect to both NMSC and MSC. In particular, it serves as an instrument to evaluate the legitimacy of a government.[87] This is because there is an obvious correlation between legitimacy and human rights protection. In most cases, the higher a government scores in the evaluation for respect of human rights, the more legitimate it is. A government can not claim legitimacy where it commits gross violation of human rights.[88] Therefore, the UDHR is still a relevant instrument as it serves the purpose of measuring governments' performance in the field of human rights and degree of legitimacy.

[86] G Alferdsson & A Eide (eds) (n 43 above) xxv.

[87] G Alferdsson & A Eide (eds) (n 43 above) xxv.

[88] G Alferdsson & A Eide (eds) (n 43 above) xxv.

4.The UDHR: aide to interpretation of domestic legislation

With respect to domestic legislation, the UDHR provides an aid to a constitutional or statutory interpretation.[89] As some of its principles form part of rules or norms of customary international law, it is relevant in interpreting domestic legislation and constitutions.[90] It most often provides an aid to interpretation of provisions of domestic legislation in particular affecting human rights.[91]For instance, in various African states, the UDHR has been used as an aide to interpret the contents of the rights enshrined in the bill of rights under domestic constitutions.[92] In addition, the UDHR has been referred in several cases in African states.[93] Moreover, the constitutions of some countries like Ethiopia provide that any human rights and fundamental freedoms provisions therein shall be interpreted in light of the UDHR among other instruments.[94] Therefore, as an instrument that gives aid to constitutional and statutory interpretation, the UDHR remains relevant today.

5.The UDHR: legislative, administrative and judicial acts, and democratic reforms

To begin with, the influence of the UDHR on legislative, administrative and judicial acts makes it significant and relevant today. Legislative acts in different parts of the world and national constitutions have been greatly influenced by the principles of the UDHR.[95] The influence varies from direct reproduction of the rights it contains into domestic constitutions to getting inspiration to formulate and guarantee rights enshrined under the constitutions.[96]

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[89] Read Y Shany 'How supreme is the supreme law of the land? Comparative analysis of the influence of international human rights treaties upon the interpretation of constitutional texts by domestic courts' (2006) 31 (2) Brook Journal of International Law 341-404.

[90] E Re (n 8 above) 154.

[91] H Hannum (n 31 above) 303; CASE NO: CCT/20/94.

[92] For instance, the case of THE STATE versus HENRY WILLIAMS and others, the Constitutional Court of South Africa, the Constitutional Court has used the UDHR in order to interpret the contents of the rights under the bill of rights of the constitution. CASE NO: CCT/20/94. In the Attorney General v. Unity Dow case in Botswana, the Supreme Court noted that '[t]he Universal Declaration must have formed part of the backdrop of aspirations and desires against which the framers of the Constitution of Botswana formulated its provisions.' H Hannum (n 31 above) 303-304.

[93] For national cases citing the UDHR, see H Hannum (n 79 above) 47-49.

[94] FDREC (n 31 above), Art13 (2).

[95] H Hannum (n 31 above) 313-315.

[96] H Hannum (n 31 above) 313-315.

Second, it is possible to see that in some African states like Ethiopia, Botswana, Mauritius and South Africa, the UDHR, together with other IHRI, influence the acts of the judiciary as courts have been resorting to the UDHR to get assistance in the interpretation of provisions of the Bill of Rights under their respective constitutions.[97]

Third, the UDHR is significant and relevant today as it influences administrative acts. Particularly, it serves as a basis for formulation and enforcement of policies by the executive organs of governments. It has been submitted that both administrative policies and enforcement of domestic laws may either advance or undermine the norms of human rights.[98] Therefore, states need to have regard to these rights in the formulation and implementation of policies and laws. The norms and principles under the UDHR are significant in this regard because policies are directions to achievement that need to be geared in line with internal interests and international obligations and the UDHR provides such obligations broadly. Accordingly, the principles adopted in the UDHR are progressively more utilized by governments of different states in formulating foreign policies and in deciding on matters of development assistance.[99]

Therefore, the impact of the UDHR on the acts of the three classic organs of a government, which we should not underestimate, ascribes contemporary relevance and significance to the instrument.

Finally, the UDHR is relevant and significant today as it offers guidance to democratic reform. It is relevant on the point of democratic reforms. As different countries particularly in Africa are struggling to bring about democracy for their people, it helps these countries as it provides 'a fundamental statement of rights, either binding on a state as customary law or serving as an inspiration for interpreting domestic law,' which are significant in consolidating democracy in Africa.[100]In addition, the UDHR provides that the protection of human rights through the principle of the rule of law, which is one of the principles of democracy, is necessary, and if this is not entrenched in a country, the people may resort to a rebellion

[97] See n 91, n 92 & n 93 above.
[98] H Hannum (n 31 above) 316.

[99] H Hannum (n 31 above) 316.

[100] H Hannum (n 31 above) 313-315.

against tyranny and oppression to ensure it.[101]The UDHR has, therefore, significant influence in the formulation of human rights standards and democracy at the national level in such countries.

6. The UDHR: part of customary international law

The UDHR is part of customary international law, which is a source of public international law.[102] The repeated and consistent reliance on, and resort to the UDHR by the UN, inter-governmental organizations, and governments 'leads to the conclusion that the Declaration or, at the very least, some of its provisions, have become principles of customary international law.'[103] This makes, at least, some rights under the UDHR form rules of customary international law,[104] i.e., *erga omnes* duties (duties that exist with respect to matters that concern all states) of states.[105]Moreover, these rights have acquired the status of duties that represent 'a well-recognized peremptory norm under the doctrine of *jus cogens*, which binds all nations under international law,' and which are non-derogable.[106] Several international law jurists have come to such conclusion and so does the ILA. The ILA has concluded that 'many if not all of the rights elaborated in the ... Declaration ... are widely recognized as constituting rules of customary international law.'[107] Therefore, the UDHR is still relevant as it contains a set of principles of customary international law that applies to all states today.

C. Some of the realities on the ground that make the UDHR relevant today

Under this section, the relevance of the UDHR would be appraised based on the second

[101] The UDHR, Preamble, para3.

[102] I Brownlie Principles of Public International Law, 5th ed (1998).

[103] T Buergenthal & et'al (n 3 above) 42.

[104] The UN Human Rights Committee mentioned some rights as forming part of customary international law. They can be related to the UDHR provisions: Prohibition of slavery and torture or cruel, inhuman or degrading treatment or punishment (arts 4&5); arbitrary deprivation of life, and arrest and detention (arts 3 & 9); denial of freedom of thought, conscience and religion (art18); presumption of guilt of a person (art 11(1)); marriage (art 16 (1)); and the right to a fair trial (art 10). See General Comment 24, 1994

[105] E Re (n 8 above) 153.

[106] E Re (n 8 above) 154.

[107] H Hannum (n 31 above) 319.

perspective: some realities of the world. These realities are important in showing the relevance of the UDHR today as they prove that it is particularly relevant to tackle a number of issues. I will discuss some of the specific issues subsequently.

1. The UDHR: the rise of new rights

In recent years, various new rights are emerging. These rights include the right to development and the right to freedom of religion. Here, I will deal with the right to development as the right to freedom of religion[108] is a right that is distinct from the classic understanding of the notion of human rights and at its infancy, and needs deeper research.

Coming to the right to development, it is possible to say that it is one area of modern human rights concern as with poverty human beings would be compelled lead degrading life.[109] Though the issue of the right to development has got emphasis about three decades ago, it is still not enjoyed by the vast majority of the population of the world. However, the UDHR has provided for the right, though indirectly. It contains a number of elements that became central to the international community's understanding of the right to development as it attaches importance, for example, to the promotion of social progress and better standards of life, the right to participate in public affairs and the right to an adequate standard of living.[110]

The relevance of the UDHR today is not limited to indirect recognition of the right to development; rather, extends to the realisation of the right as well. Because, though the '[r]esponsibility for development must primarily be shouldered by the developing nations themselves,' it needs international cooperation and participation of all members of the community.[111]Thus, the benefit such cooperation and participation may offer towards the realization of the right to development should not be undermined. The UDHR provides these

[108] It is a right that says religions should be free from critics, disgrace and association with a specific unapproved act. It emerged due to the common trend of associating certain religion with an act of terrorism after the 9/11 terrorist attack. See a statement made by H.E. Mr. Ali Reza Moaiyeri Ambassador and Permanent Representative of the Islamic Republic of Iran Before the Sixth Resumed Session of Human Rights Council on the Occasion of 60th Anniversary of Universal Declaration of Human Rights, Geneva – 10 December 2007

[109] I Hadiprayinto 'Poverty the right to development and international human rights law' p.1, available at http://www.civitatis.org/pdf/povertyhr.pdf , accessed on August 13, 2008.

[110] I Hadiprayinto (n 108 above) 10; D Türk 'The right to development' (1998/9) 12 (1) INTERIGHTS Bulletin 42-43.

[111] S Chowdhury & et al (eds) The Right to development in international law, (1992) 154.

methods as means of realization, among others.[112] Categorically, it provides that the right to development would be realized through cooperation with the UN, all peoples and all nations, every individual and every organ of society, and the peoples of Member States themselves and among the peoples of territories under the jurisdiction of Member States, among other means.[113]This shows that the UDHR is far sighted. It also shows that it is not only a response by the world to the realities immediate to WWII but also it is a response relevant to today's challenge of many countries, particularly of Africa, Asia, Eastern Europe and Latin America.

At this juncture, it is important to mention that the relevance and significance of the UDHR with respect to the right to development is astonishingly glaring as it is an instrument possessing a special place in the international order. It is a Declaration that significantly differs from the UN Declaration on the Right to Development, 1986 (DRD). The UDHR is often regarded as an instrument of strong moral, legal and political force and also its provisions, at least some, form part of international customary law unlike the DRD. The DRD is a mere declaration with no such degree of moral, legal and political force. This also makes the UDHR acquire considerable importance with respect to the right to development and relevant today.

2. The UDHR: relevance to globalization

Unlike the time when the UDHR was adopted, the world is in the era of globalization today. Globalization opens a door for more regular interaction of people 'across national and cultural borders.'[114] This has made the interaction among people and states complex. For instance, cultural identity is put at risk due to cultural domination of one group (of the western world) over the culture of the other parts of the world. Furthermore, technological transfer has caused issues relating to intellectual property interests. Cross-boundary movement of human beings has also dramatically increased thereby causing issues related to the relationship between such people and the host state, and drawing attention on the manner

[112] UDHR, Preamble, para6.

[113] UDHR, Preamble, paras 6 &8.

[114] N Englehart & et al 'Observing human rights in an age of globalization,' in Constructing Human Rights in the Age of Globalisation, M Monshipouri & et al (eds) (2004) x.

of regulation of such relationship.[115] Similarly, the numbers of non-state actors like Multilateral Corporations and human rights abuses by them have steadily increased. Consequently, issues relating to the relationships of victims of such abuses and the non-state actor have arisen.[116]

These and other similar complex relationships between and among states, non-state actors and people need rules that govern them. It goes without saying that such rules have various aspects. The human rights standards and norms embedded under the UDHR that 'have gained prominence as a universally recognized set of norms and standards' may help us in formulating the rules that should be adopted to govern relationships that would arise as a result of globalization as they increasingly inform all aspects of our relations as individuals and as collective members of groups, within communities and among nations.[117] Moreover, the UDHR seems to impose the duty to respect human rights not only on states but also on non-state actors and individuals.[118] This makes the UDHR a document that can guide our relationships even at the era of globalization, after sixty years of its adoption. At this era of globalization, it is more important to respect the values and cultures of others, respect human dignity, provide justice and live with sense of brotherhood among mankind. Multilateral Corporations and developed states, in particular, must consider this fact in their relationship with other states. This is a spirit clearly enunciated under the UDHR and makes it relevant today.

3. The UDHR: on new scientific fields

Today, the world is witnessing scientific advancements in various fields. Various entities including states and intergovernmental organizations have either established research institutes, financially helped them, or both.[119] Some of the results of such scientific researches

[115] Human Rights Today: Introduction, available at http://www.un.org/rights/HRToday/

[116] Technically, non-state actors are called human rights 'abusers' when they contravene human rights rules.

[117] --- United Nations, 'Human Rights Today: A United Nations Priority,' available at http://www.un.org/rights/HRToday/ accessed on August 20, 2008.

[118] UDHR, preamble & arts 29-31.

[119] See N Lenoir 'Universal Declaration on the human genome and human rights: The first legal and ethical framework at the global level' (Summer, 1999) 30 Columbia Human Rights Law Review 537.

are capable of direct application to humans.[120] But, the manner of applying such research outputs and using human beings in researches needs regulation as it has to do with human dignity.[121]Therefore, a guide on how to apply to human beings of biomedicine, biotechnology and others for therapeutic, and diagnostic and scientific purposes is necessary.[122] The UDHR is relevant to guide this need as it provides a mechanism by which the technological advancement should be directed: advancement in line with 'human worth and dignity.'[123] Human beings should not be lowered to the level of things while invention, experimentation and application of these technologies as that undignifies them.[124] Human value and dignity should be at the centre of any invention, application and demonstration. This is what we read from the UDHR and makes it relevant today.

4. The UDHR: SEC Rights

The majority of the population of the world in general and Africa in particular lives in poverty. In sub-Saharan Africa, there is extreme poverty due to reasons like rapid population growth and limited job creation.[125] This reality has impacted on the realization of the promise UDHR has made to these people.[126] The UDHR promises that people shall be in a position to at least afford their daily subsistence.[127]It further puts that such entitlement is not subject to the defence of the economic standard of the states distinct from the case of civil and political rights, but to be realized in the same way and degree to these rights.[128]Because it puts socio economic rights on equal footings with civil and political rights, and adopts the same means

[120] N Lenoir (n 118 above) 537.

[121] UDHR, Preamble, paras 1 & 5, & arts1-7.

[122] K Mahoney & P Mahoney (eds) Human rights in the twenty-first century: A global challenge, (1993) 854.

[123] UDHR, Preamble, paras 1& 5, & art 1.

[124] K Mahoney & P Mahoney (n 122 above) 854-856.

[125] Economic and Social Council 'Report of the Secretary General: Strengthening efforts at all levels to promote pro-poor sustained economic growth, including through equitable macro-economic policies,' p.5, available at http://www.un.org/Docs/ecosoc/meetings/2007/docs/07%20Thematic%20Report.FINAL.Website.pdf , accessed on August 24, 2008.

[126] See J Olka-Onyang 'Economic and social human rights, the Universal Declaration and the new millennium: What prospects for change?' (1998/9) 12 (1) INTERIGHTS Bulletin 11-12.

[127]

[128] UDHR, Preamble.

and degree of realization. This position of the UDHR has been further endorsed through interpretation of the ICSECR by the UN Human Rights Commission.[129] This makes the Declaration a document that contains rights that are relevant and that need to be realised today. In addition, the UDHR is the only instrument that provides for property right unlike the ICCPR and ICESCR.[130]

5. The UDHR: to conflict situations

In recent years, there are a number of conflicts that deprived people from peaceful place of existence in different parts of the world and particularly in Africa. The people in such areas are not only deprived of peaceful environment but also exposed to suffer from the companion 'gross human rights abuses' such as rape, torture, conflict-related deaths from hunger and disease, and forced displacement.[131]The UDHR provides that recognition of the inherent dignity and of the equal and inalienable rights of the persons in these conflict ridden areas is the only way to peace.[132] It also implies that conflict situations may be avoided only through the respect and protection of human rights.

It is also important to note that sufferings from gross violation of human rights are not limited to the places where conflicts are alive. They exist in places where conflicts have been resolved too as in such places (Liberia, Sierra Leon and Angola) human rights consequences of conflicts endure affecting economic and social development, and the political field.[133] Therefore, the UDHR is still relevant to these places as it provides the means to sustainable peace: human rights that are 'the foundation of ... peace.'[134]

[129] See the General Comment here.

[130] UDHR, art17.

[131] Amnesty International 'The state of the world's human rights,' pp.4-5, available at http://thereport.amnesty.org/document/101, accessed on August 19, 2008.

[132] See UDHR, Preamble, para 1.

[133] Amnesty International (n 131 above) 3.

[134] UDHR, Preamble, para 1.

6. The UDHR: new conventions

The UDHR is an instrument that has inspired many specific binding human rights conventions. It is also believed that it continues to do so. Because it is framed broadly and comprehensively. For instance, it recognizes the right of freedom from fear and want, which is neither precise nor well elaborated in the existing jurisprudence.[135] This notion may be taken as a basis to proclaim specific conventions that state the matters and circumstances that enable human beings enjoy the freedom from fear and want. For example, the UDHR could be taken as instrument that requires industrialized countries endangering the environment to reconsider their actions as they are putting human beings in fear of climate change and the resulting challenges to their lives such as Tsunami and hurricanes. Consequently, a convention that obliges states to enable human beings enjoy the freedom from fear and want may be proclaimed on such matters. It will continue to inspire other rights like the right to peace based on Article 28.[136]

7. The UDHR: on human rights 'abusers'

Non-state actors are not signatories of any human rights instrument. However, they are often involved in acts that infringe human rights. For instance, Multi-National Corporations may emit wastes that may pollute the environment and armed opposition groups may recruit children into their armies. Are such non-state actors responsible for their acts? This issue is not well settled today. Many international lawyers argue that non-state actors are not the subjects of international law, as a result, cannot ratify human rights treaties and therefore, are not directly responsible for any human rights abuse.[137] However, they are indirectly responsible through the state. The state assumes the duty to protect human rights not only from violation by the government and its organs but also by others, including non-state actors.[138] Thus, the state is required to ensure that non-state actors in their territorial jurisdiction would not abuse human rights. This has been the prevalent view in international

[135] UDHR, Preamble, para2.

[136] F Schuurman (ed.) Globalization and development studies: Challenges for the 21st Century, (2001) 91-92.

[137] See, A Clapham, Human rights obligations of non-state actors (2006).

[138] Ibid.

law writings in general and international human rights law framework in particular.[139]Despite few but remarkable incidents moving to introduce changes, this view still persists.

However, this understanding has no any support under the UDHR. The UDHR provides that every individual and every organ of society shall strive to promote respect for human rights and fundamental freedoms by teaching and education of these rights and freedoms, and to secure the universal and effective recognition and observance of the same by progressive international and national measures both among the peoples of the Member States themselves and among the peoples of territories under their jurisdiction.[140] This suggests that states, non-state actors and even individuals are required to respect human rights and assume responsibility in case of their violation. Thus, the UDHR is relevant today as it can be employed in overcoming the challenges on the move towards imposing direct responsibility on non-actors for human rights abuses they may cause.

8. The UDHR: comprehensive enforcement mechanism

The UDHR provides the manners of enforcement of human rights in general. It says that the enforcement of human rights needs the entrenchment of the rule of law in all states;[141]promotion of social progress and better standards of life in larger freedom, and the determination to promote same;[142]states' effort to promote universal respect for and observance of human rights and fundamental freedoms either independently or in cooperation with the UN;[143] teaching and education to promote respect for human rights and fundamental freedoms both among the peoples of the Member States themselves and among the peoples of territories under their jurisdiction by every individual and every organ of society;[144]progressive international and national measures with a view to secure the universal and effective recognition and observance of human rights and fundamental freedoms both among the peoples of the Member States themselves and among the peoples of territories under their jurisdiction by every individual and every organ of society.[145] Thus, UDHR

[139] Ibid.

[140] UDHR, Preamble, para8 & arts 28-30.

[141] UDHR, Preamble, para3.

[142] UDHR, Preamble, para5.

[143] UDHR, Preamble, para6.

[144] UDHR, Preamble, para8.

[145] UDHR, Preamble, para8.

provides for a comprehensive mechanism that need to be adopted if the terrible reality of human rights violations may be changed as it not only provides a more comprehensive list of human rights but also envisions a comprehensive means of realization of human rights: cooperation, international and national measures, and participation of all people, states and organs of the society.[146]

9. The UDHR: on human relations

The UDHR is relevant today as it provides a guide for human relations. It puts that human relations should be conducted in a way that recognizes the inherent dignity and equal and inalienable rights of all members of the human family.[147] It reiterates that respect of human dignity and worth of the human person, equality of men and women, and human rights is the fundamental that underlies peaceful and just human relations.[148]Human relations should also be conducted in such a way that promotes development of friendly relations among nations.[149] In addition, it provides that the states, every individual, and every organ of the society are required to not only respect and protect human rights and fundamental freedoms but also to cooperate in order to ensure the promotion and protection of the same in their relationships.[150] It also puts that these duties of states, every individual, and every organ of the society are not limited to territorial relations; rather, they extend to relations beyond national boarders.[151]

11. The UDHR: on human dignity discourse

The UDHR dictates a dignified life for all. However, many people in Africa and in other parts of the world live without access to the basic requirements of a dignified life due to various reasons like political instability, conflict, corruption and under-investment in basic social services.[152]The UDHR is relevant to the people in these areas as it incorporates rights that

[146] See A Byrnes 'The implementation of rights' (1998/9) 12 (1) INTERIGHTS Bulletin 9-10.

[147] UDHR, Preamble, para1.

[148] UDHR, Preamble, paras 1 & 5.

[149] UDHR, Preamble, para4.

[150] UDHR, Preamble, paras 6 & 8.

[151] UDHR, Preamble, para8.

[152] Amnesty International (n 121 above) 4.

enable them to live in a dignified way.

Be that as it may, today, human dignity argument is forwarded with respect to various issues. For example, it has been argued that death penalty has to be abolished for it is against human dignity and worth. The UDHR is relevant in relation to the fairness and 'respect for humanity' argument against death penalty.[153] The UDHR provides that a state 'must treat its members with respect for their intrinsic worth as human beings' and with fairness even when it punishes them.[154] This makes it in the forefront of the current human dignity discourse especially in relation to abolishment of the death penalty.

Conclusion

Based upon the concrete observations and reasons pointed out in the discussion, one can easily conclude that the UDHR is relevant today. States need to work towards the realization of the promise under the Declaration and make the world a place safe for all. Being the mother instrument that gives fruit through the specific treaties, it becomes relevant today. To consider the UDHR as outdated is to consider the human rights provisions of the UN Charter as outdated. It is equally to let the other human rights treaties lose their life as the UDHR is the root and the trunk while these treaties are only its branches that need its support and live for it lives. Furthermore, the UDHR is relevant to guide the various aspects of our life as it can be used as a guide with respect to globalization, new rights, scientific researches, human relations, maintain of peace, resolution of conflicts and the like. Similarly, the UDHR helps as providing the core minimum of human rights that are dealt with specific binding conventions and instrument of interpretation of the rights under such conventions. It also provides the core minimum rights granted to human beings on areas with no binding conventions and the obligations of all states. Similarly, it is relevant to NMSC on the protection of rights that have binding conventions but not ratified. In addition, the UDHR is relevant as a means of measurement of human rights protection by governments. Finally, the UDHR continues to be relevant as an instrument that inspires new conventions today and in the future.

[153] H Steiner & P Alston International Human rights in context: Law, politics and moral, (2nd ed.) (2000) 36-38.

[154] H Steiner & P Alston (n 153 above) 36-38.