Jimma University Journal of Law

ISSN 2074-4617

Volume 8 **December 2016**

Published at least once annually by the School of Law, CLG, JU

In this issue:

Jimma University Journal of Law

Volume 8 **December 2016**

Disclaimer

The ideas in this journal don't represent the Editorial Board or the School of Law or Jimma University. They are solely of the authors'.

About the Law School

The Law School commenced its academic work on the 19th of December 2002 as the Faculty of Law of Jimma University. In 2009, the Faculty of Law and the Faculty of Humanities and Social Sciences were merged to form the College of Social Sciences and Law. As of 2014, it has been restructured as College of Law and Governance embracing Department of Governance and Development Studies.

The Law School has been producing high-caliber and responsible graduates since its inception in 2002. For the first year, it accepted 158 advanced diploma students who graduated three years later. Then, the School has been accepting and teaching students in four first degree programs, namely, in the regular, evening, summer, and distance programs. Currently, the Law School is offering two LL.M programmes: **LL.M** in **Commercial and Investment Law** and **LL.M** in **Human Rights and Criminal Law**. A third program is also underway.

Moreover, the Law School renders legal aid services to the indigent and the vulnerable parts of the society (such as children, women, persons with disabilities, persons with HIV/AIDS, and the elderly) in Jimma town and Jimma Zone through its Legal Aid Centre. Currently, the Centre has 11 branches and they are all contributing their share in the realization of the right of access to justice for the indigent and the vulnerable groups. Of course, this also helps equip our students with practical legal skill before they graduate.

At the moment, the School has the following full-time and visiting staff for its undergraduate and postgraduate programs.

Full-time Staff Profile

S.N	Name	Qualification	Specialization and/or area of interest
1.	Abay Addis	LL.B, LL.M	Constitutional Law
2.	Alemu Meheretu	LL.B, LLM, PhD, Asst. professor	Human Rights and Criminal Justice, Labor Law
3.	Ashenafi Tilahun	LL.B, LL.M Candidate	Commercial and Investment Law
4.	Azeb Belachew	LL.B, LL.M Candidate	Human Rights and Criminal Law
5.	Bisrat Teklu	LL.B, LL.M	Business Law
6.	Cherer Aklilu	LL.B, LL.M, MA	Gender Studies, Health Law
7.	Gashahun Lemessa	LL.B, LLM, MA PhD candidate	Trade and Investment Law, Public Administration(International Dev't)
8.	Gebrie Negash	LL.B, LL.M Candidate	Commercial and Investment Law
9.	Getachew Redae	LL.B, LLM, PhD Candidate	Business Law
10.	Getahun Alemayehu	LL.B, LLM, PhD Candidate	Human rights, International Law, International organizations
11.	Kalkidan Misganaw	LL.B, LL.M Candidate	Human Rights and Criminal Law
12.	Kassahun Molla	LL.B, LLM, MSC.	Public international Law
13.	Kassaye Muluneh	LL.B, LL.M	International law and the Law of international Organization
14.	Kibrom Mekonnen	LL.B, LL.M	International Law
15.	Legesse Tigabu	LL.B, LLM (CCL), LL.M (IL), Asst. professor	Comparative Constitutional Law, International Economic Law
16.	Manaye Abera	LL.B, LL.M	International Business Law
17.	Markos Debebe	LL.B, LL.M (CL), LL.M (CJP)	Constitutional Law, Criminal Justice and Procedure
18.	Marshet Tadesse	LL.B, LL.M, PhD, Asst. professor	Criminal law and criminology
19.	Mohammed Kabie	LL.B, LL.M	Business Law

20.	Obsinan Girmay	LL.B, LL.M	Commercial and Investment Law
21.	Raveendran Nair	LL.B, LL.M, PhD candidate	Law of crimes
22.	Samson Shafi	LL.B	Commercial Law
23.	Sintayehu Demeke	LL.B, MA, Asst. professor	International Development Studies
24.	Tadele Geremew	LL.B, LL.M	Law and Development
25.	Tadesse Simie	LL.B, LLM, PhD candidate	Criminal justice
26.	Temam Mohammed	LL.B, LL.M	Business Law
27.	Wagari Negassa	LL.B, LLM	International Investment Law
28.	Yiheyis K/mariyam	LL.B, LL.M Candidate	Human Rights and Criminal Law
29.	Yosef Alemu	LL.B, LLM, Asst. professor	Taxation and public finance
30.	Zelalem Shiferaw	LL.B, LL.M (RLDevt.), LL.M (HrtsL)	Rule of Law for Development, Human Rights Law

Scrutinizing Funding Restrictions of the Charities and Societies Proclamation of Ethiopia in light of International Human Rights Standards

Zelalem Shiferaw Woldemichael♣

Abstract

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) under Art.31 has guaranteed the right to freedom of association. The details of such right are provided by the Charities and Societies Proclamation (Proclamation No.621/2009) adopted by the government. Under the Proclamation, only Ethiopian Charities and Societies are allowed to work on human rights. However, the Proclamation restricts access to funding of such organizations as it requires them to generate not more than 10% of their funds from foreign sources. In this article, it is argued that such restriction entails violation of the right to freedom of association and hinders the protection and promotion of human rights in Ethiopia.

Key words: Access to funding, Civil Society organizations, freedom of association, Charities and Societies Proclamation

---

♣ Lecturer of Law, School of Law, JimmaUniversity

I would like to thank internal and external reviewers of my manuscript for their constructive comments. In particular, i would like to extend my heartiest gratitude to Mr.Getahun Alemayehu for his insightful and critical comments on the first draft of this article.

I. INTRODUCTION

Few months before the writing of this article, the African Commission on Human and Peoples' Rights (the African Commission/Commission, hereafter) passed a ground breaking decision which held the government of Ethiopia liable for failing to comply with its obligations laid down under Articles 4, 5 and 6 of the African Charter on Human and Peoples' Rights.[1] The communication was brought to the Commission by civil society organizations(CSOs) which were operating in Ethiopia called: 'Ethiopian Women's Lawyers Association' (EWLA) and 'Equality Now' (a foreign civil society organization),on behalf of *Makeda*, who was abducted, raped and forced into marriage in Ethiopia at age thirteen.[2] The Commission required the government of Ethiopia to pay 150,000 US$ to *Makeda* for the violation she sustained fifteen years ago.[3] The decision was considered by some authorities as a precedent setting as it was the first time the Commission dealt with abduction, rape and forced marriage case.[4]

Currently, the work of EWLA has significantly reduced due to the restriction on access to funding made on it by the Proclamation.[5] Equality

[1] Equality Now and Ethiopian Women Lawyers Association (EWLA) v. The Federal Democratic Republic of Ethiopia, **(**Communication 341/2007).The decision was passed during the 57th Ordinary Session of the African Commission held from 4 to 18 November 2015. (Look at Report presented to the 58th Ordinary Session of the African Commission on Human and Peoples' Rights, held in Banjul, the Gambia(6-20,April 2016)

[2] EWLA is a non-profit women's advocacy group founded by Ethiopian women lawyers. It began its work in 1996 after being registered in 1995.EWLA operates under three core programs: Legal Aid and representation, public education and capacity building and *research and law reform advocacy.* http://www.ewla-et.org/index.php/about-us/brief-history/135-brief-history, accessed on 15/03/2016

[3] http://www.equalitynow.org/AGLDF#ethiopia, accessed on 26/04/2016

[4] www.equalitynow.org/victory_makeda_triumphs_in_ethiopia_justiceforgirls,(Dec 12,2016)

[5] The Observatory for the Protection of Human Rights Defenders, Violations of the Rights of NGOs to funding: From Harassment to Criminalization(2013) at 11,(Dec 15,2016), http://www.omct.org/files/ 2013 /02 /22 162 /obs_annual_report_2013_uk_web.pdf

Now has also ceased to operate in Ethiopia as the Proclamation prohibits foreign CSOs from working on human rights.[6] Among the kinds of CSOs recognized under the Proclamation, only Ethiopian Charities and Societies are permitted to work on human rights.[7] However, such organizations are not allowed to generate more than 10% of their funding from foreign sources.[8] This has abruptly reduced the source of funding and scope of activities of a number of Ethiopian Charities and Societies working on human rights in Ethiopia.[9] Given the fact that engagement on human rights issues is reserved to Ethiopian Charities and societies, the restriction on access to funding made on such organizations may hinder the overall protection of human rights by CSOs in Ethiopia.

Access to funding of CSOs which comprises the ability to solicit, receive and use funding is an inherent element of the right to freedom of association.[10] Unjustifiable restriction of access to funding will, therefore, result in violation of the right to freedom of association. On the other hand, international human rights treaties to which Ethiopia is a party provide that restrictions on the right to freedom of association may not be carried out arbitrarily.[11] Accordingly, the laws of Ethiopia that govern

[6] Cumulative reading of Art.2 (2) and Art.14 (5) reveals that foreign CSOs and Ethiopian Residents Charities/Societies are not allowed to work on human rights.

[7] Kinds of CSOs recognized under the Proclamation as can be noted from Art.2 (2) of the Proclamation are: Ethiopian Charities/Societies, Ethiopian Residents Charities/Societies and Foreign Charities.

[8] Read Art.2 (2) of the Proclamation. Note that the Proclamation has not made funding restriction on the rest of CSOs. Instead, the law has made restriction on the areas that these organizations may engage. This article has not examined the underlying reason and legality of such restrictions.

[9] International Center for Not-for-Profit Law, Global Trends in NGO Law,(Dec 20,2016) http://www.icnl.org/

[10] Art.22 of the ICCPR guarantees the right to freedom of association. This Article protects all activities of associations including fundraising activities(UN Special Rapporteur ,*Freedom of Peaceful Assembly and Association*,(Dec 30,2016),at http://www.freeassembly.net,

[11] Look, for example, Art.22 of the ICCPR and Art.8 of the *International Covenant on Economic Social and Cultural Rights.*

access to funding of CSOs should not bring about violation of the right to freedom of association.

This article has critically examined whether the restrictions on access to funding made on Ethiopian Charities and Societies under the Charities and Societies Proclamation of Ethiopia conform to international human rights standards. It has also considered the implication of such restriction on the protection and promotion of human rights in Ethiopia. In so doing, the Article has attempted to respond to the following key questions: What is the normative framework for civil society in Ethiopia? What is the conceptual framework underlying access to funding of CSOs? Are restrictions on access to funding made on Ethiopian Charities and Societies compatible to international human rights standards?

The study has used books, articles, UN documents and other literatures as key sources of information. Moreover, legal instruments (national and international) as well as decisions and commentaries of the Human Rights Council and the African Commission have been considered for the purpose of looking at the issues in a broader perspective. The discussions are presented in the following chronological order: the first part unpacked the notion underlying civil society. Next, the normative framework for civil society at an international and national level has been considered. Then, the restrictions made on access to funding by the existing legal frameworks of Ethiopia has been examined in light of international human rights standards. The final part summarized the main issues raised in the discussion part.

II. DEFINING CIVIL SOCIETY

Various definitions of civil societies have been advanced by authorities. However, no significant difference exists among such definitions. The World Bank adopted the definition of the term developed by a number of leading research centers which defined it as: "The wide array of non-governmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others,

based on ethical, cultural, political, scientific, religious or philanthropic considerations".[12]According to this definition, CSOs include a wide array of organizations: community groups, non-governmental organizations (NGOs), labor unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations.[13] The IMF also made no major difference from the definition considered above. It defined CSOs as:

> …a wide range of citizens' associations that exist in virtually all member countries to provide benefits, services, or political influence to specific groups within society. CSOs include business forums, faith-based associations, labor unions, local community groups, NGOs, philanthropic foundations, and think tanks.[14]

In the same manner, the World Health Organizations elaborated that the term CSOs captures wide range of organizations, networks, associations, groups and movements that are independent from government and that sometimes come together to advance their common interests through collective action.[15] There is generally wide consensus that branches of government (government agencies and legislators), individual businesses, political parties, and the media are usually excluded from the definition of CSOs.[16]

III. INTERNATIONAL AND NATIONAL LEGAL FRAMEWORKS FOR CIVIL SOCIETY: A BRIEF OVERVIEW

The right to freedom of association is an important entitlement that enables individuals to form and join CSOs. At present, the right is guaranteed under both binding and non-binding international instruments.

---

[12] http://web.worldbank.org/wbsite/external/topics/cso/0,,contentmdk:(Nov.12,2016) 20101499~menuPK :244752~pagepk:220503~pipk:220476~thesitepk:228717,00.html
[13] ibid.
[14] http://www.imf.org/external/np/exr/facts/civ.htm accessed on 19/03/2016(Oct.8,2016)
[15] http://www.who.int/trade/glossary/story006/en/,(Oct.11,2016)
[16] http://web.worldbank.org/wbsite/external/topics/cso/0,, contented: 20101499~menu(Dec 13,2016)

Among the non-binding international instruments, the *Universal Declaration of Human Rights* (UDHR) has included the right under Article 20(1).This Provision reads: "Everyone has the right to freedom of peaceful assembly and association". Though the UDHR is a non binding international human rights instrument, it is hardly possible to undermine its role in the promotion of human rights since it has influenced a number of States in framing their national legal frameworks.[17] The other non-binding international instrument that guarantees the right to freedom of association concerns the *Declaration on Human Rights Defenders*.[18] Though the declaration is adopted with the prime emphasis of protecting the right to defend human rights, it also reaffirms rights that are instrumental to the defence of human rights, including, *inter alia*, freedom of association.[19] The Declaration entitles everyone to form, join and participate in NGOs, associations or groups at national and international level.[20]

The binding international human rights treaties which Ethiopia ratified such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Convention against Racial Discrimination* (ICRD) have also guaranteed the right to freedom of association. Article 22 of the ICCPR reads: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." The ICRD under Article 5 requires States Parties to ensure the right to freedom of association. The *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW) under Article.7 also demands States Parties to take all appropriate measures to ensure to women, on equal terms with men, the right to participate in non-governmental organizations and associations. The *Convention on the Rights of the Child* (CRC) and the *International*

[17] Koen De Feyter and George Pavlakos (eds.), The Tension between Group Rights and Human Rights: A Multi-disciplinary Approach,15 (2008)
[18] http://wwwohehr.or/english/law/treedomhtm.(Nov.21,2016)
[19] Look at Art.5 of the Declaration
[20] ibid.

Covenant for the Protection of all Persons from Enforced Disappearance (CPED) likewise enshrine the right to freedom of association under Articles 15 and 24 respectively.

Regional human rights instruments also guarantee the right to freedom of association. Article 15 of the *African Charter on Human and Peoples' Rights* (ACHPR) to which Ethiopia is a party stipulates: "Every individual shall have the right to free association provided that he abides by law." The *American Convention on Human Rights* (ACHR) deals with the right in a more detailed fashion. It entitles everyone the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.[21] The *European Convention on Human Rights* (ECHR) used similar wordings with the ICCPR in articulating the contents of the right. Like the ICCPR, Article.11 provides:"Everyone has the right to… freedom of association with others, including the right to form and to join trade unions for the protection of his interests" The Arab Charter on Human Rights adopted by the Council of the League of Arab States on 22 May 2004 also guarantees the right to freedom of association. Unlike other regional human rights treaties, the Charter makes the right to be applicable only to citizens.[22]

The right to freedom of association is offered a constitutional recognition in Ethiopia. The FDRE constitution which is the supreme law of the land entitles every one the right to freedom of association for any cause or purpose.[23] As it will be considered in the subsequent sections in a relatively deeper sense, such entitlement is subject to restrictions. The constitution provides that the restrictions on the enjoyment of the right will be carried out by appropriate laws.[24] In 2009, the government of Ethiopia adopted Charities and Societies Proclamation that provides restrictions in the enjoyment of the right. The Law is adopted to regulate

[21] Look at Art.16(1) of the ACHR
[22] Look at Art.24 of the Charter
[23] Look at Art.31 of the FDRE constitution
[24] ibid.

the registration and other aspects including, but not limited to, access to funding of CSOs.

IV. ACCESS TO FUNDING OF CIVIL SOCIETY ORGANIZATIONS: AN INTEGRAL PART OF THE RIGHT TO FREEDOM OF ASSOCIATION

As considered above, the right to freedom of association, which is the legal basis for CSOs, is safeguarded under international and regional human rights treaties as well as the national laws of Ethiopia. In order for such legal recognition of the right to be meaningful, however, it is essential that CSOs should have the ability to seek, receive and use resources from domestic, foreign, and international sources that enable them to accomplish their objectives.[25] Financial resource (fund), which is the subject of treatment in this article, is part of the resource necessary for the operation of CSOs. Access to funding includes access to monetary transfers, in-kind donations and other forms of financial assistance.[26]

As elaborated by the Special Rapporteur on the rights to freedom of peaceful assembly and of associations (the special Rapporteur, hereafter), access to funding is an integral element of the right to freedom of association.[27] This is due to the critical importance of access to funding for the effective exercising of the right to freedom of association. Without funding, CSOs cannot properly carry out their activities and meet their

[25] UN Special Rapporteur on Human Rights Defenders, 'Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to promote and Protect Universally Recognized Human Rights and Fundamental Freedoms' (Dec 20,2016), http://www.ohchr.org/ Documents/ Issues/ Defenders/ Commentary toDeclarationondefendersJuly2011.pdf

[26] Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai(2013) A/HRR/23/39

[27] ibid, Some authorities argue that access to funding is not only an element of the right to freedom of association, but is protected as a substantive self-standing right. Read, International Service for Human Rights, 'Right to Access Funding'(2009),P.3,(Dec 16,2016), http://www.icnl.org/research/resources/foreignfund/right-to-access-funding.pdf

objectives. It is by using their resources (including financial resources) that CSOs will be able to accomplish their basic activities such as facilitating public meetings, organizing advocacy campaigns, coordinate workshops and conferences, running programs in communities, conducting research etc.[28] If CSOs are denied the means and resources to pursue their legitimate objectives as an association, then their right to freedom of association cannot be considered to be effectively protected in concrete terms.[29] The Supreme Court of US in *Buckley v.Valeo* pointed out that: "The right to join together for the advancement of beliefs and ideas … is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective".[30]

Among international instruments, *The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Defend Universally Recognized Human Rights and Fundamental Freedoms* has clearly articulated that access to funding is indispensable for the enjoyment of the right to freedom of association. Article 13 of the Declaration enunciates: "everyone has the right, individually and in association with others, to solicit, receive and utilize resources…" As noted above, the term *resource* is broad and includes human, material and financial resources.

The Human Rights Committee, in *Viktor Korneenko et al vs. Belarus* elaborated that the right to freedom of association protected under the ICCPR relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory

[28]World Movement for Democracy, Civil Society and the Right to Access Resources, (Dec 16,2016), http://www.movedemocracy.org/sites/default/files/WMD%20Right%20to%20Access%20Resources%20Infographic%20Text%20Only.pdf

[29] International Service for Human Rights, *supra* note 27, P.3,

[30] *Buckley v. Valeo,* 424 U.S. 65–66; 1976,cited in Robert J.Bressler,Freedom of Association: Rights and Liberties under the Law,3(2004)

activities.[31] According to the Committee, hence, fundraising activities of CSOs are also protected by the right to freedom of association guaranteed under the ICCPR.[32] In the concluding observation it passed on Egypt, the Committee has further clarified on the inextricable link between access to funding and the right to freedom of association. It held that the legislation adopted by the government of Egypt which requires CSOs to obtain approval from the concerned authorities of Egypt before receiving foreign funds contradicts the right to freedom of association.[33] In the same vein, the International Labor Organization (ILO) has underscored that laws requiring official approval of funds from abroad may be incompatible with Convention No. 87 on Freedom of Association and Protection of the Right to Organize.[34]

Similarly, other treaty bodies and organs of the UN have stressed on the need to ensure access to funding of CSOs for the effective exercising of the right to freedom of association.[35] The Committee on Economic Social and Cultural Rights has, for example, considered that *the control on foreign funding* available for associations infringes their right to freedom of association and the right to form trade unions.[36] The Committee on the Rights of the Child in its concluding observation on the Central African Republic has also suggested that the State party should make every effort to strengthen the role played by civil society, *inter alia*, through the provision of support to civil society in *accessing resources*.[37] In its Resolution adopted in 2013, the Human Rights Council of the UN has called up on member States of the UN to ensure that they do not

[31] Communication 1274/2004, Para 7.2
[32] CESRC, Summary record of the 11th meeting, cited in International Freedom for Human Rights, 'Freedom of Association in the Arabian Gulf: The Case of Bahrain, Kuwait and Yemen', at 67, (Dec 15,2016) https://www.fidh.org/IMG/pdf/etude.pdf
[33] International Service for Human Rights, *supra* note 27,at 3
[34] ibid
[35] ibid
[36] The Observatory for the Protection of Human Rights Defenders, *supra* note 5,at 11
[37] Committee on the Rights of the Child, Concluding Observations on the Central African Republic, CRC/C/15/Add.138, 18 October 2000, Paras 22 and 23.

discriminatorily impose restrictions on potential sources of funding aimed at supporting the work of human rights defenders.[38] The UN Special Rapporteur on the situation of human rights defenders considered that "Governments should allow access by human rights defenders…to foreign funding as a part of international cooperation to which civil society is entitled to the same extent as Governments".[39]

At regional levels, the Inter-American Commission on Human Rights has averred that freedom of association may not be realized without permitting CSOs to access funding. In its two reports on the situation of human rights defenders, the Commission considered that: "One of the State's duties stemming from freedom of association is to refrain from restricting the means of financing of human rights organization"[40] The Council of Europe through its recommendation adopted in 2007 affirmed that the right to freedom of association entitles NGOs to solicit donations in cash or in kind.[41] The African Commission has also highlighted on the need to facilitate access to funding of CSOs for the exercising of the right to freedom of association. The Special Rapporteur on the situation of Human Rights Defenders in Africa recommended that States should provide both financial and material support for human rights defenders.[42]

[38] Human Rights Council, Protecting human rights defenders, A/HRC/RES/2/6
[39] UN General Assembly, Report of the Special Rapporteur on the situation of human rights defenders, UN Document A/66/203, July 28, 2011, Para 70
[40] The Observatory for the Protection of Human Rights Defenders, supra note 5,at 15
[41] Recommendation CM/Rec(2007)14 of the Committee of Ministers of the Council of Europe,Para.50, (Dec 16,2016), https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2007)14E_Legal%20status%20of%20NGOs.pdf
[42] African Commission on Human and Peoples' Rights, Intersession Report, November 2011 - April 2012, Para 50.(Dec 16,2016), http://www.achpr.org/sessions/51st/intersession-activity-reports/human-rights-defenders/

V. RESTRICTIONS ON ACCESS TO FUNDING OF CIVIL SOCIETY ORGANIZATIONS IN ETHIOPIA

A. PRELIMINARY

The FDRE Constitution, as alluded to above, guarantees the right to freedom of association. Article 31 outlines:

> Every person has the right to freedom of association *for any cause or purpose (emphasis added)*. Organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited.

The phrase 'for any cause or purpose' is not commonly used in other international and regional human rights treaties. At first glance, the phrase seems to confer broader right to beneficiaries. However, the following statement makes it clear that the exercising of the right may be subject to restrictions. As indicated in the Article, restrictions may be made by the instrumentality of appropriate laws. Understandably, the term 'appropriate laws' is meant to refer to laws adopted by the government of Ethiopia to regulate issues associated with CSOs. The Charities and Societies Proclamation is a law adopted to govern the registration and operation of CSOs. The Proclamation incorporates specific rules relating to CSOs. Among such rules are those relating to foreign funding of CSOs.

As highlighted above, access to funding is an integral part of the right to freedom of association. It follows that unreasonable restrictions on access to funding of CSOs will nullify the essence of the right to freedom of association. Restrictions on access to funding of CSOS are, hence, expected to comply with international human rights standards.

B. THE NATURE OF CIVIL SOCIETY ORGANIZATIONS RECOGNISED UNDER THE CHARITIES AND SOCIETIES PROCLAMATION

The Charities and Societies Proclamation introduced 3 categories of CSOs:

i. **Ethiopian Charities/Societies**: Those charities or societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians, generate income from Ethiopia and wholly controlled by Ethiopians.[43] However, they may be deemed as Ethiopian Charities or Ethiopian Societies if they use not more than ten percent of their funds which is received from foreign sources.[44]
ii. **Ethiopian Residents Charities/Societies:** Are charities or societies that are formed under the laws of Ethiopia and which consist of members who reside in Ethiopia and who receive more than ten percent of their funds from foreign sources.[45]
iii. **Foreign Charities:** Are those charities that are formed under the laws of foreign countries or which consist of members who are foreign nationals or are controlled by foreign nationals or receive funds from foreign sources.[46]

"Charity" is defined in the Proclamation as an institution which is established exclusively for charitable purposes and gives benefit to the public. 'Charitable purpose' includes: the prevention or alleviation or relief of poverty or disaster, the advancement of the economy and social development and environmental protection or improvement, the advancement of human and democratic rights and etc.[47] On the other hand, 'Society', is defined as an association of persons organized on non-

[43] Charities and Societies Proclamation, Art.2(2)
[44] ibid, It should be emphasized that 'use' of funds of a CSO may relate to use of funds for administrative activities or implementation of purposes of the organization (look at Article 88 of the Proclamation) Foreign sources as defined under Art.2(15) of the Proclamation include the government, agency or company of any foreign country; international agency or any person in a foreign country.
[45] id,Art.2(3) The distinction between Ethiopian Charities/Societies and Ethiopian Residents Charities/Societies is that the former comprises members who are only Ethiopians. The latter can have members who are not Ethiopians. Furthermore, Ethiopian charities and Societies generate income from Ethiopia. They are allowed to generate not less than 10% of their funds from foreign sources. Ethiopian residents charities and societies, on the other hand, generate more than 10% of their funds from foreign sources.
[46] id,Art.2(4)
[47] id,Art.14(2)

profit making and voluntary basis for the promotion of the rights and interests of its members and to undertake other similar lawful purposes as well as to coordinate with institutions of similar objectives.[48]

Pursuant to Article 14 (5) of the Proclamation, only Ethiopian Charities and Societies are allowed to participate on human rights and governance issues listed under Article.14(2)(j),(k),(l),(m) and (n) of same, namely: the advancement of human and democratic rights, the promotion of equality of nations, nationalities and peoples and that of gender and religion, the promotion of the rights of the disabled and children's rights, the promotion of conflict resolution or reconciliation and the promotion of the efficiency of the justice and law enforcement services. Ethiopian Residents Charities or Societies and Foreign Charities cannot carry out the above activities.

Although the Proclamation authorizes Ethiopian Charities and Societies to work on human rights, it has limited their access to funding as they are allowed to generate not more than 10% of their funding from foreign sources. If such CSOs contravene such restriction on funding, the Charities and Societies Agency established by the Proclamation (hereafter 'the Agency') is empowered to suspend them until they comply with the requirements of the law.[49] Later, the Agency may cancel the licenses of the organizations if they fail to rectify the causes of suspension within the time limit set by it.[50] The following part will examine such restriction in light of international human rights standards. It will also assess the potential impacts (if any) of the restrictions on the protection and promotion of human rights in Ethiopia.

[48] id,Art.55(1)
[49] Read Arts 4 and 92(1)(C) of the Proclamation
[50] Art.92(2)(c) of the Proclamation

C. EXAMINING THE RESTRICTIONS ON ACCESS TO FUNDING IN LIGHT OF INTERNATIONAL HUMAN RIGHTS STANDARDS

Under Article 13(2) of the FDRE Constitution, it is stated that interpretation of the rights specified under Chapter 3 of it should be made in a manner conforming to the principles of the UDHR, International Covenants on Human Rights and international instruments adopted by Ethiopia. This provision gives the opportunity to interpret Article 31 of the Constitution (which guarantees the right to freedom of association) in light of the normative standards specified under international human rights treaties ratified by Ethiopia.

Accordingly, in order to determine the content and scope of the right to freedom of association, it is essential to interpret Article 31 of the FDRE Constitution in light of Article 22 of the ICCPR which guarantees the right to freedom of association. States Parties of the ICCPR are allowed to impose restrictions on justifiable grounds.[51] Restrictions will be dubbed justifiable: if they are *necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others*. They are also expected to be *prescribed by law*.[52] Accordingly, through the cumulative reading of Article 31 of the FDRE Constitution and Article 22 of the ICCPR, one can discern that access to funding (which is an integral element of the right to freedom of association) can be legitimately restricted by the government if such restriction helps prevent

[51] Look at Art.22 of the ICCPR, Art.10 of ACHPR,Art.11 of ECHR and Art.16(1) of the ACHR

[52] It is elaborated in the 'Siracusa Principles' that the law should be consistent with the ICCPR (Siracusa Principles on the Limitation and Derogation of Provisions in the *International Covenant on Civil and Political Rights* (UN Doc E/CN.4/1984/4 (1984)). As Article 60 of the ACHPR requires the African Commission to draw inspiration from, among others, the Universal Declaration of Human Rights and other instruments adopted by the United Nations, it is possible to deduce that the ACHPR also requires States Parties to ensure the existence of the above mentioned justifiable grounds while carrying out restrictions.

or avert the illegal activities of CSOs such as illegal subversion of constitutional order and maintain public safety, public order, public health or moral.

The Proclamation is promulgated to ensure the realization of citizens' right to association enshrined in the FDRE Constitution and aid and facilitate the role of charities and societies in the overall development of Ethiopian people.[53] In the opinion of the present writer, however, the restrictions on access to funding placed on Ethiopian Charities and Societies will hamper the effectiveness of the Proclamation in realizing the right to freedom of association. It will also diminish the role of CSOs in protecting and promoting human rights.

The above discussion has clarified that Ethiopian Charities and Societies are precluded from generating more than 10% of their funds from foreign sources. The restriction applies at all conditions. For example, Ethiopian Charities and Societies will not be permitted to receive an amount exceeding 10% of their fund from foreign sources irrespective of the fact that they are going to use the fund for lawful purposes, such as running their statutory activities. As the restriction is placed unconditionally, the government is relieved from proving that denying Ethiopian Charities and Societies from receiving more than 10% of their funds from foreign sources helps to achieve legitimate purposes laid down under the FDRE Constitution and the ICCPR, i.e., *national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.*

This modality does not conform to the requirements of the FDRE Constitution and the ICCPR. These instruments do not authorize the government of Ethiopia to restrict access to funding without showing justifiable grounds for doing so. As the Special Rapporteur rightly expounded, justifiable grounds that warrant governments to undergo legitimate restrictions on access to funding include those carried out for

[53] Paras 1 and 2 of the Charities and Societies Proclamation

the purpose of preventing unlawful activities, such as money-laundering and terrorism.[54] Similar circumstances which fall within the justifiable grounds mentioned under the FDRE Constitution and the ICCPR should exist for the government of Ethiopia to lawfully restrict access to funding. The underlying reason for imposing funding restrictions on Ethiopian Charities and Societies can be gathered from the Policy document adopted by the government in 2006.The document views NGOs as organizations established by individuals mainly for personal benefits, accountable to, and advancing the interests of foreign agencies.[55] The government believes that CSOs receiving significant amount of funding from foreign sources could be an instrument for the illicit advancement of the interests of foreign powers.[56]

As argued above, however, it is only the presence of justifiable grounds that entitles the government to legitimately carry out restrictions on access to funding. The government is expected to show clear and concrete grounds that justify restrictions. Mere allegation as to the potential manipulation of CSOs by foreign powers will not justify the government to restrict access to funding of Ethiopian Charities and Societies. In Communication No. 1119*/2002*(*Mr. Jeong-Eun Lee v. Republic of Korea)***,** the Human Rights Committee stressed that in restricting the right to freedom of association, States should demonstrate that the restrictions are in fact necessary to avert *a real, and not only hypothetical danger* to the national security or democratic order.[57]

In the presence of provisions introduced under the Proclamation that authorize the government to regulate registration and operation of CSOs, moreover, the restriction on funding appears to be unnecessary. The

[54] Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, UN Document A/HRC/20/27, May 21, 2012, Para 94
[55] Debebe Hailegebriel, 'Restrictions on Foreign Funding of Civil Society', *International Journal of Not-for-Profit Law / vol. 12, no. 3, May 2010 / 18,* at.20
[56] ibid
[57] Mr. Jeong-Eun Lee v. Republic of Korea, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 (2005)

Proclamation has granted power to the Agency to decline from registering CSOs if it considers that the proposed charity or society is likely to be used for unlawful purposes or such organization is prejudicial to public peace, welfare or good order in Ethiopia.[58] The Agency is also authorized to cancel and dissolve CSOs if, among others, they have been actually used for unlawful purposes or purposes prejudicial to public peace, welfare or security.[59] In addition, the proclamation has enshrined that any person who violates the provisions of it will be held liable in accordance with the provisions of the Criminal Code.[60]

As with the case in Ethiopia, a number of governments around the world have placed barriers that hinder CSOs' access to foreign funding. This trend is attributable to several factors including: (i) pressure posed on governments by the international community to address terrorist financing and money laundering; (ii) a desire to coordinate and increase the effectiveness of foreign aid; and;(iii) concerns about national sovereignty.[61]The forms of funding restrictions are manifold. *Venezuela*, for example, has adopted legislation that totally prohibits NGOS dedicated to the 'defense of political rights' from possessing assets or receiving any income from foreign sources.[62] In other States like *Egypt, Bangladesh and India*, access to foreign funding is subject to specific authorization from the government or a government agency.[63] Civil

[58] Art.69(2) of the Proclamation
[59] Art.92(2)(b) and 93(1)(b) of the Proclamation
[60] Art.102(1) of the Proclamation.' Person' as defined under Art.2(8) of the Proclamation includes both physical and artificial persons
[61]International Center for Not-for Profit Law, 'Global Trends in NGO Law', supra note 9,at 4
[62] Civil Society and the Rights to Access Resource,(Dec 23,2016), http://www.movedemocracy.org/ sites/default/ files/WMD%20Right%20to%20Access%20Resources%20Infographic%20Text%20Only.pdf
[63] The Observatory for the Protection of Human Rights Defenders, *supra* note 5, at42.Law No 84 adopted by the government of Egypt in 2000,for example, prohibits any association from receiving funds from domestic or foreign sources without the authorization of the Ministry of Solidarity or Social Justice.

Society laws in States like *Algeria, Bahrain, Belarus and Iran* render impossible all foreign funding.[64] The laws of States like *Uzbekistan and Sierra Leone*, on the other hand, require foreign funding to be channeled through government-controlled banks or institutions.[65] In the Russian Federation, the law governing civil societies labels foreign-funded non-commercial local organizations as 'foreign agents'.[66]

As the International Center for Not-for-Profit Law underscored**,** funding restrictions that stifle the ability of CSOs to pursue their goals may constitute unjustifiable interference with freedom of association.[67] Decline in the number of associations, reduction of activities or extinction of other associations likewise indicates unlawful restriction of the right.[68] Since such funding restrictions came in to force, the activities of a number of Ethiopian Charities/Societies have been constrained.[69] Some of them have already been forced to reduce their staff and close their branch offices.[70] Other CSOs have effectively ceased to function.[71] The Proclamation, hence, clearly deviates from international standards which require restrictions not to impair the essence of rights.[72]

In fact, it is important to bear in mind that CSOs also owe obligations. They are bound to work with integrity and ethically as a way of

---

[64] ibid, In Belarus, Article 21 of Law on Public Associations, as amended, Prohibits Belarusian NGOs from keeping in funds in Banks or other financial institutions on the territory of foreign states.

[65] ibid

[66] Art.2(6) of No 7-FZ of the Russian law which was amended several times defines a 'foreign agent' as a Russian non-commercial organization which receives monetary assets and other property from foreign sources.

[67] *10 Int'l J. Not-for-Profit L. 30 2007-2008,at.37,*http://heinonline.org

[68] UN Special Rapporteur, *supra* note 25

[69] Debebe Hailegebriel, *supra* note 55, at.20

[70] ibid.

[71] The Observatory for the Protection of Human Rights Defenders, *supra* note 5,at 45. See also International's written statement to the 20th Session of the UN Human Rights Council (18 June – 6 July 2012),p.2, http://www.refworld.org/pdfid/4fd7092f2.pdf

[72] Human Rights Committee, General Comment No. 27 (1999), .N. Doc CCPR/C/21/Rev.1/Add.9 (1999)

generating trust within the sector.[73] The scope of their operation should be limited to the extent which enables them to achieve their goals and objectives. This will not, however, entitle governments to unnecessarily interfere with their activities. Specific laws which governments adopt to regulate CSOs should merely aim at reinforcing their efficiency and accountability instead of constraining their activity. Governments should present tangible grounds and justifications for putting in to place restrictions on the exercise of the right to freedom of association.

Treaty bodies of the UN and the African Commission have expressed concern over the restriction on access to funding made on Ethiopian Charities and Societies. In its concluding observations on Ethiopia(November 2010),the Committee Against Torture considered that the Proclamation curtailed the activities of local human rights NGOs previously active in those areas, including the Ethiopian Human Rights Council, EWLA, the Ethiopian Bar Association and the Rehabilitation Centre for Victims of Torture in Ethiopia. The Committee, hence, called on the government to consider lifting the funding restriction imposed by the Proclamation.[74] Likewise, the Committee on Economic, Social and Cultural Rights and the CEDAW Committee recommended that the government of Ethiopia should amend the Proclamation with a view, among others, to lifting funding restrictions.[75] Scrutinizing the periodic report of Ethiopia (2010), the African Commission on its part recommended that the government should review the Proclamation which proscribes human rights organizations from getting more than 10% of their funding from abroad.[76]

---

[73] *id*, Para 13

[74] Report of the Committee Against Torture,(A/66/44),Para 34

[75] Look at *Concluding observations of the Committee on Economic, Social and Cultural Rights*, E/C/12/ETH/CO/1-3,Para 7 and *Concluding observations of the Committee on the Elimination of Discrimination against Women*, CEDAW/C/ETH/CO/6-7,Para 29

[76] Concluding Observations and Recommendations on the Initial, 1st, 2nd, 3rd and 4th Periodic Report of the Federal Democratic Republic of Ethiopia, Para 72

It is worthwhile to analyze that unjustifiable restriction of access to funding of CSOs will bring about serious violations of other human rights guaranteed under the FDRE Constitution and international human rights treaties ratified by Ethiopia. The decline in the number of CSOs working on human rights will, for instance, greatly impede the right to access to justice of individuals in Ethiopia.[77] Undeniably, CSOs have significant role in assisting individuals to bring their claims before international adjudicatory organs. Particularly, their contribution is quite visible in developing regions like Africa where significant number of individuals lack the necessary financial resource and knowledge to defend their case at an international or regional level. The records of human rights adjudicatory organs in Africa such as the African Court on Human and Peoples' Rights and the African Commission indicates that the majority of cases presented to them are initiated by CSOs representing individuals.[78]

So far, the African Commission has entertained very insignificant number of individual communications involving Ethiopia. Given the poor human rights record of the State,[79] it would be illogical to assume the cause of such less degree of involvement to be absence of human rights violations. Rather, it would be tenable to argue that the very limited number of individual communications filed against Ethiopia so far is attributable to absence of proper mechanisms for individuals to access international and regional adjudicatory organs. With the restrictive approach it followed in

[77] The right to access to justice is guaranteed Art.37 of the FDRE Constitution,Art.14 of the ICCPR and Art.7 of ACHPR

[78] Look at the decisions of the African Commission at http://www.chr.up.ac.za/index.php/ahrlr-downloads.html information about communications submitted to the African Court on Human and Peoples' Rights can be found at: www.african-court.org

[79] Look at the Report of the US Department of State at http://www.state.gov/documents/organization/236570.pdf and the 2015 Report of Human Rights Watch at: https://www.hrw.org/world-report/2015/country-chapters/ethiopia

dealing with foreign funding, the Proclamation will potentially exacerbate the problem instead of mitigating it.

The existing restrictions on access to funding adopted in the Proclamation will also minimize the contribution of CSOs in the promotion and protection of human rights. CSOs play significant role in challenging government law or policy, and advocating for human rights and fundamental freedoms.[80] Ethiopian Charities/Societies, the only CSOs allowed working on human rights and governance issues, as noted before, are prevented from generating more than ten percent of their funding from foreign sources. This will force such organizations to heavily rely on local sources to generate their funding. Given the fact that Ethiopia is among the poorest countries of the world, it would be quite challenging for CSOs to get adequate funding from domestic sources.[81] The resulting effect is that quite insignificant number of CSOs will work on human rights. This will undermine the protection and promotion of human rights in Ethiopia. In particular, it will jeopardize the protection of the human rights of vulnerable groups who need special protection such as children, persons with disabilities and women.[82]

In addition, CSOs facilitate the effective examination of periodic reports of States through submitting shadow/alternative reports to UN treaty bodies.[83] In most cases, CSOs make laudable contribution in the process

[80] "Global Trend in NGO Law: A quarterly Review of NGO Legal trends around the World", www.icnl.org

[81] As the International Center for Not-for-Profit Law observed, Many Ethiopian NGOs depend on foreign funding to conduct and maintain their operations(International Center for Not-for-Profit Law, *supra* note 9)

[82] Read, for example, Meskerem Geset, "The New Charities and Societies Proclamation and its Impact on the Operation of Save the Children Sweden-Ethiopia" to analyze the impact of the Proclamation on the rights of children.

[83] Shadow report and alternative report have slight technical differences. Alternative reports are reports made by CSOs where no government report is available (e.g. either because the concerned government has not written one or it writes it too late). The reports describe progress (shortcomings) in the fulfillment of rights enshrined in the relevant international treaty. Shadow reports, on the other hand, are a civil society critique of the government reports, highlighting issues that may have been neglected or

of examination of state reports through providing both reliable and independent information to the treaty bodies on issues which may be overlooked or misrepresented in the reports.[84] Shadow/alternative reports enable treaty bodies to come up with comprehensive and reliable concluding observations developed on the basis of diversified source of information. The restriction on access to funding brought in the Proclamation, as considered above, greatly hinders the participation of CSOs on human rights. Consequently, the UN treaty bodies will be forced to mainly rely on the periodic report of the government of Ethiopia in monitoring the implementation of the treaties which Ethiopia ratified. This will impede the international monitoring of human rights implementation by the government of Ethiopia.

VI. CONCLUDING REMARKS

In this article, the restrictions on access to funding of CSOs under the legal frameworks of Ethiopia have been analyzed in light of international human rights standards. It has been noted that the right to freedom of association, an important human rights entitlement that enables individuals to form and join associations, is guaranteed under the FDRE Constitution and international human rights instruments ratified by Ethiopia. The Charities and Societies Proclamation of Ethiopia is adopted to provide details of the right to freedom of association. Among the specific rules governed under the Proclamation concerns the restrictions on access to funding of CSOs.

In the Proclamation the following kinds of CSOs are recognized: Ethiopian Charities/Societies, Ethiopian residents Charities/Societies and Foreign Charities. The Proclamation does not allow Ethiopian Charities

misrepresented in the government reports. Alternative reports are usually presented when a government fails to submit a report or does not make its report available to CSOs in time for a critique. For further detail, Visit http://www.endvawnow.org/en/articles/1302-alternative-and-shadow-reporting-as-a-campaign-element.html?next=1303

[84] The Advocates for Human Rights, (Nov 21,2016): http://www.stopvaw.org/a_note_about_shadow_reports

and Societies to generate more than 10% of their funds from foreign sources. It has been argued that this modality of restriction on access to funding violates the right to freedom of association as it contradicts with the requirements of the FDRE Constitution and the ICCPR. Cumulative reading of Article 31 of the FDRE Constitution and Article 22 of the ICCPR reveals that the government cannot restrict access to funding of CSOs without proving that the restrictions are *necessary in a democratic society* in *the interests of national security or public safety*, *public order*, *the protection of public health or morals or the protection of the rights and freedoms of others*. The Proclamation, however, imposes restriction on access to funding without requiring the government to show the presence of justifiable grounds.

Apart from violating the right to freedom of association, funding restrictions introduced under the Proclamation entails violation of other human rights. In the Proclamation, involvement on human rights and governance issues is reserved to Ethiopian Charities and Societies. As these CSOs are not allowed to generate more than 10% of their funds from foreign sources, they will be forced to depend on local sources to finance their activities. Given the practical difficulty in generating significant portion of income from a developing nation like Ethiopia, the existing legal framework will greatly constrain their engagement on human rights. This will create difficulty in ensuring access to justice and protecting the human rights of individuals including women, children and persons with disabilities. Recent findings have also revealed that a number local CSOs have ceased to work on the protection and promotion of human rights as a result of the foreign funding restriction introduced in the Proclamation.

The restriction will also hinder the activities of the UN treaty bodies in monitoring the implementation of human rights treaties by the government of Ethiopia. In the absence of sufficient number of CSOs working on human rights in Ethiopia, treaty bodies will not be able to get alternative/shadow reports explaining the performance of the government

of Ethiopia in implementing human rights. They will solely rely on official reports submitted by the government in monitoring the implementation of ratified treaties. This will undermine the overall process of monitoring the implementation of human rights treaties by the government of Ethiopia.

Minimum Resale Price Maintenance Prohibition under the Ethiopian Competition Law: Law and Economic Analysis

Alekaw Dargie Assefa[♣]

Abstract

Minimum resale price maintenance (MRPM) is a device employed by a manufacturer to control its products after they are sold to retailers. MRPM occurs when a manufacturing firm replaces vertical integration by market exchange to enhance efficiency. Since 1991, Ethiopia has experienced free market economy and enacted competition laws to regulate anti-competitive practices to maximize economic efficiency and social welfare. Previous competition law assessed MRPM under rule of reason to examine economic efficiency; however, the current competition law swerves out of this path and puts MRPM under per se illegal. This Article is a modest contribution to the law and economics analysis and argues that rule of reason approach of MRPM should be adopted rather than making it per se illegal.

Key-Words

Vertical restraint, MRPM, free-riding, efficiency, rule of reason, per se illegal, externality, surplus, experience and credence goods, Ethiopia

JEL-Code

K21, L4, L42

[♣] LL.B, (Mekelle University), LL.M (University of Warwick and Mekelle University), EMLE (Rotterdam University, Hamburg University), Lecturer in Law, College of Law, Dire Dawa University. The author would like to thank the anonymous reviewers. The author is solely responsible for the views expressed and for the remaining errors. The author can be contacted at lawyerscamp1@gmail.com

Introduction

Ethiopia has gone through different economic-transformations characterised by change of economic actors and forms of ownership of resources based on government economic-orientation.[1] Pre-1974, imperial-regime claimed to practice market economy policy-orientation nevertheless with no consolidated competition law. Post-1974, the Dergue-regime, practiced socialist form of economic-system where there was no competition in the market as a matter of ideological-principle.

After the downfall of Dergue in 1991, Ethiopia started experiencing free market economy-policy. The government legislated Trade Practice Proclamation *(*hereinafter referred to as TPP)[2]. Though the TPP lacked comprehensiveness, it intended to establish a system conducive for promotion of competitive environment and regulate anti-competitive practices to maximize efficiency and social welfare as expressed in its preamble. The practices TPP prohibits mirror the Treaty on the Functioning of European Union (TFEU) Articles101 and102.[3] Article 6 of the TPP prohibits price fixing, customer allocation and refusal to deal; however, the Ministry of Trade and Industry may authorize exceptions to these prohibitions under Article 7 as long as "the advantages to the nation are greater than the disadvantages".

In 2010, Ethiopia repealed the TPP and enacted a new law, Trade Practice and Consumers' Protection Proclamation No.685/2010 (hereinafter referred to as TPCPP) that reiterated the government's commitment to a free market economy.[4] Market forces play dominant role in the operation of the market but government intervenes through laws when market fails. This is because pro-competitive economic reforms consisting of

[1] Kibre Moges (2008) 'Policy-Induced Barriers to Competition in Ethiopia', *CUTS International Jaipur*. India, p.3. Available at: http://www.cuts-ccier.org/7up3/pdf/Policy-induced_Barriers_to_Competition_in_Ethiopia.pdf. (Accessed 16 July 2016)

[2] *Trade Practice Proclamation No*. (329/2003) 9th Year No. 49, Addis Ababa 17th April, 2003.

[3] Hussein Ahmed Tura (2013) 'Ethiopian Merger Regulation', Working paper, p.5. Available at: http://dx.doi.org/10.2139/ssrn.2305198 (Accessed 20 February 2016)

[4] *Trade Practice and Consumers' Protection Proclamation No*. (685/2010), Federal Negarit Gazeta, 16th Year No.49, Addis Ababa 16th August, 2010.

liberalization, privatization and deregulation alone are not sufficient.[5] Competition law, which is dubbed as antitrust (antimonopoly law or restrictive business legislation) prohibits various anticompetitive practices. Restrictive business legislation is made to abuse of dominance, anticompetitive practices, mergers and vertical restraints.[6] Among the noticeable lack of explicit recognition of TPP were vertical restraints and mergers.[7]

TPCPP heralded the advent of vertical restraint under Article 13(1(b)) captioned "absolute prohibition" and absolutely prohibits "agreement…in a vertical relationship…object or effect setting minimum retail price". There is exception to this vertical restraint under Article 14 which stipulates

> It is possible for a business person accused of anticompetitive practice as provided for under Article 13(1) (a) and (b) above or other provisions of this chapter, to prove that the technological or efficiency or other pro-competitive gains of the agreement or other pro-competitive gains of the agreement or the concerted practice or the decision by association outweigh the detriments of the prohibited acts.

This mirrors, as it will be discussed, the Chicago school that focuses solely on economic efficiency rather than protection of consumers' interest.

Trade Competition and Consumer Protection (hereinafter referred to as TCCP) has broader goal in relation to competition as Article 3(1) declares its objective to be not only confined to the protection of business from

[5] Kibre Moges Belete (2015) 'The State of Competition and the Competition Regime of Ethiopia: Potential Gaps and Enforcement Challenges', *Organization for Social Science Research in Eastern and Southern Africa* (OSSREA), p.10. Available at www.ossrea.net/images/state_of_competition_ethiopia.pdf (Accessed 20 May 2016)

[6] Harka Haroye. (2008) 'Competition Policies and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law'. *Mizan Law Review*, **2**(1), p.42.

[7] Hailegabriel Feyissa. (2009) 'European Influence on Ethiopian Antitrust Regime: A Comparative and Functional Analysis of Some Problems'. *Mizan Law Review*, **3**(2), p.285.

anticompetitive behaviour but also to cover promotion of competitive free-market.[8]

TCCP, like TPCPP, contains vertical restraint but with different caption and detail. Under Article 7 with the heading "Anti-Competitive Agreement, Concerted Practices and Decisions" proclaims:

> Any agreement between business persons in a vertical relationship shall be prohibited if: a) It has the effect of preventing or significantly lessening competition, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or b) It involves the setting of minimum resale price.

The TPCPP under Article 14 prohibits "absolutely" behaviours with the object or effect of "setting minimum retail price" but allows exceptions when there exist technological or efficiency or other gains.

The TCCP emphasizes economic efficiency and allows even horizontal agreement and abuse of dominance as long as efficiency is achieved. However, the TCCP, unlike the TPCPP, doesn't allow exceptions in vertical restraint of minimum resale price maintenance (hereinafter-referred-as-MRPM) even though there is economic efficiency justification. Moreover, non-price-vertical-restraints which have similar effect to MRPM are not prohibited as long as efficiency exists.

The Chicago School placed efficiency at the core of competition law and fiercely attacked the traditional concepts of protecting competitive process or allowing goals of competition law other than efficiency. As a consequence, form-based approach is replaced by effects-based approach, calculating the effects of the behaviour in question on efficiency. In Europe, the transition to an effects-based perspective has been dubbed "more economic approach". The new approach is modelled on the basic assumption that market participants act rationally and maximise their own utility. This effects-based approach has led to a more lenient competition policy, especially in the field of vertical restraints such as MRPM. As observed in legislations, although effect-based approach (rule of reason) is a justification in Ethiopia and the TCCP emphasizes efficiency on a

[8] *Trade Competition and Consumers Protection Proclamation No.* (813/2013) 20th Year No.28, Addis Ababa 21st, Article 3(1),

number of occasions, MRPM is not justified by economic efficiency. As per Article 7(2(b)) of TCCP setting MRPM is prohibited and it is per se (hard core) prohibition. Due to efficiency advantage of MRPM, there is a move to evaluate the MRPM under rule of reason. The main question of this Article is, how efficiency justifies incorporating MRPM under rule of reason than under per se prohibition? It examines and analyzes MRPM from efficiency perspective. Thus, it offers insights of law and economic perspectives to handle issues related to MRPM in Ethiopia. Economic analysis of law involves the application of economic principles and methods to analyze the effects of legal rules. It contains both positive and normative strands. The concept of efficiency is adopted as the criterion for the normative analysis of law and explanatory instrument. The enactments are evaluated whether they advance efficiency and the normative analysis that deals with *the ought to* be of the law to advance efficiency. Taking "efficiency as a legal concern" and justifications from US and EU as hindsight, the Article pleas for repeal of per se MRPM prohibition and making MRPM examined under rule of reason.

The reason to examine US and EU competition laws is not only because Ethiopian competition law is influenced by EU Competition law but also "EU has been exhibiting US approaches in competition law…a change in the US system is likely to indicate a future change in the EU system".[9] Furthermore, as we will examine later, the history of US antitrust law depicts the gradual evolution of strict per se prohibition of vertical restraints to assess under the rule of reason. The evolution in the EU is also promising as competition law has emerged from legal formalism to an effects-based approach that takes into account impact of vertical restraints on economic efficiency.

To meet this objective, this Article is structured as follows. Section one discusses arguments of pro and anti-competitive effect of MRPM. Section two deals with comparative perspective on how MRPM is treated in both US and EU jurisdiction from legal and case analysis. The third section is

[9] Elif Cemre Hazırog˘lu & Semih Gokatalay. (2015) 'Minimum resale price maintenance in EU in the aftermath of the US Leegin decision'. *EUR J Law Econ*, p.2.

devoted to per se and rule of reason. Section four examines MRPM in Ethiopia from economic analysis perspective. Finally, recommendation is provided.

Section 1- MRPM as Double Edged Sword- Anti and Pro-Competitive-Effect

Firms selling their product to retailers want to retain decision-making on how their product is priced, promoted and sold to consumers. MRPM occurs when a firm replaces vertical integration by market exchange to enhance efficiency.[10] Telser expounded that firm uses retailers' service (market-solution) than vertical integration (firm-solution) as long as advantages outweigh disadvantages.[11] There are firms as manufacturer and retailers as distributors. It is intra-brand restraint whereby manufacturing firm regulates retailers conduct to specific brand and no effect on other brand.[12] Hence MRPM is contractual device by which manufacturing firms control retailers' actions as to price and promotion.[13]

The agreement between firm and retailers that the latter will sell goods at agreed price is called resale price maintenance (hereinafter-referred as RPM).[14] The agreed price falls either MRPM (vertical-price-fixing[15]) that allows retailers to sell goods at a price or above a price floor; maximum RPM allowing retailers to sell goods at or below a price ceiling or exact price.[16]

MRPM and maximum RPM make up of vertical restraints as a form of price fixing were classed as per se illegal that they are not permitted under

[10] Roger Blair & David Kaserman (1983) *Law and Economics of Vertical Integration and Control*, Academic Press, New York, p.11.

[11] Lester G. Telser. (1960) 'Why Should Manufacturers want Fair Trade'? *The Journal of Law and Economics*, **3**:86-105, p.88.

[12] Ittai Paldor. (2008) 'The Vertical Restraints Paradox: Justifying the different legal treatment of price and non-price vertical restraints'. *University of Toronto Law Journal*, **58**:317-353, p.317-318.

[13] Howard Marvel & Stephen McCafferty. (1996) 'Comparing Vertical Restraints'. *Journal of Economics and Business*, **48**: 473-486, p.473.

[14] Surinder Tikoo & Bruce Mather. (2011) 'The changed legality of resale price maintenance and pricing implications'. *Business Horizon,* **54**(5):415-423.

[15] Paldor (supra note 12) p.318.

16 Tikoo & Mather (supra note14) p.415-423.

any situation (automatically illegal and defence isn't available).[17] However when time went by, the US Court in *State Oil Co. vs. Khan* ruled that maximum RPM is not per se illegal and passed verdict that it should be assessed under the rule of reason approach whereby all relevant facts peculiar to the restraint should be considered on case-by-case basis. Similarly, the Court in *Leegin Creative Leather Products Inc. vs PSKS Inc.* ruled that MRPM is no longer per se illegal and they should be evaluated under rule of reason. The Court stated that blanket condemnation of bilateral MRPM under per se rule (absolutely illegal) is at loggerheads with economic theory such as consumer welfare.[18] The history of US antitrust regime witnessed evolution of a strict per se prohibition of vertical restraints to assess under rule of reason.

MRPM's swing from per se illegal to be rule of reason and still in some jurisdiction per se prohibition is used because it is considered 'mixed bag' practice having both pro and anticompetitive-effect.[19]

1.1 Anticompetitive Effect of MRPM

1.1.1 Price Increase

Many scholars criticised MRPM because there is immediate price hike of product by retailers; however, with mixed result as to the welfare effect of MRPM.[20] Thomas' empirical survey of RPM depicted more price increase when resale price legalized than the states where resale price remained prohibited.[21] It is empirically confirmed that RPM results in

17 Ibid.

[18] Id.p.416.

[19] Thomas A. Lambert. (2010) 'A Decision-theoretic Rule of Reason for Minimum Resale Price Maintenance'. *The Antitrust Bulletin*, **55**(1):167-224, p.168.

[20] Cemre & Semih (supra note9) p.4.

[21]Thomas R. Overstreet (1983) 'Resale Price Maintenance: Economic Theories and Empirical Evidence', *Bureau of Economics Staff Report to the Federal Trade Commission*. Available at: https://www.ftc.gov/sites/default/files/documents/reports/resale-price-maintenance-economic-theories-and-empirical-evidence/233105.pdf (Accessed 12 May 2016)

price increase and loss of consumer welfare.[22] There is ambiguous evidence for higher price and its effect. RPM doesn't bring price increase and even if it results in price increase it doesn't necessarily harm consumer welfare.[23] Consumers consensually could make trade-off between higher prices and services and information proffered by retailers. Doty asserted price increase only affects infra-marginal consumers who value goods more and continue purchasing at high price whereas marginal consumers would stop purchasing when the price hits high.[24]

1.1.2 Manufacturer Cartel Facilitation

MRPM avoids price flexibility at retailer level and stabilize at manufacturer level.[25] The existence of MRPM makes cheating detection easy or reduces the incentive to cheat for the colluded parties to keep price high. However, this argument is attacked from different fronts. Ippolito examined that there is no empirical evidence to buttress MRPM was employed to facilitate cartels and rather MRPM well-functioned in competitive-market.[26] In similar vein, Thomas asserted that application of MRPM is immensely costly and is not clear MRPM is conducive for "collusive benefit" to the manufacturer.[27] Others also criticised perceived

[22] Alexander MacKay and David Aron Smith (2014) 'The Empirical Effects of Minimum Resale Price Maintenance', *Marketing Series Paper-1-009*. Chicago Booth, p.2. Available at http://ssrn.com/abstract=2513533 (Accessed 20 May 2016)

[23] Andreas P. Reindl. (2010) 'Resale Price Maintenance and Article 101: Developing a More Sensible Analytical Approach'. *Fordham Int'l L.J*, **33**, p.1319.

[24] Ashley Doty. (2008) 'Leegin V. PSKS: New Standard, New Challenges'. *Berkeley Tech. L.J*, **23**:655-684, p.660.

[25] Robert Pitofsky. (1983) 'In Defense of Discounters: The No-Frills Case for a Per se Rule Against Vertical Price Fixing'. *The Georgetown Law Journal*, **71**:1487-1495, p.1490.

[26] Pauline M. Ippolito. (1991) 'Resale Price Maintenance: Empirical Evidence from Litigation'. *Journal of Law & Economics*, **24**:263-294, p.281-282.

[27] Thomas A. Lambert. (2008) 'Dr. Miles is Dead. Now What?: Structuring A Rule of Reason for Evaluating Minimum Resale Price Maintenance'. *William and Mary Law Review*, **50:**1937-2005, p.1949.

risk of cartel facilitation that non-price vertical-restraints might be employed as much as MRPM to meet the collusive outcome.[28]

1.1.3 Retailer Level Cartel Facilitation

MRPM is attacked because it might be used as a tool of collusion between dominant market retailers by tackling hurdles to price-fixing conspiracy namely establishment and enforcement.[29] The existence of MRPM could provide manufacturer as information tool to identify and punish cheating retailers by denying supplies and this policing role in downstream makes cartel stable.[30] However, the retailer should have significant market power as condition-precedent to secure MRPM from manufacturer.[31] The irony is that non-price vertical-restraints with outcome-equivalent for collusive behaviour of downstream as much as MPRM are regulated by rule of reason.[32] Moreover, the manufacturer has upper hand to overcome collusive-behaviour in downstream by setting price floor which bears less profit.[33] Even there exists high-profit caused by high-price because of MRPM and easy entry to retailing attracts new entrants to reduce price.

1.1.4 Foreclosing Competing Manufacturers

The existence of MRPM provides dominant manufacturer bargain chip with retailers by guaranteeing them lucrative profit margin in exchange for their refusal to distribute other incumbent manufacturers' (new entrants') goods.[34] This brings lack of substitute goods for consumer and causes welfare losses and disrupts Pareto-optimality. Citrus paribas, constrained consumption bundles entail no maximized utility for consumers. However, Thomas asserted that this scenario is not possible to

---

[28] Yves Botteman & Kees J. Kuilwijk. (2010) 'Minimum) Resale Price Maintenance Under the New Guidelines: A Critique and A Suggestion'. *The Competition Policy International Antitrust Journal*, **1**, p.4.
[29] Lambert (supra note 27) p. 1944.
[30] Paldor (supra note 12) p.318.
[31] Id.p.327.
[32] Id.p.322.
[33] Bastiaan M. Overvest. (2012) 'A Note on Collusion and Resale Price Maintenance'. *EUR J Law Eco*, **34**:235-239, p.235.
[34] Herbert Hovenkamp (2005) *The Antitrust Enterprise: Principle and Execution*, Harvard University Press, Cambridge, p.162.

happen frequently as manufacturer might fail to convince retailers to refuse to distribute others' brand product.[35]

1.1.5 Softening Competition among Retailers

Strong downstream retailers may request MRPM to stave off competition from new entrants and retain customers. New-entrants lure consumers by having less price than the established retailers. Though cut-price is hard for entrants to lure consumers, still entrants could make profits by having greater efficiencies.[36]

1.1.6 Dampening System Competition through Interlocking

Bennett et al argued that in a situation of "double common agency" whereby the presence of both duopoly manufacturers and retailers in which both retailers distribute both manufacturers' product via networks of interlocking MRPM dampen competition.[37]

1.2 Pro-competitive Effect of MRPM

As single pro-competitive efficiency explanation does not offer an across-the-board justification for MRPM holistic sum of efficiency explanations must be sought.

1.2.1 Increasing inter-brand competition

MRPM avoids price-based competition among retailers and is criticised for not using cost-effective methods of selling.[38] Rather MRPM devises another instrument of competition that stimulates stiff competition among inter-brand manufacturers.[39]

1.2.2 Special Service & Free-Riding

Free-rider justification is the cornerstone of pro-competitive explanation. According to Telser, MRPM is justified by special service argument whereby manufacturer needs retailers providing customers with special service about the product that includes point-of-purchase sales promotion

[35] Lambert (supra note 27) p.1949-1950.
[36] Matthew Bennett, et al. (2011) 'Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy'. *Fordham International Law Journal*, **33**(4):1278-1299, p. 1292.
[37] Id. p.1292-1293.
[38] Rimantas Daujotas (2011) 'Leegin case: Resale Price Maintenance vs. Consumer Welfare', p.7. Available at: http://ssrn.com/abstract=1866191 (Accessed 10 July 2016)
[39] Reindl (supra note 23) p.1319.

and information.[40] The customers need information which is costly and the manufacturer demands the retailers to disseminate information to customers. Paldor stated that provision of special services has the effect of raising price as service provider should cover cost of service and "stimulating additional demand" for manufacturer's product.[41] Paldor also added that the provision of the service is desirable and the cost of the service is covered by consumers' willingness to pay for the product. Service provider incurs the cost of training personnel, rooms for displaying-products, etc. and these costs are offset by increased demand for the product.

However, customers would get information from one retailer and purchase products from other retailer who doesn't bear the cost of providing special service. Non-service-provider retailer sells product due to information furnished to potential customers by service-provider retailer. Thus, non-service-provider retailer free rides at the expense of the service-provider-retailer. Paldor argued that service-provision brings positive "horizontal-externality" to free-riding-retailer by saving the cost of special-service-provision and shift it to under-price the product.[42] Therefore, Telser illustrated that MRPM is a means to avoid free-riding problem and achieve efficient-equilibrium when special-services provided. Paldor noted that the imposition of MRPM avoids under-price and retailers are compelled to compete on provision of service instead of price.[43] Consumers are endowed with choices ranging from low-price, low-service brands to high-price, high-service[44] and at times retailers providing presale product-service recoup return on investment from the services and sale made. It is agreed MRPM justification is applicable when the products are complex and sold with combined service as we will discuss latter.

---

[40]Lester G. Telser. (1990) 'Why Should Manufacturers Want Fair Trade II'? *The Journal of Law and Economics*, **33**:409-417, p.409.
[41] Paldor (supra note 12) p.332.
[42] Id.p.332-333.
[43] Ibid.
[44]Tikoo & Mather (supra note 14) p.417-418.

1.2.3 Quality Certification for Reputation

Lao stated that "quality certification" is a variant of free-rider theory suggesting reputable retailer's holding of goods certifies their quality and free-riding happens when discounters who incurred no cost to develop-reputation sells to customers and eventually prevents retailers to invest in quality reputation.[45] Certification is signalling[46] the quality of the product to consumer. Imposing MRPM eliminates price competition and assured reputable retailer sufficient margin to recoup investment of service provision.[47]

1.2.4 Distributional Efficiency

Manufacturer chooses either vertically-integrated-distribution or buys market force to distribute its goods by making cost-benefit analysis of transaction cost.[48] Thomas asserted that manufacturer reaps benefits from retailer's special-distribution skill and lack of control over distribution service could be mitigated by MRPM.[49] He also stated MRPM provides leverage as "middle ground" where manufacturer secures benefits and avoids costs of buy and make choices.[50] Distributional-efficiency is critiqued because MRMP is hurdle to low-margin retailers to be innovative and transfer efficiency to consumers.[51]

---

[45]Marina Lao. (2010) 'Resale Price Maintenance: The Internet Phenomenon and Free Rider Issues'. *The Antitrust Bulletin*, **55**(2):473-512, p.481.

[46] Howard Marvel & Stephen McCafferty. (1984) 'Resale Price Maintenance and Quality Certification'. *Rand Journal of Economics*,**15**(3):346-359, p.349.

[47] Paldor (supra note 12) p.341.

[48] Richard H. Coase. (1937) 'The Nature of the Firm'. *Economica New Seriess*, **4**(16):386-405, p.388.

[49] Lambert (supra note 27) p.1951-1952.

[50] Ibid.

[51]Warren S. Grimes (2009) 'Resale Price Maintenance: A Comparative Assessment', *Federal Trade Commission Panel on Resale Price Panel on Anticompetitive Effects*. Available at: https://www.ftc.gov/sites/default/files/documents/publicevents/resale_price_maintenance_under_sherman_act_and_federal_trade_commission_act/wgrimesppt0219.pdf.(Accessed 17 July 2016)

1.2.5 Contract Enforcement Mechanism Theory

Sometimes competitive-retailers may have an incentive to free-ride using manufacturer's reputation to provide a lower quality level than sought neither by manufacturer creating vertical externality nor anticipated by consumers.[52] Free-riding brings extra short-run profit to retailer and disincentive to provide desired service.[53] Therefore, manufacturer induces retailers to provide service via private enforcement mechanism that entitles manufacture monitoring and credible threat to terminate.[54] MRPM creates future-quasi-rents by devising incentives for retailers to pursue distributing of manufacturer's product.[55] It is assumed that potential future-rents lure the retailers not to engage in shirking MRPM.

1.2.6 The Outlets Theory

MRPM is called to function as substitute for directly limiting retailers number by getting rid of competition between retailers to achieve optimal density for retail network.[56] In such case, MRPM is employed as alternative to location clause.

1.2.7 Demand Risk Theory

Sometimes retailers suffer information asymmetry as to consumers' demand. When retailers are more risk averse, it is desirable to share risk between the parties. MRPM overcomes the uncertainty when demand turns out to be low.[57]

1.2.8 Easing Market Entry

MRPM enables market entry for new-products of firm by offering higher-retail-margin; retailers are induced to hold new-brands and provide sales effort that concomitantly encourages inter-brand-competition.[58]

---

[52] Benjamin Klein & Kevin M. Murphy. (1988) 'Vertical Restraints as Contract Enforcement Mechanism'. *Journal of Law & Economics*, **31**:265-299, p.266.
[53] Ibid.
[54] Id.p.267.
[55] Id.p.268.
[56] J.R Gould & L.E Preston. (1965) 'Resale Price Maintenance and Retail Outlets'. *Economic*, **32**(127):302-312, p.304-306.
[57] Patrick Rey & Jean Tirole. (1986) 'The Logic of Vertical Restraints'. *The American Economic Review*, **76**(5):921-939, p.922.
[58] Tikoo & Mather (supra note 14) p.418.

In unilateral RPM by nonmonopolistic firm is permitted to refuse to deal with retailers which failed to comply with declared RPM whereas in bilateral RPM agreement firms prepare formal and enforceable RPM policies.[59] Vertical-restraints are substitutes for one another which means prohibition of MRPM induces firms to utilize exclusive territories, contractual arrangements, subsidizing retailers' effort and taking over markets from retailers which make competition authority sole deciding regulator as to distribution-methods.[60] Furthermore, substitution effects make firms substitute agency agreement for distributional agreement.[61]

The forgoing discussion reveals that when MRPM overall net social efficiency goals outweigh efficiency-loss, it should be subject to rule of reason otherwise subject to per se illegality.[62]

Each jurisdiction treats MRPM differently. "To supporters, it is "fair trade"; to opponents, "price fixing."[63] The following quote explains briefly

> Resale price maintenance (RPM) has had a history similar to that of a religious war, with the legal status shifting as the various sects have had more or less influence over the courts and the political arenas. Both the RPM and anti-RPM missionaries have overstated their cases. [64]

Section 2-MRPM in US and EU Competition Laws

Competition law is designed to achieve different objectives in different jurisdictions. Competition law comprises multiple and diversified goals. These include ensuring competitive process as goal and means, promote consumer welfare, enhance efficiency, ensure economic freedom,

[59] Id.p.421.

[60] Roger Van den Bergh. (2016) 'Vertical Restraints: The European Part of the Policy Failure'. *The Antitrust Bulletin*, **61**(1):167-185, p.175.

[61] European Commission (2010) '*Guidelines on Vertical Restraints, 2010/C 130/01*', at100. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF

[62] Paldor (supra note 12) p.351.

[63] Thomas Overstreet & Alan Fisher. (1985) 'Resale Price Maintenance and Distributional Efficiency: Some Lessons from the Past'. *Contemporary Economic Policy*, **3**(3):43-58, p.44.

[64] Id.p.43.

promote fairness, promote consumer choice, achieve market integration and promote competitiveness in international-market.[65]

Efficiency is economic term consisting allocative-efficiency which means resources allocation to most efficient use; productive-efficiency is producing by least cost way and dynamic-efficiency is rate of advent of new products or techniques.[66] This brings competition law to make trade-offs among irreconcilable efficiency goals pursued simultaneously that disrupts Pareto-efficiency. Efficiency and consumer welfare are separate concept and it is argued that competition-policy should accord priority to innovation and productive-efficiency which in the long-run protects consumer-welfare.[67] Welfare economics provides Kaldor-Hicks efficiency that allows existence of both winners and losers, however, demands the winners gain more than the loser lose and out of the surplus the winners pay potential compensation. Kaldor-Hicks efficiency concerns aggregate (total-welfare) rather than individual-welfare. Total welfare implies the total sum of producer and consumer surplus maximization. Total-welfare is concerned on how the pie (total surplus) is enlarged due to productive (dynamic-efficiency).

2.1 MRPM in US Antitrust Law

Antitrust policy emerged as compromise between irreconcilable laissez-faire and interventionist-ideologies.[68]Whether total-surplus, consumer-surplus or "weighted average of producer plus consumer-surplus" should

[65] International Competition Network (2007) 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies', p.4-12. Available at: http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf.(Accessed 6 May 2016)

[66] Ibid.

[67] Joseph F. Brodley. (1987) 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress'. N.Y.U.L.Rev, **62**:1020-1053, p.1021.

[68] John Lopatka & William Page ''Obvious' Consumer Harm in Antitrust Policy: The Chicago School, the Post-Chicago School and the Courts': Cited in Antonio Cucinotta, Roberto Pardolesi & Roger Van den Bergh(eds.) (2002) *Post-Chicago Developments in Antitrust Law- New Horizons in Law and Economics*, MPG Books Ltd, Bodmin, Cornwall, ISBN 1843760010, p.129.

be maximized is fierce on-going debate in US.[69] US values the importance of innovation to competition policy because innovation leads dynamic-efficiency.[70] Chicago School has influenced US Supreme-Court to embrace economic goals (total welfare). The US Supreme-Court rarely takes consumers' interest as paramount concern in competition-law.[71] Even Sherman's letters depicted that his concern was protecting interest of business than consumers'-interest.[72]

Sherman Act was enacted in 1890. Sherman Act-Section-1 was the ground on which interpretation was made to prohibit vertical-restraints reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal...[73]

Troesken noted competing rationales for origin of Sherman Act are analysed by three schools of thought. Traditional interpretation argues the Act was enacted to promote consumers' welfare and to restrain market power whereas revisionist interpretation opines small businesses were strong lobbyists for antitrust to weaken efficient trusts and finally the hybrid interpretation suggests small business backed up antitrust to counterbalance strong trusts using vertical restraints, etc.[74]

When Sherman introduced antitrust bill, small businesses and retailers wrote letters expressing discontent on vertical-restraints.[75] Many types of trusts employed vertical-restraint to shape retailers' behaviour in the business-arena. The pressure stemmed from retailers, rivals and small

---

[69] Dennis Carlton. (2007) 'Does Antitrust Need to be Modernized'? *Journal of Economic Perspectives*, **21**(3):155-176, p.157.
[70] Rudolph Peritz 'Dynamic efficiency and US antitrust policy': Cited in (supra note 68) p.108-109.
[71] Lopatka & Page (supra note 68) p.131.
[72] Werner Troesken. (2002) The Letters of John Sherman and the Origins of Antitrust. *The Review of Austrian Economics*, **15**(4):275-295, p.275.
[73] *The Sherman Antitrust Act*, 1890.
[74] Troesken (supra note 72) p.275.
[75] Id.p.285.

business firms prompted trusts to integrate-vertically.[76] However, Sherman was neither friend of consumer or small-firms discontented by vertical-restraints nor adhered vertical-restraints in the proposal.[77]

2. 2 MRPM in US Case Law

The Supreme-Court in Dr. Miles decisions decided that manufacturer's setting minimum prices at which retailers resell the product was illegal that falls under the ambit of common law and Sherman Act Section-1.[78] Dr. Miles Company was active manufacturer and seller of proprietary medicines which were prepared in secret and widely traded in US. The Company channelled its product via wholesaler by fixed-price for the wholesaler and retailers.[79] The Company concluded written agreement that compelled the retailer-agent not to sell the medicines at any price quoted and not to sell for unaccredited retailers by the Company. Dr. Miles sued John D. Parks & Co. drug wholesaler which refused to enter into consignment agreement but sold Dr. Miles' medicines securing fraudulently from the rest accredited consignees and agents. The basis of argument was that the manufacturer shouldn't impose MRPM because "the right of alienation is one of the essential incidents of a right of general property in movables and restraints upon alienation have been generally regarded as obnoxious."[80] Thus the Court was concerned about the property rights of retailers' and freedom of distribution not the analysis of economic justification of MRPM in antitrust law ambit.

This laid the foundation for per se rule under which agreements are prohibited according to Sherman Act Section-1 without considering the effect.[81] Though US depicted progressive tolerance for vertical-restraints,

[76] Id.p.286.
[77] Id.p.291-292.
[78] Barbara Bruckmann (2007) 'Revisiting Dr. Miles: Reinstating a Modern Rule of Reason for Vertical Minimum Resale Price Agreements', *The Antitrust Source*, p.1. Available at: www.antitrustsource.com (Accessed July 2016)
[79] *Dr. Miles Medical Company v. John D. Park & Sons Company, Certiorari to the Circuit Court of Appeals for the Sixth Circuit*, No. 72. p.374, 1911.
[80] Id.p.404.
[81] Bruckmann (supra note 78).

it has imposed per se illegal rule against vertical-restraints until 1970s.[82] In US vertical-restraints are categorized into two namely price and non-price restraints.[83] Price restraints are either MRPM or maximum RPM which firm forces retailers to comply with whereas non-price vertical-restraints contain blanket class of all other restraints.

The Chicago School has adhered to per se legality based on efficiency justifications. Long struggle between schools of thought help US has solid tradition of competition law based on economic-analysis.[84] When time went by, US antitrust case subordinated non-economic goals to the fulfilment of economic efficiency.[85] In Sylvania ruling, the Supreme Court rejected per se rule in non-price-vertical restraints and brings rule of reason. The verdict reads as follow:

> There are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable, and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Similarly, the facts of this case do not present a situation justifying a per se rule. Accordingly, the per se rule stated in Schwinn is overruled, and the location restriction used by respondent should be judged under the traditional rule of reason standard.[86]

In similar vein, the Supreme Court passed the verdict avoiding per se illegality of price constraint against namely maximum RPM and MRPM and subject to rule of reason.

The Supreme Court in *State Oil v. Khan Case* overruled per se illegality of maximum RPM and subject it under rule of reason. In this case, operators of gas station concluded agreement with oil company that fixed

---

[82] Sandra Marco Colin (2010) *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes*, Hart Publishing Ltd, Oxford, ISBN 978-1-84113-871-8, p.15.

[83]Yossi Spiegel & Yaron Yehezkel (2000) 'Price and non-price restraints when retailers are vertically Differentiated', p.2. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=236024 (Accessed 20 May 2016)

[84] Colin (supra note 82) p.47.

[85] Id.p.49.

[86]*Continental T.V. Inc. v. GTE Sylvania, Inc. 433 U.S*. 36, 1977.

maximum gasoline price and retailers are forced not to exceed the suggested retail price.[87]

After almost a century of Dr. Miles, US Supreme Court overruled the per se prohibition of MRPM in Leegin case.[88] The Court seemed to follow Hayek's path. Hayek stresses that competition serves as "discovery procedure" that emphasizes the role of the case-by-case analysis favouring rule of reason.[89]

Leegin adhered the policy of refusing to sell to retailers which fall to observe the suggested prices. PSKS sued Leegin claiming that it violated antitrust laws by forcing to enter vertical agreement to set MRPM. PSKS was selling Leegin's product prices as low as 20% below the minimum-price ordered by Leegin and refused to halt this practice to get discount.

The Court tried to distinguish between restraints with anticompetitive effect that are harmful to consumer and with competitive effect to the best interest of consumer. The Court stipulated that rule of reason demands factfinder to weigh "all of the circumstances."[90] Both the Court and each parties back up the debate from economics perspective and employ extensive economic-literature. The Court argued that rule of reason's case-by-case decision entertains common law statute and replaces per se illegality with rule of reason. The Court, however, cautioned that "it can't be stated with any degree of confidence that MRPM 'always or almost always tends to restrict competition and decrease output'."[91] In dissenting opinion, Breyer articulated that "…antitrust law cannot, and should not, precisely replicate economists'…views."[92] Hence rule of reason is applicable when the total welfare effect outweighs the loss by assessing the context. Price-competition is not the only goals of competition law but

[87] *State Oil Co. v. Barkat U. Khan and Khan & Associates Inc.118* S. Ct. 275, 1997.
[88] *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551* U.S. 877, 2007.
[89] Friedrich Hayek (1973) *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, T.J. International Ltd. Cornwall, ISBN 0-415-09868-8, p.67.
[90] Leegin (supra note 88).
[91] Ibid.
[92] Ibid.

also "quality-or-variety-increase-investment" competition.[93] Furthermore, US Supreme Court realizes the similar effect of both price and non-price effect of restraints and progressively lifted per se illegality and replaces with rule of reason.

2.3 MRPM in EU Laws

Achieving market-integration is the goal of competition-law in EU. European-Commission competition policy is charged with the task of being a means to the mission accomplishing of the internal market via abolition of trade barriers.[94] The legal basis for the prohibition of vertical-restraints in EU is Article-101. It prohibits those acts which hamper internal market and stipulates

> The following shall be incompatible with internal market: all agreements between undertaking…decisions by associations of undertakings and concerted practice which may affect trade…have as their object or effect the prevention, restriction or distortion of competition within the internal market, in particular.[95]

The more elaborated explicit discussion appeared in the landmark case of *Grundig/Consten* which laid the foundation that Article-101 comprises both horizontal and vertical-agreements.[96]

The European-Commission has introduced block exemption to clear confusion regarding the permitted and prohibited agreements. In regulation 330/2010, EU introduces quasi per se prohibition of vertical MRPM.[97] The prohibition of RPM extends to both direct agreements on fixed (MRPs) or agreements serving the purpose of RPM via indirect means such as fixed distribution margins, maximum discount levels, rebate dependent on the observance given price level or termination of deliveries due to low price level.[98] The Commission stipulates that

---

[93]Richard Markovits (2014) *Economics and the Interpretation and Application of U.S and E.U. Antitrust Law: Volume II Economics-Based Legal Analyses of Mergers, Vertical Practices, and Joint Ventures*, Springer, New York, p.VIII.

[94] ICN (supra note 65) p.19.

[95] *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2008/C115/01*.

[96] Opinion of Mr. Advocate-General Roemer Delivered, 1966 on Joined Cases 56 and 58/64, at 299 in *Consten and Grundig v. Commission*, E.C.R.

[97] Bergh (supra note 60) p.171.

[98] Ibid.

banning of MRPM is justified because of its anticompetitive effects: encourages collusion among sellers or buyers, stifling competition at different levels of trade, results in exorbitant price, foreclosure of rival firms, softening dynamism and innovation at distributional level.[99] However, European competition authority realizes that supplier-driven MRPM may lead to efficiency in case of experience and credence goods by preventing free-riding and lying the burden of proof on firm to ascertain distributional-efficiencies.[100]

Many seminal articles cogently argued that vertical-restraints are employed as devices to tackle externalities, solve principal-agent problems and reduction of transaction-costs.[101] The existence of divergence of literature on 'vertical restraints effect'[102] compels economists to plead in favour of an effect-based approach focusing on efficiency benefits and potential anticompetitive effects of vertical restraints rather than purely form-based legalistic approach.[103] Thus "efficiency as a legal concern" is used to justify public policy decisions.[104] Taking efficiency, EU Commission has reiterated that "economics-based approach" is to be preferred to strictly legalistic-approach of decision making in area of vertical restraints.[105] Similarly, the European Court of Justice had adhered to more economically inspired reasoning.[106] Professor Roger stipulated that vertical-restraints may have both beneficial and harmful effects and goes on:

> *If vertical restraints were used mainly to improve distribution efficiency, rather than to support collusion or erect entry barriers, they could be held simply legal.*

[99] European Commission (supra note 61) at.100.
[100] Id.225.
[101] Rey & Tirole (supra note 57) p.921.
[102] Patrick Rey & T. Verge. (2010) 'Resale Price Maintenance and Interlocking Relationships'. *J. IND.ECON*, **58**, p.828.
[103] Bergh (supra note 60) p.173.
[104] Andrea Renda, (2011) '*Law and Economics in the RIA World'*. PhD Dissertation, Erasmus University Rotterdam, p.10.
[105] Cucinotta, Pardolesi & Bergh (supra note 68) p.VIII.
[106] Roger Van den Bergh 'The Difficult Reception of Economic Analysis in European Competition Law': Cited in (supra note 68) p.34.

> The difficult task of competition policy is to distinguish between both hypotheses and to enable a trade off if vertical restraints at the same time produce anticompetitive effects and achieve efficiencies. In spite of these difficulties, the following two lessons may be derived from the economic analysis. First, the economic consequences of vertical restraints and not their legal form should be decisive in judging their conformity with the competition rules. Second, economic analysis does not provide a justification for the different treatment of different types of vertical restraints, since they are substitutes for each other.[107]

Professor Roger states that EU competition-law guarantees no full efficiency-analysis of vertical-restraints but U.S. rule of reason does.[108] Even though EU has exerted to instil "economic based approach", Professor Roger suspects that it would be premature, however, to characterize the new rules as a complete victory of economics and effects based law making. He concludes "there is no perfect harmony between competition economics and competition law."[109] As long as the aim of competition-law which is "single market integration" is highly prized, it poses threat to advent rule of reason. This means internal market objectives shadow productive and allocative efficiency in European competition-law.[110] Even the opinion of Advocate General in T-Mobile case, it is well articulated that Article-101 is designed to "protect not only the immediate interest of individual competitors or consumers but also to protect the structure of the market and thus competition as such (as an institution)."[111]

The preceding discussion shows US Supreme-Court has progressively changed hardcore (form-based, per se illegality) to effect-based (soft, rule of reason). Nevertheless, 'efficiency defence' in EU is severely limited.[112] Legal certainty which is achieved by "simple" rules rather than complete economic-analysis are responsible for not flourishing effect-based

---

[107] Id.p.38.
[108] Bergh (supra note 60) p.173.
[109] Ibid.
[110] Bergh (supra note 106) p.42.
[111] Opinion of Advocate General Kokott, 2009, Case C-8/08, at 58 in T-*Mobile Netherlands Bv et al v. Raad Nederlandse Mededingingsautoriteit*.
[112] Bergh (supra note 106) p.43.

analysis of rules.[113] For the abolition of per se illegality and to the advent of the rule of reason, by Supreme Court, Chicago School has supplied effect-based analysis by using economics tools.

Section 3- Per Se Illegality and Rule of Reason

Chicago School helped flourished price-theory as a powerful tool to examine competition-law and non-price forms of competition as a gap-filling or subsidiary-role.[114] Unlike Harvard School which accepts multitude of goals, Chicago School advanced productive and allocative efficiency as the only objectives to be a guide in interpreting and applying competition-law.[115]

The "pursuit of economic efficiency" is the goal of antitrust policy for Chicagoans in which efficiency-enhancing (gain) dealing is the heart of the antitrust-policy-goal.[116] The Chicago School strong influence on US antitrust-policy emerged as of 1970s and reached its climax using price-theory.[117] However, European Competition-law is unflinched from integration-goal and pursuit of economic efficiency has been sidelined and yet European-Commission has been tempted by economic efficiency-gains as illustrated in *Wanado*.[118]

3.1 Per Se Rule

Per se rule is always anticompetitive and grants automatic violation.[119] This is hard-core violation that needs no defenses (justifications) are allowed when the fact existing depicts violation as observed in US

[113] Id.p.56.

[114] Roger van den Bergh & Peter Camesasca (2006) *European Competition Law and Economics: A Comparative Perspective,* Sweet & Maxwell, New York ISBN:9780421965805, p.79.
[115]Ibid.
[116] Id.p.84.
[117] Ibid.
[118]Id.p.85
[119] Bryce J. Jones & James R. Turner. (2010) 'The Fall of the Per Se Vertical Price Fixing Rule'. *Journal of Legal, Ethical and Regulatory Issues*, **13**(2) p.83-84.

Supreme Court.[120] There is no need to adduce evidence that practice is anticompetitive as assumption is taken.[121] Per se rule is comparatively easy for antitrust authorities and plaintiffs when the facts exist.[122] Per se rule prohibited restraints such as horizontal price fixing, tying, vertical non-price and price restraints and it was condemned that per se approach was over-inclusive, overly formalistic and avoids pro-competitive gains.[123] The Court applied per se analysis if the conduct is "manifestly anticompetitive" or the practice demonstrates "pernicious effect on competition" and devoid of any redeeming value.[124] Per se rule has the advantage of lower regulation-costs, reduce rent-seeking and minimize knowledge problems.[125]

3.2 Rule of Reason

This is a shift from rules based on forms (formalistic-approach) to rules based on economic-efficiency effect (effect-based-approach).[126] When the net economic efficiency outweighs anticompetitive effect and is demonstrated with experts it is called rule of reason.[127] To prove net effect in rule of reason is painstaking task and difficult to win and makes courts sceptical of rule of reason.[128] Hovenkamp noted "…the rule of reason created one of the most costly procedures in antitrust practice."[129] Even with this risk, the actual (potential) economic effects of challenged practice under the context is analysed. Rule of reason engages in case-by-

[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] Alison Jones. (2010) 'The Journey toward an Effects-Based Approach under Article 101 TFEU-The Case of Hardcore Restraints'. *The Antitrust Bulletin*, **55**(4):783-818, p.784.
[124] Tye Darland. (1989) 'Antitrust Law- Vertical Price Restraints: Per se Illegality or Rule of Reason'? Business Electronics Corp. v. Sharp Electronics Corp, Comment. *The Journal of Corporation Law*, **14**:495-513, p.496.
[125] Arndt Christiansen & Wolfgang Kerber, 2006. Competition Policy with Optimally Differentiated Rules Instead of "Per Se Rules Vs Rule of Reason". *Journal of Competition Law and Economics*, **2**(2):215-244, p.216.
[126] Jones (supra note 123) p.784.
[127] Jones &Turner (supra note 119) p.84.
[128] Ibid.
[129] Hovenkamp (supra note 34) p.105.

case analysis to examine whether the complained conduct violates given competition-law by granting flexibility to court.[130] Rule of reason is not automatically legal but close to legal.[131]

While discussing rule of reason Bork articulates that "consumer welfare'' is the thrust of antitrust law. Bork put consumer welfare "whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing efficiency so greatly as to produce either no gain or a net loss in consumer welfare."[132] Bork noted that antitrust shouldn't have both equity and income distribution concern as "shift in income distribution does not lessen total wealth."[133] "Consumer'' is broadly interpreted consisting of business buyers, sellers, and individual consumers.[134]

Posner criticised rule of reason saying "it is little more than a euphemism for nonliability."[135] Even Peter went too far and proposed for removal of the rule of reason arguing free market has comparative-advantage over judicial-evaluation.[136] However, taking efficiency, Bork argued, in favour of rule of reason, that all vertical restraints "should be completely lawful."[137] The rule of reason is allowed to offer opportunity "for novel business practices to come under close and careful scrutiny so that their true economic effect might be evaluated."[138] This means accepted overriding goal of competition law should be economic efficiency (aggregate economic-welfare) which serves as a value-free goal that saves judges from imposing personal thoughts as regard to fair business

---

[130] Darland (supra note 124) p.496.
[131] Jones &Turner (supra note 119) p.84.
[132] Robert Bork (1978) *The Antitrust Paradox*, Basic Books Inc, New York: Cited in Jones & Turner, p.97.
[133] Id.p.97.
[134] Ibid.p.97.
[135] Richard A. Posner. (1977) 'The Rule of Reason and the Economic Approach: Reflection on the *Sylvania* Decision'. *The University of Chicago Law Review*, **45**(1):1-20, p.14.
[136] Peter Nealis. (2000) 'Per Se Legality: A New Standard in Antitrust Adjudication Under the Rule of Reason'. *Ohio State Law Journal*, **61**:347-398, p.349.
[137] Jones &Turner (supra note 132) p.98.
[138] Nealis (supra note 136) p.348.

practice.[139] This economic-efficiency is "aggregate economic welfare" that sums consumer welfare and stockholder profits.[140]

In order to bless rule of reason, courts examine three evaluations: a) the degree of competitive harm from defendants' practice; b) existence of legitimate and useful activities of the participants; c) whether legitimate purpose is achieved by another less restrictive means or not. [141] Both positive and negative effects of the practice are examined.

Rule of reason is rebuttable presumption which is utilized to analyse RPM.[142] However, courts in applying the rule of reason are prone to decision-error costs. Therefore, it is better to minimize the sum of welfare costs resulted from decision errors of type I ("false positives") and type II ("false negatives") and the costs of applying of rules.[143] Type I error occurs when the practice with negative welfare effect is mistakenly allowed whereas type II error happens when practice with positive welfare effect is mistakenly prohibited.[144]

Section 4- Economic Analysis of Minimum Resale Price Maintenance Prohibition in Ethiopian Competition Law

4.1 Economic Efficiency Defense in Previous Legislations

The approaches as to the relevance and the content of competition-policy and law are varied. The argument includes weak institutional capacity of developing countries may not be conducive environment for intensive competition and invites strong-state to handle comprehensive and intensive competition policy.[145] It is suggested that developing country competition-law must promote long-term growth of productivity and as unrestricted competition policy emphasized on efficiency is suitable to developed economies.[146] One-size-fits-all-approach doesn't seem to hold

[139] Id.p.351-352.
[140] Ibid.
[141] Id.p.359.
[142] Pamela Jones Harbour & Laurel A. Price. (2010) 'RMP and the Rule of Reason: Ready or not, here we come'? *The Antitrust Bulletin*, **55**(1):225-244, p.225.
[143] Christiansen & Kerber (supra note 125) p.216.
[144] Id.p.225.
[145] Kibre (supra note5) p.15.
[146] Id.p.16.

as Colombia which is small economy accords weight to economic-efficiency.[147] Ethiopia is not an exception to this and enacted legislations which allow anticompetitive practices as long as economic-efficiency is offset.

So far Ethiopia has enacted three competition proclamations. Because of liberalization measures as groundwork for the WTO accession, Ethiopia enacted TPP in 2003. Ethiopia introduced TPP that emphasized, at the preamble, the desirability "to establish a system that is conducive to the promotion of competitive environment, by regulating anti-competitive-practices in order to maximize economic-efficiency and social welfare."[148] Article-3 reads objective "to secure fair competition process" by preventing and eliminating anticompetitive practice.

TPP doesn't explicitly deal with vertical-restraints rather sets general prohibition under Article 6(1) as follows: no person is allowed to "enter into any written or oral agreement that restricts, limits, impedes or in any other way harms free competition…distribution…" This is similar to Sherman Act Section one whose interpretation was made to prohibit vertical-restraints even in the absence of the explicit words of vertical restraints. It offers hints about vertical restraints as the word distribution implies. Hailegebriel argued that despite no complete verbal similarity corresponding Article-6(1) and EC-Treaty Article-81(1) the former is influenced by the latter.[149]

Notwithstanding Article-6(1) the Ministry may bless entry into any competition harming agreement "after making the necessary studies, and ensuring that advantages of the agreement to the Nation is greater than the disadvantages."[150] The authorization of this agreement may be cancelled *"in the event that the advantages to the nation are no longer greater than the advantages*" emphasis added.[151] Therefore the Ministry periodically

[147] R. Shyam Khemani (2002) 'Application of Competitive Law: Exemptions and Exceptions', *United Nations Conference on Trade and Development*. New York, p.8.
[148] TPP (supra note 2)
[149] Hailegabriel (supra note 7) p.274.
[150] TPP (supra note 2) Article7.
[151] Id.Article 9.

assesses advantages and disadvantages of authorized agreement. It is clear that economic-efficiency (total welfare) is accorded priority in this legislation. It is argued that recognition of economic analysis of anticompetitive practices with ex-ante authorisation exists under Article-7 as the phrase "*ensuring that advantages of the agreement to the Nation is greater than the disadvantages*" is apparently broad enough to be interpreted as *economic or non-economic analysis* of factors.[152]

Legal and structural limitations as well as exclusion of consumer protection provisions of this proclamation led to the enactment of TPCPP. This proclamation under Article 3 sets the objective of "protecting consumers' rights and benefits" and "accelerating economic development."[153] Article 9(3) allows abuse of market dominance when it is "achieving efficiency and competitiveness."[154] Moreover, Article-10 stated that the Council of Minister may enact regulation to exempt trade activities of abuse of market dominance when it finds such activities are necessary for facilitating economic development.

Article 13(1(b)) absolutely prohibits any "agreement between business persons in a vertical relationship that has an object or effect of setting minimum retail price." TPCPP explicitly recognizes prohibition of MRPM, unlike its predecessor. The proclamation doesn't explicitly mention the prohibition of non-price vertical-restraints.

Article 13(1(b)) resembles its European counterpart and witnesses European Competition Law Article 101 mark. Reindl pointed that RPM as "restriction by object" is characterised as a "hardcore" violation.[155] The following explains;

> The difference between "restriction by object" and "restriction by effect" does not reflect two entirely separate analytical standards. It would be incorrect to assume that article 101 TFEU has only two diametrically opposed analytical routes: one that is inflexible and never requires any scrutiny of the circumstances in which an agreement occurs, and another that always requires a full-blown analysis in which

[152] Hailegabriel (supra note 7) p.282.
[153] TPCPP (supra note 4)
[154] Id.Article 9(3).
[155] Reindl (supra note 23) p.1303.

> an elaborate examination of relevant markets, market power, and anticompetitive effects is required-a standard that plaintiffs invariably are unable to provide. Rather, these two approaches represent two poles at each end of a spectrum that cover more nuanced analytical approaches in between.[156]

Some practices may have restriction of competition as "object" for instance, price fixing, limiting output and restriction on sales whereas other agreements don't have restriction of competition as their object which requires identification of latent restrictive effects of agreement that demands examination of economic analysis before prohibition.[157]

Article 14 allows MRPM and stated that if the business person prove technological or efficiency or other pro-competitive gains of the agreement outweigh detriments of the prohibited acts, he is relieved from being accused and his anticompetitive practices are blessed.

The discussion made here demonstrated that previous legislations constantly held the rule of reason as dear value. There was big leeway left for economic analysis in previous legislations implicitly and explicitly.

There was no automatic prohibition of anticompetitive practice rather these practices were blessed when there are efficiency defenses. Anticompetitive practices were not condemned without inquiry into the actual effects on competition. This is rule of reason in which the potential and actual competitive effects of a challenged practice under the market is analysed contextually. Economic efficiency was the priority. And this economic efficiency justification is even adopted in harsh horizontal agreement, abuse of market dominance and merger cases. To pass the test the total-welfare gain must exceed the total-loss.

4.2 Economic Efficiency Defense in Current Proclamation

The declared policy objectives of competition law are set out in preamble and Article 3 of current TCCP.[158] Hence goal of competition law is not a single goal rather multiple goals are recognized. When competition law objectives and different policies (economic objectives) in other economy sectors become at loggerheads, the latter takes precedence over the former

[156] Id.p.1300.
[157] Hailegabriel (supra note 7) p.283 footnote 41.
[158] TCCP (supra note 8)

and exempted from the whole application of TCCP according to Article 4(2) of TCCP.

Words "exemption" and "exception" are appeared frequently in competition law policy. "Exemption" is "excused or free from some obligation to which others are subject" whereas "exception" is exclusion "from or not conforming to a general class, principle, rule, etc."[159] Exemptions are broader in scope whereas exceptions are narrow in focus and examined on a case-by-case basis applying the rule of reason approach.[160] "Best practice" dictates that competition law should be "general law of general application" indiscriminately applied to "all sectors and all economic agents" in economy take part in commercial activities both private and public.[161]

Article 5 prohibits abuse of market dominance. However, abuse of market dominance is exceptionally allowed according to Article 5(3) when the existence of "justifiable economic reasons" are proved. The exception under Article 5(3) of TCCP is narrower than TPCPP which contained broad phrase "legitimate business purposes" under Article 9. Naked horizontal agreement and vertical restraints (except MRPM) are blessed exceptionally as long as efficiency defense exists.[162] Article 11(2) overrides exceptionally and allows merger as long as merger results in efficiency or other pro-competitive gain that outweigh the significant adverse effect of merger.

To sum up, it is clear that TCCP emphasizes and adopts economic efficiency justifications exceptionally in many anticompetitive practices. Furthermore, it dropped per se or absolute prohibition. However, TCCP is hostile to MRPM and denies economic efficiency defenses in exceptional circumstances, unlike the previous legislation which allowed exceptional economic efficiency defense for MRPM. The current legislation swerved

[159] Khemani (supra note 147) p.1.
[160] Id.p.2.
[161] Id.p.5.
[162] TCCP (supra note 8) Article 7(1(a) & 2(a))

out of economic efficiency defense path which was possible in TPCPP. Competition law has evolved from legalistic formal approach to effect-based approach that focuses on the impact of MRPM on economic efficiency. Non-price vertical-restraints which may serve the same economic goal are not explicitly prohibited and any vertical restraint which produces efficiency is allowed. Apart from MRPM, there is perfect harmony between competition economics and TCCP. The attitude held by stakeholders of competition law and policy towards vertical restraints "varies significantly from one period to another"[163] holds water to Ethiopian context.

4.3 Economic Analysis of MRPM

MRPM needs at least three parties to the relationship for analysing the full effect of MRPM on economic efficiency defense; namely manufacturing firm which manufactures and at least two retailers which distribute manufacturer's product.

TCCP under Article 7(2(b)) states that vertical relationship shall be prohibited when setting of minimum resale price occurs and no exception is allowed regardless of efficiency justification. In a similar vein, any person who transgressed Article 7(2(b)) shall be punished with a fine of 10% of total annual turnover. It is this Article's view that economic efficiency is best served when MRPM is judged according to a rule of reason.

4.3.1 Total Welfare-Utility Maximizing

The prohibition of MRPM is justified by price hikes. However, Reindl submitted that price test is outright wrong hence, MRPM's effect on output should be taken as a proxy instead of prices.[164] MRPM effect on price increase is ambiguous. Assume MRPM is imposed and the price for goods g manufactured by firm shows increasing which means current price is greater than initial price(pc>pi). In the midst of this, when output increases even though price increase which means current quantity is

[163] Patrick Rey & Thibaud Verge. (2010) 'Resale Price Maintenance and Interlocking Relationship'. *The Journal of Industrial Economics*, **8**(4):928-961, p.928.
[164] Reindl (supra note 23) p.1319-1320.

greater than initial quantity (qc>qi) this illustrates the consumer value the enhanced services provided and willing to buy goods for the greater price for the exchange of rendered services. In such case, the marginal utility of the consumer derives is the difference between marginal utility of goods g less (pc-pi). When the total utility from increased service quality rendered is greater than the price imposed, MRPM will not lead a decrease in total consumer welfare.

The relation between price increase and output is affected by the elasticity of goods manufactured by firm which takes either of pcqc>piqi, pcqc=piqi or pcqc<piqi.[165] In such case, the ratio of marginal consumers to infra-marginal consumers are crucial to analyse the effect of MRPM. If marginal consumers are willing and able to pay more for special service provision but infra-marginal consumers would opt lower special service provision, manufacturer seeks to increase special service.

Consumer surplus measures consumer welfare.[166] However, there is "misunderstanding" between consumer surplus and consumer welfare which is called "Chicago Trap" and the proxies for welfare are allocative efficiency, economic welfare, and wealth.[167] Bork defined "consumer welfare" as total welfare but others misunderstood this as consumer surplus.[168]

Often, welfare analysis is static that concerns only current welfare and ignores the future welfare effect.[169] Literarily, welfare is reduced to "price advantage" whereby "benefits" is interpreted as "price reduction" and "harm" means price increase.[170] This is a neoclassical economy concept that measures consumer surplus in price terms and concerns on distributive justice aspect that shifts wealth in favour of consumers rather than producing total wealth.

---

[165] Cemre & Semih (supra note 9) p.13.

[166] Victoria Daskalova. (2015) 'Consumer Welfare in EU Competition Law: What Is It (Not) About'? *The Competition Law Review*, **11**(1):133-162, p.137.

[167] Id.p.143.

[168] Robert Lande. (1999) 'Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)'. *Hastings L. J*, **50**:959-968, p.961.

[169] Daskalova (supra note 166) p.137.

[170] Ibid.

The consumer is end user (final consumer) in TCCP. TCCP Article 3(2) price effect becomes as one of the objectives of competition law. This implies retailers shouldn't be prohibited from competing on price to get reduced price for consumers through MRPM. MRPM avoids myopic price competition objective and rather pushes retailers to compete on special services (sales effort) to attract customers. TCCP objective under Article 3(2) seems akin to EU's 1997 "Green Paper on Vertical Restraints" definition which states that "effective competition is the best guarantee for consumers to be able to buy good quality products at the lowest possible prices."[171] However, consumer welfare consists more than price such as quality, safety, choice, and innovation.[172] The total welfare effect should be guiding principle rather than narrowed consumer welfare to evaluate MRPM effect. Increasing the pie (total welfare) should be the goal of competition law not distributing the pie (distribution justice) which should be the task of other laws.

4.3.2 MRPM and Transaction Cost Approach

Distribution has costs and the manufacturer has choices of either using firm solution by establishing its own distribution channels or market solutions by contracting with independent retailers to distribute its goods.[173] When the manufacturer opts for a market solution (retailers' distribution channel), it creates appropriable quasi-rents which lead to lock-in effect as a result of specific investments and this makes reign opportunistic behaviour.[174] It is obvious that in long term contract sunk

[171] EU Commission (1997) 'Green Paper on Vertical Restraints in EC Competition Policy', p. 17. Available at: http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_6_raporlar/1_2_green_papers/com1997_green_paper_on_vertical_restraints_ec_competition_policy.pdf. (Accessed 9 July 2016.)

[172] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] (electronic Reports of Cases), at 22.

[173] Oliver E. Williamson. (1974) 'The Economics of Antitrust: Transaction Cost Considerations'. *Pennsylvania Law Review,* **122**:1439-1496, p.1450.

[174] Benjamin Klein, Robert Crawford & Armen Alchian. (1978) 'Vertical Integration, Appropriable Rents, and the Competitive Contracting Process'. *Journal of Law and Economics*, **21**(2):297-326, p.298.

cost is huge and parties won't make investment unless they devise a mechanism to avoid hold-up problem.

MRPM could be employed as a tool to tackle the problem of shirking contractual duties among the contractual parties. RPM plays "the additional role of protecting rents to retailers"[175] and eliminate ex-post form of opportunistic rent shifting. For example, retailer A invests in special service-provision of manufacturer's product. Training of personnel, building of shops and other costs are sunk costs retailer A invested and he is locked-in. On the contrary, Retailer C, doesn't invest rather collects benefits via free-riding by saving the cost of special service provision and shift this cost to under-price special service providing retailer's goods. Retailer C acts opportunistically. This is what we call "horizontal externality". Retailer A seeks commitment device to claim the residual value of his investment. MRPM prohibits under-pricing by Retailer C and forces him to compete on sales effort.

Retailer A would be encouraged to invest and reap the benefit of his investment as long as he is protected from opportunistic behaviour. Hence, MRPM guards Retailer A's quasi-rents against erosion by Retailer C price competition and forces to compete on sales effort competition.[176] Retailer A calculates the degree of appropriability of quasi-rents when he invests and Retailer C sticks to opportunistic situations to hold-up when quasi-rents generated. MRPM avoids under-provision of special service due to hold-up problem.

4.3.3 MRPM and Free-Riding

It is argued that curbing free-riding produces efficient distribution by retailers. When retailers' margins increase the price goes up and drop in product sales follows. Hence, the intention of imposing MRPM by manufacturer is to protect price increase and drop of sales.

Free-riding is a negative externality created when one retailer benefits from the action of another without paying for the benefit accrued and

[175] Frank Mathewson & Ralph Winter. (1998) 'The Law and Economics of Resale Price Maintenance'. *Review of Industrial Organization*, **13**:57-84, p.70-74.
[176] Id.p.74.

emerges as follows. Retailer A provides pre-sale service and information (such as how to use the goods, alternative offers, free tests, etc.) to customers and must cover this cost by adding to the price of goods sold. Retailer B doesn't provide pre-sale service and information dissemination about the product rather possesses discount store and offers the product at cheaper price. Consumers after having full-service from service rendering retailer about the available offers, choices, free test and possessing pertinent information about the product they go to nearby retailers who don't provide and buy the product.

This free-riding by both consumer and retailer discourage service providing retailer and consumers who value the service find no provider of service. This demands the intervention of manufacturer to impose MRPM to curb the free-riding problem and protecting exit of retailers who provide service valued by customers. Thus, MRPM prevents free-riding problem observed among retailers.

The free-riding argument is based on the assumption that customers value of pre-sales and pre-purchase information. And this is not a blanket endorsement of free-riding justification for every product. Free-riding justification is convincing for products possessing the attributes of experience and credence. The value of service provision increases in experience goods whereby the consumer can adequately evaluate after they only buy and use and in credence goods where consumers can't evaluate the quality of products even after consuming.[177]

There is a risk of purchasing without being exposed to information about the product. The degree of risk of consumer injury from non-informational promotion increase from search goods to experience goods and from experience goods to credence goods along the scale line.[178] Therefore, for experience and credence goods for which information promotion is valued and necessary and free-riding retailers should be discouraged by MRPM. Consumers wouldn't go away after fully

[177] Warren S. Grimes. (1992) 'Spiff, Polish, and Consumer Demand Quality: Vertical Price Restraints Revisited'. *California Law Review*, **80**(4):815-855, p.825.
[178] Id.p.827.

benefiting from the service and information promotion when the free-riding retailers are discouraged. When the market is competitive imposing MRPM to curb free-riding retailers shouldn't be condemned as long as consumers could switch to substitutes when MRPM imposed.

However, the advent of internet retailing significantly changes how consumers purchase goods.[179] Online retailer provides pre-purchase information to consumers and these consumers go to brick-and-mortar stores for products and reduces need for in-person retailer service.[180] Lao argued that free-riding occurs in opposite direction whereby customers benefit from internet retailer's service and purchase from brick-and-mortar retailer and on top of that internet retailer don't support MRPM, so that, internet retailing weakens free-riding explanation for MRPM.[181]

This Article submits that internet retailing service justification is not persuasive to deny MRPM justification in the Ethiopian context. In internet coverage, Ethiopia, as the following data speak, has a bleak picture. Ethiopia is grouped under "higher barriers across the board" where the country overwhelmed by obstacles to expanding internet adoption; the offline population is illiterate and rural, has very low internet penetration rate, 50% of the offline population is literate and 61% of the population is illiterate.[182]

In addition, Ethiopia ranked 80 out of 81 countries in terms of internet's contribution to development, 92 million out of 94 population non-internet users makes half of total offline population in East Africa; urban internet access in Ethiopia is the lowest among African peers. Ethiopian

[179] Lao (supra note 45) p.475.
[180] Id.p.475-476.
[181] Ibid.
[182] McKinsey & Company (2014) 'Offline and Falling Behind: Barriers to Internet Adoption', *Report*, p.6-42. Available at https://www.google.de/search?biw=1366&bih=628&q=related:www.mckinsey.com/~/media/McKinsey/dotcom/client_service/High%2520Tech/PDFs/Offline_and_falling_behind_Barriers_to_Internet_adoption.ashx+McKinsey+%26+Company+(2014)+%E2%80%98Offline+and+Falling+Behind:+Barriers+to+Internet+Adoption%E2%80%99&tbo=1&sa=X&ved=0ahUKEwjXtLqanvrNAhWfHsAKHe5pClwQHwgmMAE&dpr=1 (Accessed 20 July 2016)

consumers yet to benefit from the internet retailing as online retail penetration is 0.4% and Ethiopia faces daunting challenge in realizing internet penetration.[183]

4.3.4 MRPM as a Tool to Align Incentive Incompatibility

Agency relationship bore externalities which can be tackled by vertical restraints. However, in the absence of free-riding[184] (externalities), vertical restraint is used to align engaged parties' interests.

Retailers are not reaping the benefit from providing service and information promotion; hence, manufacturer devises incentive design to compensate retailers.[185] Retailers for increased service and information promotion of products should be incentivised by having sufficient margin to cover the cost they incurred. Retailers demand minimum expected return from the service they rendered and information promotion about the product and otherwise leads to dropping distribution of products belonging to manufacturer.[186] To ward off distribution drop; to encourage retailers to provide service and promote information about the product and retain their valued service, manufacturer employ MRPM to align incentives.

Recommendation

Competition law is recent phenomenon to Ethiopia. The first proclamation, TPP stated in the preamble its objectives were to regulate anti-competitive practices to maximize economic-efficiency and social-welfare. TPP allows exceptions to anticompetitive practices as long as "the advantages to the nation are greater than the disadvantages". TPCPP, heralded the advent of vertical restraint and explicit recognition of MRPM. Exception is allowed as long as efficiency outweighs detrimental effect.

---

[183] Id.p.67-72.

[184] Benjamin Klein. (2009) 'Competitive Resale Price Maintenance in the Absence of Free Riding'. *Antitrust Law Journal*, **76**(2):431-481, p.434.

[185] Id.p.436.

[186] Ibid.

Effect-based approach (rule of reason) has been and is a justification in Ethiopia and TCCP emphasizes efficiency on a number of occasions. TCCP contains vertical-restraint and prohibits MRPM entirely (per se illegal) and no exception is allowed even though efficiency justification exists. Non-price-vertical-restraints are treated more favourably and are generally subject to a rule of reason. Vertical-restraints are substitutes for one another which means prohibition of MRPM induces firms to utilize such as exclusive territories and contractual arrangements. This makes competition authority sole deciding body as to distribution-methods. On top of that naked horizontal agreements are blessed exceptionally as long as efficiency defense exists. A fortiori, MRPM should be assessed under rule of reason.

Dictated by normative analysis of law and economics that takes efficiency as objective normative criterion for evaluating laws; this Article endorses MRPM should be assessed under rule of reason when economic efficiency exists. The Article pleas for repeal of per se MRPM prohibition and making MRPM assessed under rule of reason. It argued for the endorsement of MRPM under rule of reason evaluation in case of experience and credence goods.

This Article finds no convincing economic justifications why TCCP is hostile to MRPM and denies economic efficiency defences in exceptional circumstances. This might be related to neoclassical economy concept that measures consumer surplus in price terms that concerns on distributive justice aspect that shifts wealth in favour of consumers rather than producing total wealth. Total welfare unlike consumer welfare is the sum of consumer surplus and producer surplus and indifferent to distributional justice.

The ICC's Involvement in the Conflict in Darfur and the Peace Versus Justice Debate

Kassahun Molla[♣]

Abstract

The involvement of the ICC in Darfur, Sudan has elicited many mixed legal and political reactions. Critics of the ICC's involvement, among other things, claim that the involvement of the ICC could drive Sudan into dissolution, undermine the peace process and prolong the violence. Advocates of ICC's involvement, on the other hand, claim that the involvement of the ICC promotes the peace process, exposes the crimes perpetrated by the parties, stigmatizes leaders and eventually removes them from office. This article argues that tighter controls on humanitarian activities, a rally of support for those prosecuted and arrest warrants that were able to cause some travel inconveniences are the outcomes of the involvement of the ICC in Darfur.

Introduction

The involvement of the International Criminal Court (hereinafter, ICC) in the conflict in Darfur, Sudan was triggered due to the referral of the situation in Darfur to the ICC by the U.N Security Council. Both before and after the arrest warrants issued by the ICC, the involvement of the ICC has elicited many mixed legal and political reactions. Critics of the ICC's involvement, among other things, claimed that the involvement of the ICC could drive Sudan into dissolution, undermines the peace process

[♣] Research Associate at Public International Law and Policy Group, The Netherlands, (MSC in International Crimes and Criminology, LL.M in International Law), former Head of Law School and Lecturer at Jimma University School of Law

and prolong the violence. [1] Advocates of ICC's involvement, on the other hand, claimed that the involvement of the ICC promotes the peace process, exposes the crimes perpetrated, stigmatizes leaders and eventually removes them from office. [2] The claims made by these opposing camps have not been tested in light of the reality on the ground in Sudan.

This article addresses the impacts of ICC's involvement in Darfur in light of the current reality in Sudan. The article is not an empirical assessment of the situation in Sudan. It is a modest contribution towards understanding the contrasting claims made by opposing camps regarding the involvement of the ICC. For this purpose, the paper uses the analytical framework developed by review of the literature regarding the impacts of intervention in conflicts by international tribunals. This will help to identify the vital theories relevant to the discussion, and then the framework will be used to measure the impacts of ICC's intervention in Darfur Sudan.

The first part of the article will briefly discuss the evolution of the conflict in Darfur and the referral by the UN Security Council. Following this, the second part discusses the theoretical debates regarding the impacts of tribunals intervention in a conflict. The third part of the article analyzes the ICC's involvement in Darfur in light of the theoretical framework developed in the second part of the article. Finally, the article ends with concluding remarks and suggestions.

[1] See Wasil Ali, Justice a threat to peace in Darfur? (30 JUNE 2008), available at http://www.sudantribune.com/spip.php?article27689, [last accessed Sep. 18, 2016], Allo, Awol Kassim, Mayhem in Darfur: The Accountability, Peace and Immunity Debate (March 1, 2009). Mizan Law Review, Vol. 3, No. 1. Available at SSRN: https://ssrn.com/abstract=1507302,

[2] See Akhavan, Payam, Are International Criminal Tribunals a Disincentive to Peace? Judicial Romanticism with Political Realism, Human Rights Quarterly, Vol. 31, Aug. 2009, Clark, J. 'Natalya, Peace, Justice and the International Criminal Court Limitations and Possibilities', Journal of International Criminal Justice 9 (2011), 521-545

1. Brief Background of The Conflict, Referral by The UNSC and the ICC's Involvement in Darfur

Darfur is part of Sudan, home for diverse ethnic and linguistic groups that is located in the western part of the country. The Fur, Zaghawa, Tunjur, Maslit, and Birgid are tribes identified as "Africans" and they were the first to settle in Darfur before the Darfuri Arabs came to settle there.[3]With the influx of Arab tribes, combinations of economic, Arab supremacism, political marginalization and ethnic tensions in the region between 1986 - 2004 gave rise to three civil wars that claimed many lives of the people of Darfur.[4] Over the years, each of the problems in Darfur increased, and led to bloody civil wars between the Arab supremacist and the African inhabitants. While the Arabs were well equipped and trained, the African inhabitants were poorly organized and ill-equipped. [5] In fact, the Arab Gathering and the Islamic Legion, groups that were created for the expulsion of Africans from the area of the Sahel and to fight for Islamization of Sahel respectively, were the progenitors of the Janjaweed militias.[6] The term Janjaweed refers to Arab Militiamen on horseback, they were tolerated and backed by the government of Sudan and other states.[7]

In response to the Arab tribes' movement in Darfur, the African tribes started to organize armed resistance that culminated in the establishment two rebel groups.[8] These were the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). The former, which announced its establishment in February 2003 as Sudanese Liberation Movement/Sudan Liberation Army (SLM/SLA), attacked

[3] See Natsios, S. and Scott, Z, Darfur, Sudan, Oxford University Press, 2012
[4]See Ibid
[5] See Liu, Zihng, The Prosecutor v. Omar Hassan Ahmad Al Bashir, Independent, August 27, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830778, Last accessed 10 Oct., 2016
[6] See Ibid
[7] Kastner, Philipp, *The* ICC in Darfur-Savior or Spoiler? 14 ILSA J. Int'l & Comp. L. 145 2007-2008, p. 146
[8] Natsios, S. and Scott, Z., Supra note 3, P.240

different places from the beginning of June 2002.[9] In response to this the government mobilized and trained the Janjaweed Units and engaged in massive recruitment of the Janjaweed from different Arab tribes. This was a pivotal point where the government transformed its tactics. At this point, the targets of the attacks by the regime and the Janjaweed became civilians and their village.[10]The conflict in Darfur has resulted in the internal displacement of 2.7 million people, has claimed 300, 000 lives and forced 250,000 people to flee their country.[11]

With these high casualties, the conflict elicited different international responses. Included among the responses was the establishment of a Commission of Inquiry by the Secretary-General of the United Nations. The initiative to establish the commission came from the U.N Security Council.[12]In January 2005, the Commission reported its finding and the report stated that the government of Sudan and the Janjaweed militia were responsible for serious violations of international humanitarian and human rights law amounting to war crimes and crimes against humanity. [13] Based on the findings of the Commission, the U.N Security Council decided to refer the situation in Sudan to the ICC, thereby triggering the referral power of the Security Council in the Rome Statute.[14] Sudan is not a party to the Rome Statute and the ICC got jurisdiction over Sudan because of the referral made by the U.N Security Council.

[9] Ibid
[10] Ibid
[11] See International Coalition for the Responsibility to Protect (ICRtoP) , The Crisis in Darfur, available at http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-darfur, , [last accessed Sep. 18, 2016]
[12] UN Security Council, *Security Council Resolution 1564 (2004) on Darfur, Sudan*, 18 September 2004, S/RES/1564 (2004), available at: http://www.refworld.org/docid/41516da44.html [accessed 17 October 2016]
[13] See, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, available at : http://www.un.org/news/dh/sudan/com_inq_darfur.pdf [accessed 17 October 2016]
[14] UN Security Council, *Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan*, 31 March 2005, S/RES/1593 (2005), available at: http://www.refworld.org/docid/42bc16434.html [accessed 17 October 2016]

The investigation by the ICC has produced a range of cases against government officials, leaders of the Janjaweed militia and opposition leaders. The charges include war crimes, crimes against humanity and genocide. President Al Bashir is the first sitting President to be wanted by the ICC, and the first person to be charged by the ICC for the crime of genocide. The ICC issued the first arrest warrants in April 2007 for two suspects and in March 2009 for President Al-Bashir. The arrest warrants issued by the court, particularly for President Al-Bashir, have been severely criticized and praised as well. [15] Ever since it has been a subject of political, legal and academic controversies.[16] The debates concerning the warrants include, among other things, issues regarding jurisdictional competence of the ICC on non-state party to the Rome Statute, issues of heads of state immunity, political allegations that portray the ICC as instrument of powerful sates, and the insensitivity of the ICC for the peace process in Darfur.[17]

The above is a brief development of events that led to the involvement of the ICC in Sudan. Unlike the Nuremberg model and the *ad hoc* tribunals, the ICC has a forward looking jurisdictional power. As a result, interventions by the court and their impacts can easily be a point of controversy. The following part of the article presents the two opposing positions regarding the impacts of interventions in the form of a criminal prosecution.

2. Opponents of Intervention

Critics of international criminal justice have developed a set of arguments against intervention in a form of prosecution by tribunals. First, it is

[15] See Supra note 1

[16] See Global Policy Form, International Criminal Court Investigations Sudan**,** available at**:** https://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/darfur-sudan.html, Last accessed on 4 Nov. 2016

[17] Blommestijn, Von Michiel and Ryngaert, Cedric, Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity, available at :www.zis-online.com/dat/artikel/2010_6_461.pdf , Last accessed on 4 Nov. 2016

claimed that intervention in a form of prosecution can instigate and prolong the violence. [18] The assumption is a threat of accountability in a form of prosecution makes responsible leaders of atrocities cling to power and refuse to lay down weapons. [19] In support of this, exemplary models like the amnesties granted to military officers in Chile, Argentina, and South Africa's Truth and Reconciliation Commission are often cited as evidence of the possibility and viability of dealing atrocities with a non-prosecutorial model. [20] Clark argues that "in both South Africa and in Latin America, justice - in the sense of criminal trials - was traded for peace."[21]

Moreover, critics of prosecution model argue that an indictment complicates or undermines peace negotiations. The argument here is, if key leaders of atrocities would face prosecution, it would then be difficult to persuade leaders with the power to end violence to stop or reduce it.[22] For example, in the case of Uganda, it was argued that the ICC's involvement was an obstacle to the peace talks between the government and The Lord's Resistance Army (**LRA**), as the latter made it clear that it would not sign a peace agreement while facing an arrest warrant.[23] In this case ICC was accused of exacerbating the conflict, complicating the peace negotiation, portraying bias towards one party and neglecting the traditional conflict resolution mechanisms.[24]

[18] See Kastner, Philipp, supra note 5

[19] See Kersten, Mark, Seeing the Forest for the Trees: The International criminal court and the Peace – Justice Debate, available at: https://justiceinconflict.org/2016/07/21/s, Last accessed on 4 Nov. 2016

[20] Clark, J. Natalya, Peace, Justice and the International Criminal Court: Limitations and Possibilities, Journal of International Criminal Justice 9 (2011), at p. 539

[21] Supra note 10, P. 539

[22] Rodman, Kenneth A., Why the ICC Should Operate Within Peace Processes, Ethics & International Affairs, 26, No. 1 (2012), p. 64

[23] See Ambiguous impacts: The Effects of International Criminal Court Investigation in Northern Uganda, Refugee Law Project Working Paper no. 22, oct. 2012

[24]See Malu, N. Linus, The International Criminal Court and conflict transformation in Uganda

Views from the field, ACCORD, available at: http://www.accord.org.za/ajcr-issues/the-international-criminal-court-and-conflict-transformation-in-uganda/

Furthermore, it is claimed that at national and international level intervention by tribunals might draw support for leaders sought by tribunals. The thrust of this claim is that international trials are sensitive to politicization and "leaders who defy international criminal justice may gain greater support from domestic constituents and similarly positioned foreign leaders."[25] It is also claimed that exposing and shaming states for non-cooperation might risk "more resistant because it can fuel nationalists' claim that the tribunal is moving away from its purported focus on individual guilt to a more expansive focus on shaming and blaming the state and nation".[26]

3. Proponents of Intervention

Advocates of prosecution model, in contrast, raise many advantages of intervention by tribunals. Among many imperatives, deterring offenders and preventing recurrence of crimes are considered as the main goals of justice through prosecution. In setting an important precedent and deterring further atrocities many transitional justice scholars find that the trial model is indispensable. In an ongoing conflict, it is claimed that the prospect of accountability in a form of prosecution would induce perpetrators to reduce violence against victims.[27]

The fight against impunity is another important justification invoked by advocates of the prosecution model. Proponents of impunity stress the importance of accountability in ensuring stability and peace. Orentlicher argues that the consequences of "a complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct".[28]Cautioning against relapsing to atrocities because of inactions,

[25] Broache, Michael P., The International Criminal Court and Atrocities in DRC: A Case Study of the RCD-Goma (Nkunda faction)/CNDP/M23 Rebel Group, available at: http://ssrn.com/abstract=2434703, Last accessed on 4 Nov. 2016

[26] Peskin, Victor, Caution and Confrontation in the International Criminal Court Pursuit of Accountability in Uganda and Sudan, HRQ, Vol. 31, No 3, Aug. 2009, p. 661

[27] Hillebrecht, Courtney, The Deterrent Effects of the International Criminal Court: Evidence from Libya, available at http://dx.doi.org/10.1080/03050629.2016.1185713, Last accessed on 4 Nov. 2016

[28] Quoted by Majzub, Diba, Peace or Justice? Amnesties and The International Criminal Court, Melbourne Journal of International Law, Vol. 3

Aguilar argues "when the past is pushed aside before it has been clarified, discussed and dealt with, sooner or later it will invade a nation's political life, forcing governments to face it, though not always under the most favorable conditions".[29]

Stigmatization or marginalization of key leaders of atrocities is also often invoked to justify intervention by tribunals. Stigma is not always a result of actual punishment, rather "stigma attaches to its target regardless of that target's reaction to it".[30] And it is argued that tribunals like the ICC are powerful in stigmatizing perpetrators of atrocities.[31] Intervention is also presented as important tool to increases the awareness of the international community, thereby attracting necessary support and attention.[32] Gorno and Brien, for example, stress the roles the ICC intervention played in pushing leaders of the LRA in northern Uganda to end the conflict. They contended that the arrest warrant stigmatized, cut support from neighboring states like Sudan, increased awareness of the conflict in northern Uganda and ultimately pushed the LRA leaders to a negotiating table.[33]

4. Analysis of the impacts of the ICC's Involvement in Darfur

In the following part, the theoretical framework in the above part of the article will be used to analyze the impacts of the involvement of the ICC in Darfur. At this juncture, one has to understand in the absence empirical evidence; it is really hard to establish the concrete effects of the ICC's involvement. Thus, the following discussion is not an undertaking to establish a chain of causation between the ICC's involvement and the events that unfolded thereafter.

---

[29] Quoted by Kersten, Mark, Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Conflicts, Oxford University Press, 2016. P.21

[30] See Mégret, Frédéric, Practices of Stigmatization, Law and Contemporary Problems, Vol. 76:287-318

[31] See Akhavan, Payam , supra note 26

[32] See Grono, Nick and Brien, Adam O', Justice in Conflict? The ICC and Peace Processes, available at: mercury.ethz.ch/serviceengine/Files/ISN/.../3_from+2008-03_**ICC**+in+Africa.pdf, Last accessed 23 Sep. 2016

[33] Ibid

4.1 Removal from office, The Expulsion of NGOs and Fragmentations

At the individual level, the two contrasting claims that are usually made are accountability in a form of prosecution would remove leaders, and would make leaders cling to power.

In the context of Darfur, with a reasonable certainty it can be asserted that the prosecution did not bring the removal of the key leaders sought by the ICC. When the arrest warrants were issued, Ahmed Harun had been serving as a Minister of State for Humanitarian Affairs and Al-Bashir was the President of Sudan. Since the issuance of the arrest warrant in April 2007, Ahmed Harun has been serving in different high ranking positions. First, he had been appointed to head an inquiry into allegations of human rights abuses in Darfur. Following this, from May 2009 – 12 July 2013 he had been appointed as the Governor of South Kordofan, and since 14th of July 2013, he has been serving as the Governor of North Kordofan. The arrest warrant did not bring the removal of President Al-Bashir either. Al-Bashir won two elections, in 2010 and in 2015 after the arrest warrants. In the latest one, he was re-elected with 94.5% of a vote. As it was claimed by some the indictment did not set into motion a chain of events that would bring the ultimate removal of the responsible leaders. No one with certainty can also claim that they cling to power because of the arrest warrant by the ICC since there is no tangible evidence to that effect.

Expulsion of NGOs was one of the impacts that can directly be linked to the arrest warrant issued for President Al-Bashir. Panicked by the arrest warrant, the administration of Al-Bashir reacted by expelling a number of humanitarian agencies working in Darfur. [34] The ejection of NGOs came immediately after the ICC issued the arrest warrant. It was widely

[34] UN News Center, Expulsion of Aid Groups from Darfur Will Have Wide Impact, UN Agencies Warn, available at http://www.un.org/apps/news/story.asp?NewsID=30105#.WAtIpfp97IU, last accessed, Oct. 21, 2016

accepted that the expulsion of humanitarian NGOs had dire consequences for the internally displaced people in Darfur. [35] Some estimated that the expulsions reduced 50 percent of the overall humanitarian assistance in Darfur. In fact, the expulsion of NGOs was the direct consequence of the arrest warrant issued by the ICC, as NGOs were suspected of working with the office of the prosecution.

As already alluded, fragmentation and unity of groups or individuals are the other two opposing claims that are usually made in relation to the impacts of the involvement of the ICC in a conflict. The impact of President Al-Bashir's arrest warrant was initially felt by the leading National Congress Party (NCP).[36] The party perceived the move by the ICC as the gravest threat ever to the survival of the party and took it as a move that was made to change the regime in Sudan.[37] In addition, initially signs of fragmentations within the party between Al-Bashir and his group on the one hand, and groups that felt Al-Bashir's leadership was driving Sudan into a pariah state, on the other hand, were unfolding. However, this did not go further to have any appreciable consequences.

Further, first by using the Janjaweed militia as a scapegoat, the government denied the existence of a relationship between the government and the Janjaweed militia.[38] At the moment the denial was considered as a move of the government distanced itself from the militia. It was also believed that the indictment would pressure the Sudanese government to cut support for the Janjaweed militia, as the methods of arming and supporting this militia were criticized severely.[39]In contrast to this, recent developments regarding this indicate the other way around. On June 24, 2014, the New York Times, for instance, reported that "the Sudanese government has reconstituted the Janjaweed, notorious militias

[35] Ibid
[36] Bubna, Mayank, The ICC's Role in Sudan: Peace versus Justice, IDSA Issue Brief, p. 6
[37] Ibid
[38] See Human Rights Watch, Failing Darfur, available at : https://www.hrw.org/sites/default/files/features/darfur/fiveyearson/report4.html, Last accessed oct, 2016
[39] See Akhavan, Payam , supra note 26

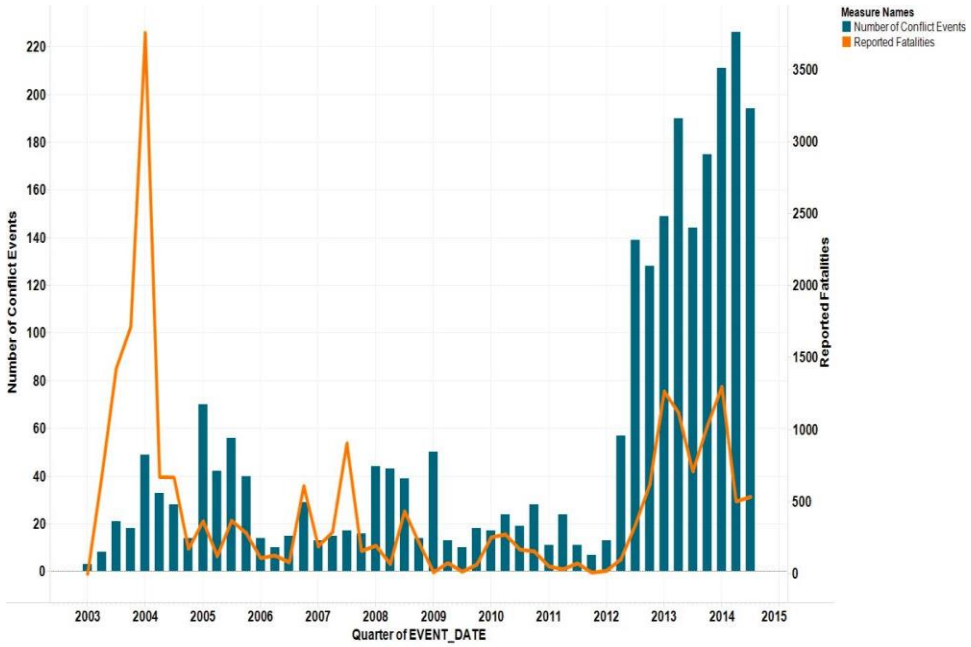
that terrorized the restive Darfur region for years, making them an official, uniformed force that has recently burned down huts and attacked civilians".[40] Thus, the arrest warrant hanging over Al-Bashir could not deter him from officially integrating the Janjaweed. I maintain that the failure to enforce the arrest warrant because of the strategic interests of powerful states and the political support that Al-Bashir enjoys emboldened him to contempt the arrest warrant issued by the ICC. According to New York Times, "government's role in fomenting the violence is hardly secret anymore."[41] This exemplifies the situation where the international politics playing above international justice, rendering the latter toothless.

4.2 The National Level of Violence and The Peace Negotiations

De-escalation and escalation of violence are another two opposing claims that are often made as the impacts of an involvement of ICC in a conflict. In the case of Darfur, it is extremely difficult to assess and attribute violence that happened or stalled after the involvement of the ICC. This is so because, ICC is one among the many actors involved in Darfur and the complex political dynamic limits us from making attribution to a particular entity. The following figure, provided by the Armed Conflict Location and Event Dataset, shows trends in violent incidents. The figure shows the numbers of conflict incidents and reported the fatalities after the involvement of the ICC.

[40]Jeffrey Gettleman, Sudan Said to Revive Notorious Militias, the New York Times, June 24, 2014, available at http://www.nytimes.com/2014/06/25/world/africa/sudan-darfur-janjaweed-militia-khartoum.html**,** Last accessed oct, 2016

[41] Ibid



Source: ACLED

A cursory examination of the figure indicates that the conflict trends change over time in relatively smaller scale up until 2012, and thereafter there is a sharp rise in the number of conflict events with the corresponding rise in reported casualties. If one considers the referral of the situation in Darfur to the ICC by the UN Security Council as the initial point of ICC's involvement in Darfur, one can see small scale rising and falling of violence in between 2005- 2012. The question is can it be claimed that the ICC's involvement has de-escalated the violence initially and then the failure to enforce the arrest warrants caused the escalation of violence again? At this moment, in the absence of empirical evidence that correlates the ICC's involvement to this fact in the ground both claims cannot be confirmed beyond mere speculation.

Portraying intervention as an impediment to peace and as an incentive to peace negotiations are the other two competing claims made by opponents and proponents of the ICC. In relation to the Darfur conflict, important attempts of peace negotiations between the insurgents and the government

of Sudan have been made at different times. The article, however, discusses only two of them since they were closer to the arrest warrants. The first is the Darfur Peace Agreement (DPA) that was signed on 5 May 2006 between the government and one of the SLM/A's factions in Abuja.[42] The JEM refused to sign this peace negotiation and rejected the agreement considering that the methods of power and wealth sharing proposed by the agreement did not adequately address the initial causes of the conflict.[43] Subsequently, this attempt failed. At this point, the ICC had not issued an arrest warrant for any of the accused and the failure of the peace negotiations cannot be linked to ICC's intervention.

In the negotiation of February 2010, the Sudanese government and the JEM signed another peace agreement in Doha.[44] It would seem that the change of venue from Abuja, Nigeria to Doha (Qatar) was caused by the involvement of the ICC, as Qatar is not a party to the Rome Statute. The ICC had only issued arrest warrant for Ahmed Haroun and Ali Kushayb at the beginning of the negotiation. Later, when the ICC issues an arrest warrant for president Al-Bashir on March 2009 the first rounds of the talks, some argued, was dominated by talks regarding the arrest warrant. [45]According to some, JEM considered that the arrest warrant would weaken the government of Sudan and withdrew from the peace agreement "saying it would not negotiate with an indicted war criminal "[46] Here it can be argued that to some extent indictment has played a role for withdrawal of JEM at this specific moment.

It is possible to concede that the arrest warrant had an impact on this specific negotiation, but it can also equally be argued that the ICC's involvement was not the cause for the failure of the Doha negotiation.

---

[42] Nadil Nabil Jurdi, The International Criminal Court and National Courts: A Contentious Relationship, Ashgate Publishing, Ltd., 28 Feb 2013, p. 223

[43] Ibid

[44]Ibid

[45] Patrick S. Wegner, The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace–Justice Divide, Eberhard-Karls-Universität Tübingen, Germany, 2015

[46] Ibid

This is so because, JEM as a party to the negotiation had resumed its efforts even after the arrest warrant. For example, the ceasefire agreement between the government and JEM on 24 February 2010 was agreed after the first arrest warrant. The reason for the failure to reach a negotiated agreement was the absence of a genuine interest of the parties to resolve the conflict. It was claimed that "while the government engaged in the talks because they needed to show that the indicted Al-Bashir was not blocking peace efforts; the JEM was interested in being recognized as the only negotiation partner on the reel side ".[47] The discussions at the later stages indicate that the main cause for the failure of the negotiations was not the ICC's involvement. It was more a question of representation, administrative status of Darfur, and more importantly, it was a question of marginalization of the people in Darfur.[48]

4.3 Stigmatization at The International Level

Stigmatization versus rallying are the other competing claims that are made in relation to the ICC's involvement in a conflict. Reduction of acceptance by other states that might be caused as a result of discrediting attributes of an arrest warrant can be used to assess whether the tainted status being identified as a leader of atrocious crimes has stigmatized the accused or rallied individuals and states in support of the accused.

In the context of Sudan, particularly in the case of Al-Bashir, after the arrest warrant many states rallied in support of Al-Bashir. The arrest warrant did not stop many states from inviting Al-Bashir in order to show their solidarity. In fact, since his indictment, until March 2016, he was able to visit 21 different countries and made 74 trips.[49]Out of which, seven were signatories to the Rome Statute and have an obligation to

[47] See Patrick S. Wegner, supra note 59
[48] Ibid
[49] See Nuba Reports, Sudan's president has made 74 trips across the world in the seven years he's been wanted for war crimes, Quartz Africa,4 March 2016, available at http://qz.com/630571/sudans-president-has-made-74-trips-across-the-world-in-the-seven-years-hes-been-wanted-for-war-crimes/ , last accessed 20 oct. 2016

cooperate with the court in arresting Al-Bashir.[50] Due to this, the failure of Uganda and Djibouti, as it was the case with Chad and Kenya previously, to arrest Al-Bashir is referred by the ICC to the Assembly of States Parties to the Rome Statute. [51]

One of the impacts of the arrest warrants was the fact that it led to a unified opposition to the move made by the ICC. For example, the African Union criticized the move by the ICC, requested the deferral of the case and adopted a resolution calling for the African states not to cooperate with the ICC.[52] The Arab League also rejected the arrest warrant and showed strong support for Al-Bashir.[53]

President Al Bashir has also faced challenges because of the arrest warrants. For instance, he was not able to travel freely in different countries. For instance, in South Africa, a civil society group brought a suit to the South Africa's High Court to enforce Al-Bashir's arrest warrant.[54] Even though the government of South Africa allowed him to leave the country, the court actually ordered that he should remain in South Africa pending a ruling on the application.[55] Moreover, in some cases due to the arrest warrant he had to cancel trips. This is the case, for example, when he decided to call off his trip to the USA to attend the 68th UN General Assembly after the ICC invited the officials of USA to apprehend and Surrender him. [56] Similarly, on 21 April 2015 he called off

[50] Ibid

[51] See DABANGA, ICC reports Uganda, Djibouti for not arresting Al Bashir, available at : https://www.dabangasudan.org/en/all-news/article/icc-reports-uganda-djibouti-for-not-arresting-al-bashir , last accessed, oct..2016

[52] See Coalition For The International Criminal Court, News on the African Union, Sudan and the ICC, available at http://www.iccnow.org/?mod=newsdetail&news=3414, Last accessed, 5 oct. 2016

[53] Ibid

[54] Ibid

[55] See Amnesty International, South Africa: Decision to leave International Criminal Court a 'deep betrayal of millions of victims worldwide' available at : https://www.amnesty.org/en/latest/news/2016/10/ , Last accessed on 4 oct. 2016

[56] See Security Council Report, Sudan (Darfur) Chronology of Events, available at: http://www.securitycouncilreport.org/chronology/sudan-darfur.php?page=2, Last accessed on 4 oct. 2016

his conference visit to Indonesia to attend the Asia-African leaders' conference in the capital Jakarta.[57]

Conclusion

The article attempted to modestly appraise the impacts of the ICC's involvement in Darfur Sudan at individual, domestic and international levels. As outlined, in the above parts of the article, the theoretical debates concerning an involvement of a tribunal in a conflict is often presented in a sharp contrast without offering the necessary evidence for substantiating claims. The first position presents dire consequences of intervention by a tribunal in a conflict, while the opposite position claims many fruits that would be collected as a result of an intervention.

In the context of Sudan, the intervention did not bring the removal of President Al-Bashir or other leaders that were prosecuted by the ICC. There is no any empirical evidence that would confirm that the prosecuted leaders are still in power because of the ICC's arrest warrant either. Rather, the intervention has created tighter controls on humanitarian activities as evidenced by the expulsion of NGOs working in Darfur as a result of the arrest warrants issued for Al-Bashir. The little sign of fragmentation created at the beginning as a result of the intervention within the party and the persistent denial of a link with the Janjaweed militia could not endure the test of time. The failure of the ICC to enforce the arrest warrants and the absence of the necessary political support for the ICC have rendered the court toothless.

As the discussion showed the claims that the ICC could escalate and impede peace negotiations in Darfur is more of speculation. There is no available evidence to substantiate these claims made by opponents of the intervention. It is also completely difficult to attribute the decrease of violence, at the initial sage of the intervention, to the ICC's involvement.

[57] See Report by Aljazeera, Sudan president cancels conference visit to Indonesia, available at : http://www.aljazeera.com/news/2015/04/sudan-president-cancels-conference-visit-indonesia-150421171322043.html, Last accessed on 4 oct. 2016

The failures to conclude peace agreement cannot also be attributed to the ICC's involvement. As the analysis indicated the failures of the parties to negotiate was caused by the inadequacy of the terms of the agreements to satisfy the expectations and demands of the parties to the conflict rather than the involvement of the ICC.

Finally, the impact on the acceptance of, particularly president Al-Bashir, is more of restriction to travel to some countries. The evidence rather suggests that the ICC's involvement drew many African countries and regional organizations to rally in support of President Al Bashir.

Finally, the author concedes that the absence of empirical evidence is the main limitation of this article. The writer suggests further empirical researches to confirm claims made by opposing groups.

Host States' Police Power and the Proportionality Test in International Investment Law

Legesse Tigabu Mengie[♣]

Abstract

Capital exporting countries have effectively maintained the imbalance inherent in international investment law as they have better bargaining power in negotiating investment treaties. On the other hand, developing countries race to the bottom and undertake demanding investment related obligations to attract foreign direct investment. These countries are compromising their regulatory power as the terms they enter into would not allow them to take the necessary measures against foreign investors. The imbalance between the protection of investment and host states' regulatory power has called for the development of balancing tools which aim at enabling host states to exercise their inherent regulatory power to achieve domestic policy objectives. One of such balancing tools is the proportionality test. The central question of this essay is: how far does the proportionality test counterbalance the imbalance inherent in international investment law. It has analyzed the proportionality test in investor-state arbitration procedures in light of the imbalance inherent in international investment law, the fragmented nature of international investment law and its institutions, and the host states' regulatory power. This study shows that the proportionality test developed by the international investment dispute settlement system has manifested some positive developments but failed to effectively play a balancing role.

[♣] LL. B (Haramaya University), LL.M in Comparative Constitutional Law (Central European University), LL.M in International and European Public Law (Erasmus University), Assistant Professor in Law, College of Law and Governance, Jimma University, legessetigabu@yahoo.com/legeselaw@gmail.com.

1. Introduction

The proliferation of bilateral investment treaties (BITs) and the increasing use of investor-state dispute settlement procedures have made interest-balancing tools indispensable in international investment law (IIL)[1]. Among these balancing tools is the proportionality test. The growing importance of the proportionality test is evident in international investment dispute settlement (IIDS). Given the fact that IIL is highly criticized for being uneven, the balancing role of the proportionality test will continue to advance. However, the legal and institutional fragmentation in international investment governance has inhibited consistent development of the principle of proportionality. Thus, the balancing role this principle would play in such a fragmented system is worth considering.

A number of scholarly works have depicted an imbalance in IIL between foreign investor's investment protection interest and the police power (legitimate regulatory power) of a host state. Kate Miles has explained the widely shared view about such imbalance and asserted that the main reason that caused the imbalance is the capital exporting countries' continuous determination to ensure their 'political and commercial' control in international investment.[2] Related to this, what is less explored is the extent to which the principle of proportionality in IIL, as it stands today, counterbalances such imbalance imposed by the capital exporting countries and allows legitimate exercise of host states' police power.

This essay analyses the proportionality test employed in IIDS procedures in light of the imbalance inherent in IIL, the fragmented nature of IIL and its institutions, and the host states' police power. Such analysis would require an integrated investigation approach involving multilevel and multidimensional aspects of IIL which influence the use of

[1] C. Sieber, 'The Principle of Proportionality in International Law' (Swiss National Centre of Competence in Research, Working Paper No 2012/38 December 2012), p.23.

[2] K. Miles, 'International Investment Law: Origins, Imperialism and Conceptualizing the Environment' *Colorado Journal of International Environmental Law & Policy*, 21 (2010), 1-48.

proportionality test in IIDS. To this effect, this essay has used relevant cases and secondary sources. The next section presents the development of the proportionality test in IIL. Section three provides the balancing role of the proportionality test in IIDS. Section four considers the bottlenecks in the advancement of the proportionality test. Lastly, section five provides concluding remarks which show that the proportionality test adopted by the IIDS system has failed to effectively play a balancing role.

2. The development of the proportionality test in IIL

The early and narrow purpose of IIL which did not go beyond protecting foreign investment from the risk of abuse of power has faced a series of criticisms. The recent socio-legal studies have shown the imbalance in IIL between the host states' police power and the protection of the interests of foreign investors. Kate Miles has, for example, called for a balancing approach describing the current IIL system as an instrument established to serve political and commercial interests of capital exporting countries.[3] Others including Charlotte Sieber have explained how the tension between the host states' regulatory power and foreign investor protection guarantees under international investment agreements (IIAs) make the application of the principle of proportionality relevant in IIDS.[4] Guiguo Wang has also concurred with the aforementioned works citing the continuous dynamics between the two conflicting interests and the relevance of the proportionality test to address this issue.[5]

Recently concluded BITs have witnessed how the two conflicting interests manifest themselves in contemporary IIL. Capital importing countries are striving to maintain regulatory flexibility while capital exporting countries aim at maximizing investment opportunities and

[3] ibid, pp.3-5.
[4] Sieber, pp.23-26.
[5] G. Wang, *International Investment Law: A Chinese Perspective*, (Routledge Research in International Economic Law, 2015), p.425.

guarantees.[6] This tension continues to resonate itself in the application of IIAs' provisions in IIDS procedures and it is in this context that the proportionality test became practically relevant in IIL.[7] International arbitration tribunals have, thus, recognized this battle and started applying the proportionality test to bring about the right balance. Host states have raised a serious concern that the notion of indirect-expropriation which is developed to protect foreign investment from invasive regulatory measures would be applied broadly in many domestic regulatory and legitimate measures regarding protection of environment, human rights and public safety and health.[8] Such states claimed that 'this would mean that a state could not regulate these areas without incurring an obligation to compensate'.[9]

It is in response to this concern that the International Centre for Settlement of Investment Disputes (ICSID) tribunal introduced the proportionality test in IIDS system for the purpose of determining indirect expropriation in *Tecmed v. Mexico*[10] as will be discussed in the next section. It should, however, be noted that the development of the proportionality test is not consistent due to the fragmented nature of international investment governance and lack of a single appellate body.[11]

[6] H. Shin and J. Kim, 'Balancing the Domestic Regulatory Need to Control the Inflow of Foreign Direct Investment Against International Treaty Commitments', *Asia Pacific Law Review*, 19 (2011), 177-194.
[7] Sieber, p.23-25.
[8] U. Kriebaum, 'Regulatory takings: Balancing the interests of the investor and the state', *The Journal of World Trade and Investment*, 8 (2007), 717-744.
[9] ibid.
[10] N. Osterwalder and L. Johnson, *International Investment Law and Sustainable Development*, (International Institute for Sustainable Development, 2011), p.141.
[11] C. Schreuer 'Investments, International Protection', (Max Planck Foundation for International Peace and the Rule of Law, 2013), p.4. http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1533?prd=EPIL [last accessed 11-12-2015].

3. The balancing role of the proportionality test in IIDS

International investment arbitration tribunals faced criticism in several occasions for giving priority for foreign investment protection over host states' police power. Such criticism revolves around broad interpretation of indirect expropriation which has made it easy for foreign investors to claim compensation even when host states exercise their police power to pursue legitimate national public policies. *Tecmed* has introduced the proportionality test for the first time in determining indirect expropriation in investor-state dispute with a view to ensure the right balance between investment protection and exercise of police power.[12] At this juncture, it is apt to see if *Tecmed* and the subsequent investor-state arbitration awards have fought back the imbalance discussed above. In *Tecmed*, the tribunal declared the 'sole effects' test – the sole test which has been used to determine indirect-expropriation before *Tecmed* – insufficient and added the proportionality test to supplement it.[13] The tribunal stated in its judgment that:

> After establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments.[14]

In determining indirect-expropriation, the tribunals were applying the 'sole effects' test and, thus, their role was limited to considering if a regulatory measure has caused serious damage to investment without any concern whatsoever about the regulatory power of the host state. In this regard, *Tecmed* has brought about a radical change by establishing a balancing approach through the proportionality test.

---

[12] P. Ranjan, 'Using the public law concept of proportionality to balance investment protection with regulation in international investment law: A critical appraisal', *Cambridge Journal of International and Comparative Law,* 3 (2014), 853–883.

[13] ICSID: *Tecmed v. Mexico*, ARB (AF)/00/2, Judgement of 29 May 2003, paras 117-122.

[14] ibid, para 122.

However, the tribunal considered the public policy concerns raised by Mexico minor[15] and didn't show a real commitment to the proportionality test it adopted to ensure the balance between investment interests and police powers of the host state (Mexico). Mexico claimed that its actions do not amount to expropriation of whatsoever form within the meaning of Art 5 of the BIT concluded between Spain and Mexico[16] stating that it was exercising its legitimate regulatory power to protect the environment and public health.[17] Though the tribunal considered the previous 'sole effects' test inadequate stating that the harm caused by regulatory action is not sufficient to establish indirect-expropriation, it has failed to apply the proportionality test in a manner it could serve the purpose for which it was introduced.

The tribunal considered the environmental, public health and social concerns raised by the concerned community and Mexican state as insignificant and not 'serious and urgent' enough.[18] It has also impliedly approved some favor that should be done to a foreign investor in arbitration proceeding stating that 'investors are not entitled to exercise political rights such as voting for the authorities that will issue the decisions that affect such investors.'[19] *Tecmed* has not, therefore, shown genuine commitment to the proportionality test and failed to effectively counterbalance the imbalance inherent in IIL. It has not also applied all the elements of the proportionality test as it has proceeded to 'a strict proportionality review' setting aside the other two stages of review.[20] What is more, its assessment has emphasized on the effects of the measures on the investment without giving matching due attention to legitimate exercise of regulatory power.

---

[15] *Tecmed v. Mexico,* paras 147-149.
[16] Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States, 18 December 1996, Art 5 (1).
[17] *Tecmed v. Mexico,* paras 103-108.
[18] ibid, para 147.
[19] ibid, 122.
[20] Ranjan, p.864.

Due to the increasing relevance of ICSID tribunals in IIDS and because over 150 countries have signed the ICSID convention[21], it is appropriate to examine the cases recently resolved by ICSID tribunals involving the principle of proportionality to see if this principle is really playing a balancing role. In *LG&E v. Argentina*, the tribunal employed the proportionality test referring to *Tecmed* stating that 'the Tribunal must balance two competing interests: the degree of the measure's interference with the right of ownership and the power of the State to adopt its policies.'[22] The tribunal considered both the economic impact of the measures and the legitimate regulatory powers.[23] This judgement considered deprivation of the right to enjoy investment as an important factor to establish indirect-expropriation without, however, going further to test the proportionality of regulatory measures taken. [24] This approach is very close to the 'sole effects test' which emphasizes on economic implications of a measure on investment i.e. the approach *Tecmed* was meant to change.

The *El Paso v Argentina* tribunal has also applied the proportionality test citing *Tecmed*. Like *Tecmed*, it has failed to employ the first two elements of the proportionality test – suitability and necessity – and it has not shown in a clear manner how it applied the 'strict proportionality assessment'.[25] In 2015, the *Tidewater v. Venezuela* tribunal limited itself to the effect of regulatory measure on investment in determining an issue related to indirect expropriation. The tribunal stated that 'it is well accepted in international law that expropriation need not involve a taking of legal title to property; it is sufficient if the State's measures have an

[21] http://www.internationalarbitrationlaw.com/arbitral-institutions/icsid/ [last accessed 11-12-2015].
[22] ICSID: *LG&E v. Argentina,* ARB/02/1, Judgement of 26 September 2006, para 189.
[23] ibid, paras 190-197.
[24] ibid, para 198.
[25] ICSID: *El Paso v Argentina,* ARB/03/15, Judgement of 31 October 2011, paras 243-248.

equivalent effect.'[26] This clearly defeats the balancing approach introduced by *Tecmed* and would bring the 'sole effects test' back.

4. The bottlenecks in the advancement of the proportionality test in IIL

Most of the challenges in the advancement of the proportionality test in IIL are related to the nature of this discipline. The initial purpose of IIL was just to provide protection for foreign investment. The impacts of foreign investment on host states were not subjects covered by earlier BITs.[27] Capital-exporting countries have also strengthened investor protection aiming at ensuring their political and commercial control in international investment on one hand and addressing the possibility of host states' systematic interference in investment on the other. This shaped the understanding on IIL and the protection purpose became dominant posing a challenge to attempts to adopt a balancing approach through the proportionality test in IIDS.

The legal and institutional fragmentation in international investment governance has also become a serious challenge to the advancement of the principle of proportionality in IIL. Establishment of different tribunals for every dispute led to varying interpretations and this made uniform application of this principle far-fetched and the losers are host states as effective implementation of this principle would have been in their favor. The lack of an appellate body which can ensure reliable application of the proportionality principle has, thus, significantly impacted the consistent advancement of the principle.[28] The Legal fragmentation has also inhibited coherent development of the principle as tribunals constituted for each dispute have to apply the provisions of IIAs considering their unique nature. All these factors have become challenges to the proportionality test and the current investor-state arbitrations tend to give

[26] ICSID: *Tidewater v. Venezuela*, ARB/10/5, Judgement of 13 March 2015, para 104.
[27] Shin and Kim, 179.
[28] Schreuer, p.4.

investment protection a priority over regulation in the public interest.[29] What is more, though the principle of proportionality has been used in IIDS since *Tecmed*, the tribunals have failed to follow the 'analytical three-step structure'[30] as discussed in section three and this has posed another challenge in the advancement of the principle in IIL.

5. Conclusion

While the proportionality test has been introduced in IIDS with a view to bring about the right balance between protection of foreign investment on one hand and legitimate exercise of police power by a host state on the other, it has failed to effectively serve the purpose for which it was introduced. The tribunals have not gone through the rigorous proportionality review steps which have been necessary to ensure the right balance between the two conflicting interests. The lack of consistency in the development of the proportionality test in IIDS is also evident and this weakens the effectiveness of the proportionality test in investor-state dispute settlement.

[29] J. Cosmas, 'Can Tanzania Adequately Fulfill Its Public Health Regulatory Obligations Alongside Bilateral Investment Treaties Obligations?' *Journal of Politics and Law*, 8 (2015), 126-136.
[30] Ranjan, p.864-866.

Jimma University Legal Aid Center 2016 Report: The Success Stories and Challenges

Introduction

Peoples' rights to Human Rights in general and rights to due process and fair hearing in particular should not depend on the depth of individual's pocket. Justice has never been equal for the poor majority as they are unable to hire a lawyer. Equally affected are women, children, prison inmates, HIV/AIDS victims and veterans who are unable to seek and enforce their constitutional rights.

Jimma University School of Law Legal Aid Center (henceforth 'JUSL-LAC') was established to bridge the gap between access to justice and indigence. Although such center was established in developed world long ago, it is the first of its kind in South, Southwest and West Ethiopia, and is one of a handful number of pioneers in the nation.

JUSL-LAC basically utilizes clinical students and volunteers who study law at the University in addition to the academic staff of Jimma University School of Law and the full time employed lawyers for the centers outside of Jimma town. Each volunteer and clinical student is expected to contribute four hours per week and academic staff members are expected to handle and supervise clients' cases.

JUSL-LAC is rendering legal services at 11 Woreds in Jimma Zone namely, *Jimma main office, Jimma Woreda Court, Jimma High Court, Jimma Zone prison administration, Agaro, Gera, Limu Kosa, Shabe, Dedo, Serbo and Omo Nada* and is keen to keep up th**e** already started good work. JUSL-LAC is also on the verge of opening three new centers in *Manna, Limu Seka and Sokoru Woredas.*

1. Background

Jimma zone is one of the largest zonal administrations in Oromia regional state with an estimated total population of three million. Half of the total population are women. Jimma University (henceforth 'JU') is a public higher educational institution established in December 1999 by the amalgamation of Jimma College of Agriculture (founded in 1952) and Jimma Institute of Health Sciences (established in 1983) to contribute its best to the academia world and serve the population of the zonal administration in many spheres. The two campuses are located in Jimma city 335 km southwest of Addis Ababa with an area of 167 hectares.

JU is Ethiopia's first innovative Community Oriented Education Institution of higher learning. In line with this philosophy, JUSL-LAC was established based on the unanimous decision of Academic Commission of the then Law Faculty (now School of Law) on Dec 25, 2008.

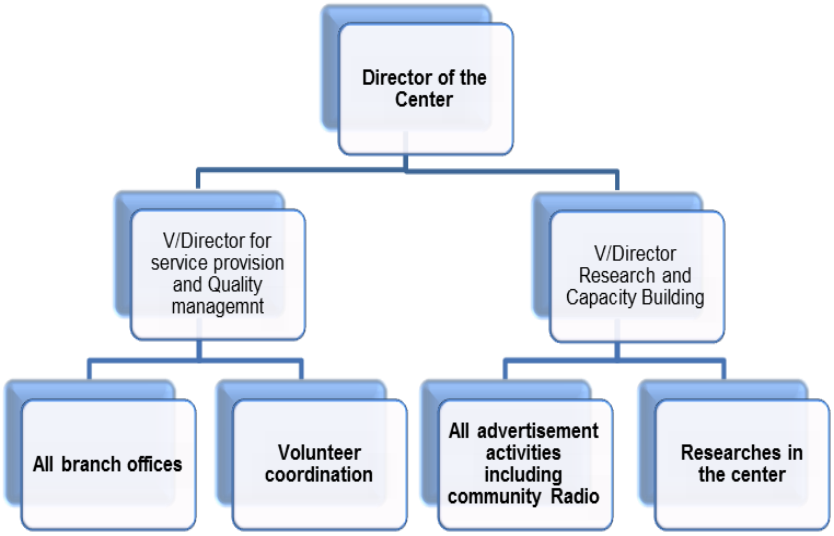
JUSL-LAC was primarily established with the vision of providing free legal services to indigents and *vulnerable groups like the poor, women, veterans, HIV/AIDS victims and children in and around Jimma town on one* hand, and to expose students of the law school to the practical aspect of law on the other hand.

Having these multifaceted goals, JUSL-LAC has been rendering its cherished legal service at 11 centers, including the one at the head office. Initially, service delivery was started by opening two centers at Jimma Zone High Court and Jimma Woreda Court. However, the number of centers was increased to *six* in the year 2003 EC by opening new centers in Agaro, Dedo, Serbo and Jimma Zone Prison. In 2008 EC new centers have been opened at Gera, Omo Nada, Shabe and Limu Kosa. Currently, the center has a total of 11 centers. Through its Jimma Community FM Radio legal awareness education program, the Center has also equipped hundreds of thousands of people with basic legal knowledge.

2. Organizational structure of the center

To enable the center attain its objective and contribute effectively in the furtherance of access to justice, the organizational structure of JUSL-LAC was framed to different structures. On the top of the organizational structure is the director who is empowered to supervise the day-to-day activities and operation of the Center. Under the director, there are two vice directors, one vice director for service provision and quality management with the power and the duty to manage and coordinate the different activities of the Centers and the other vice

director for research and capacity building with the power and duty to direct and conduct capacity building activities for service providers, beneficiaries, and organs involved in the administration of justice; to direct and conduct researches related to the vision and mission of the Center; and to conduct promotions about the availability of free legal service and build the public image of the Center.



3. The number of centers and their locations

Currently, JUSL-LAC has a total of 11 centers. Center expansion was made on the basis of the community demand for the establishment of centers and JU's commitment to deliver community services to the needy societies. Accordingly, the followings are the number of centers with their locations.

1	Jimma university main office	Jimma university main campus
2	Jimma town woreda court	Jimma town
3	Jimma zone high court	Jimma town
4	Jimma zone prison administration	Jimma town
5	Kersa woreda court	Serbo
6	Omo nada woreda court	Omo Nada
7	Dedo woreda court	Sheki
8	Shabe sonbo woreda court	Shabe
9	Gomma woreda court	Agaro

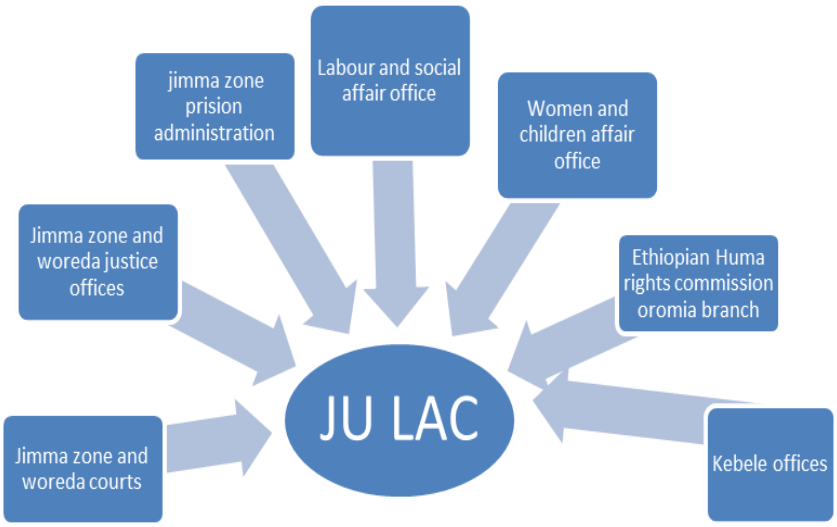
10	Gera woreda court	Gera
11	Limmu kosa woreda court	Limu kosa

4. Partners

Ethiopian Human Rights Commission, Oromia Supreme Court and Oromia Justice Bureau are the partners of the center. The Ethiopian Human Rights Commission has been the main funder of the center. The Oromia Supreme Court also supports the center with materials and some finance. Oromia Justice Bureau supports the center by giving and renewing advocacy license.

5. Linkages with the stakeholders

To be effective, legal aid service requires the cooperation and coordination of various stakeholders. Accordingly, JUSL-LAC has many stakeholders with which its' cooperations are vital in the accomplishment of the center's objectives. Jimma zone high court, different woreda courts, Jimma zone Justice office, different woreda justice offices, jimma zone prison administration, police offices, woreda labour and social affair offices, women and children affairs offices, Ethiopian human rights commission oromia branch office and kebele administrations are among the main stakeholders with which JUSL-LAC has a linkage.



6. The services the center provides

There are three main services that JUSL-LAC provides. These are legal services, community legal education and research and capacity building.

6.1 Legal Services

These services are those which are in one way or another connected with justice sectors and administrative government organs. Through its legal services, the center provides the following major services to its clients

- free legal counsel
- writing statement of claim and statement of defense
- writing different applications to be submitted to the courts and other organs
- Advocacy (legal representation before courts)
- Mediation

So far the Center is offering these legal services to the population through its 11 centers. In six of the centers, the Center has managed to employe lawyers to run the services. The center however relies on School of Law students to provide the services at Jimma Woreda Court, Jimma zone High Court and Jimma Zone prison Administration. The students are assisted by the academic staff of the

School. The Center's office located in the JU Main campus functions as a coordinating center for all the services and functions.

6.2 Legal Education (Awareness Raising Program)

The Center believes that the abuses and human rights violations suffered by the vulnerable parts of the population are attributable to lack of awareness especially of the rights of these groups. Accordingly, it strongly believes that ensuring respect for their rights can be promoted through effective and broad-based community legal education programs. Thus far, the Center has relied on the Jimma University Community Radio in which it has been able to run an hour-long awareness raising program per week in two languages (Amharic and Afan Oromo) but there are critical limitations both in terms of the structure, breadth, effectiveness and sustainability of running the program through this medium. The Center, however, aims to run the program effectively by utilizing various available means and media such as community organizations, centers and other channels with broad audiences but this requires the availability of adequate financial supports.

6.3 Research and Capacity Building

It is crucial that legal service and legal education programs at the Center be supported by appropriate evidence. Research is therefore a critical part of its strategic approach as it helps to identify the need and areas of focus for its services. It also helps us engage with the community and stakeholders in addressing the problems in a more effective and sustainable manner. Research also plays a crucial role in empowering and building the capacity of the community, stakeholders and the Center itself in dealing with the root causes of the problem of human rights violations and lack of access to justice to the vulnerable members.

Thus far there is no baseline research conducted in Jimma Zone nor in the country in relation to the need for legal aid service. There is also no standard developed in relation to providing the service. In fact, the level of awareness of the idea of legal aid and its role is at a critically low level in the country. The Center aims to address these problems by using research and capacity building as its strategic approach. To this end, the following are areas in which the Center needs strong support for its activities

- Organizing thematic and generic conferences and workshops and training programs
- Publication

- Conducting a baseline survey of legal aid service need in Jimma Zone
- Developing standards and guidelines for the provision of services

In this regard, due to budget constraints, the center has only managed to develop standards and guidelines for service provision.

7. Service delivery mode and service quality management system

JUSL-LAC employs different modes of service delivery. The service delivery model varies purposely to attain the objectives of the center, which are community services and equipping law students with practical skills. For centers found in Jimma city, JUSL-LAC uses fourth and fifth year law students to deliver the services and in those centers outside of Jimma town the center uses junior lawyers as they are at a distance place from the university. Beside these, the center also uses volunteer law school staff and licensed lawyers. The center doesn't compromise the service quality and employs different service quality controlling mechanisms to these ends. Accordingly, the center has a daily and weekly meeting with the students and it has also developed a strict reporting format.

8. Summary of the services and success stories of the center

The JUSL-LAC service shows tremendous progress from time to time in quality and accessibility. Initially, the service of the center was very limited in variety and the number of beneficiaries it reaches. The center, however, shows progress from time to time in increasing the variety of the services and accessibility. Currently, thousands are benefiting from the service of the center annually. In the 2016 budget year alone, the center managed to reach a total of **8466** clients. Out of these, 6845 were female and **1601** were male. The service distributions were counseling **4422**, mediation **171**, document preparation **3526** and representation **347**. Out of the total cases it represented and disposed by the court, the center won **81** and lost only two. The cases the center won were represented and litigated by fifth year law students. The service fee the center provided is estimated to **16,932,000 birr.** The winning rate of the center is 99.5 %. This is mainly due to the fact clients who come before the center have strong cases but lack only the financial capacity to litigate before the court. An estimated 450,000 peoples have benefited from the Radio program and over 5,000 brochures were distributed on varies legal issues.

The following tables show the summary of the services.

8.1 Summary of overall activities

Type of legal Service	WOREDA	JIMMA PRISON	HIGH CT	AGARO	DEDO	SERBO	HEAD OFFICE	GEERA	LIMMU	SHEBE	*NADDA*	*TOTAL*
Counseling	1888	682	720	221	284	323	188	26	21	31	38	4422
ADR	12	-	12	18	28	26	46	8	2	10	9	171
Documents	1082	946	468	213	250	242	96	65	10	89	65	3526
Representation	78	28	44	32	36	4 8	54	5	2	8	12	347
Total	3060	1656	1244	484	598	639	384	104	35	138	124	8,466

8.2 Distribution Of Service By Subject Matters

Subject Matter	**JIMMA PRISON**	**WOREDA**	**HIGH CT**	**AGARO**	**DEDO**	**GEERA**	**SERBO**	**HEAD OFFICE**	**GEERA**	***NADDA***	***SHEBE***	***LIMMU***
Family Matters	-	2020	1040	212	248	42	459	288	46	67	76	25
Succession and Property	-	431	121	98	168	15	42	47	23	23	23	4
Tort	10	118	19	36	31	5	32	30	-	5	5	1
Land Dispute	12	218	21	82	42	10	42	4	35	16	18	5
Employment	-	133	19	22	54	12	20	3	3	4	6	-
Contractual disputes	-	124	24	13	39	8	2	10	-	6	7	-
Others	-	-				-		-	-	-	-	-
Criminal cases	1646	16	8	21	14	12	3	2	-	3	3	-
Sub total	**1658**	**3060**	**1244**	**484**	**536**	**104**	**639**	**384**	**104**	**124**	**138**	**71**

8.3 Distribution of service by beneficiaries

Female	**6865**
Male	**1601**
Total	**8466**

8.5 Subject matters on which legal awareness education has been delivered through JUFM

Subject matters on which legal awareness education delivered.	Airing time			Beneficiaries
	Length of broadcast		Total Annual Airing Time	
	Amharic broadcast	Afaan Oromo broadcast		
Prisoners' Rights	1 hour	1 hour	104 Hours/Year (52 hours in Amharic Language and 52 hours in Oromiffaa Language)	450,000 persons (This is based on the assumption that at least 10% of the population the FM Radio reaches would listen to the broadcast)
Child and Woman's Right	2 hours	2 hours		
Human Rights Laws	6 hours	6 hours		
Procedural law and Self-Advocacy skill	2 hours	2 hours		
Oromia Land Law	2 hours	2 hours		
Family Law	2 hours	2 hours		
Law of Property and Succession	2 hours	2 hours		
Employment and Labor Law	2 hour	2 hour		
Traffic Law	1 hour	1 hour		
Tort Law	2 hours	2 hours		
Anti-Corruption Law	1 hour	1 hour		
Administrative law and good governance	2 hour	2 hour		
Law of Contracts	1 hour	1 hour		
Commercial Laws	2 hours	2 hours		
Other Subject Matters	24 hours	24 hours		

9. The cases the center represented and won from the end of September 2016- January 2017

There are a number of cases that the center represented in different branches. The number of cases increased tremendously this year and, since September 2017 alone, there were around 32 cases which were decided in favor of the center in Jimma town centers. The followings are the details of the cases.

S. N	Name of the client	sex	Type of the case	Representation	Adjudicatory court	File no.	Judgment
1	**Kedija Kedir** • Marriage has been dissolved • The client has two children • The husband is not voluntary to pay maintenance, even though he is capable to do that • The client has spent three months with her children without any payment • The center has litigated on behalf of the client in court of law, which earned her 1800 birr for three months • Currently she is receiving 600 birr monthly from her husband through her bank account	F	maintenance	Representation	Jimma woreda	35654	Payment of 600 birr monthly as maintenance
2	**Nasra A/oli** • the client is a mother for three children • following pronouncement of marriage dissolution, she had nothing to feed her children • The center has	F	maintenance	Representation	Jimma woreda	35570	2400 birr unpaid monthly maintenance

	represented her in court of law by 2008 and she has got a judgment of 600 birr monthly • After certain period, the judgment debtor suspended payment • In 2009 the center has re-litigated the issue on her behalf, by which she is awarded 2400 birr as installment (unpaid maintenance)						
3	**Yeshi Kenea** • She was living in an irregular union • She got one child during the union • After a moment, the partner has left the client and the child alone • He disowned the child • She suffered for a long period of time with the child • The center has represented the client in court and proved that the partner in the union was the father of the child, and has got judgment of 350 birr as a maintenance monthly	F	Maintenance and paternity	Representation	Jimma woreda		350 birr monthly maintenance and paternity
4	**Lemlem Fekadu** • The issue was about partitioning common property • The court that entertained the issue first was Gommaworeda court. • Gommaworeda court decided that the dwelling house, 2	F	Property (family)	Representation	32026	Jimma zone high court	The judgment of Woreda court has been

	coffee plantation plots of land and a cow were personal properties of the husband while the fact was that they were their common property. • The issue was appealed to Jimma high court and the center represented the client at high court. Then the case was remanded to Gommaworeda court and the court divided the property equally amonmg the individuals.						reverse d
5	**Abebech Ayele** • The clients marriage has been dissolved upon court judgment • During the marriage she gave birth to thre children • The defendant didn't pay maintenance for the children for 10 months. • The client has suffered with the children during those times • The center has represented the client in court during the litigation and finally earned her 1500 birr unpaid maintenance and then after monthly payment of 500 birr	F	Mainte nance	Represe ntation	Jimma woreda	391 64	Three months unpaid mainten ance of 1500 birr and monthly paymen t of 500 birr
6	**SenaitAbreha** • The marriage between the client and the defendant has been dissolved by court • The defendant was arguing that a house with	F	Proper ty (in marria ge)	Represe ntation	Jimma woreda	313 72	She has been entitled to equal partitio n of

	four services and two shops belongs to third party while in fact it were their common property • In the litigation, the defendant brought his mother as the owner of the properties and made her the intervener • The center has enabled the client to get half of the two shops and half of the house that have four services						shops and a house with four services together with other properties in the home
7	**Rashad A/macca** • The client was serving in a certain institution as a guard • she has served there for three years • she has been fired from her job • The center has represented the individual and finally earned her an award of 8223 birr compensation and with job experience	M	Labor	Representation	Jimma woreda	-	8223 birr compensation for unlawful termination of employment contract
8	**AbzarYahya (child)** • Our client was a child under 18 • His father is dead • After the death of his father, his grandmother has fired him from home for the fear that he might claim inheritance one day. • The child's father acquired one house and five rooms service during his lifetime. After the center has	M	Succession	Representation	Jimma woreda	-	He has been entitled to succeed his father equally the rest children

	litigated on behalf of the child, he has been entitled to succeed equally with the rest two children						
9	**Marshet Worku** • Their marriage has been dissolved following court order • The defendant and our client got one child during their marriage • The defendant has tried to hide the properties they acquired in marriage • He has tried to suspend the litigation by bringing different interveners at different times • The litigation was delayed for two years • At last, the properties acquired during marriage, including house, service with four classes, seven cows, four sheep and properties used in the home have been divided equally	F	Family (property)	Representation	Jimma woreda	33756	Properties acquired in marriage, house, service with four classes and domestic animals have been divided between them equally
10	**Sinshaw Kifle** • Our client was employed as a waitress in a private enterprise • He served in the enterprise for 3 years and 9 months, but fired without notice and payment • After the center has represented the client in a court of law, he has been a judgment	M	Labor	Representation	Jimmaw oreda	38998	Since the contract was unlawfully terminated, he has been entitled

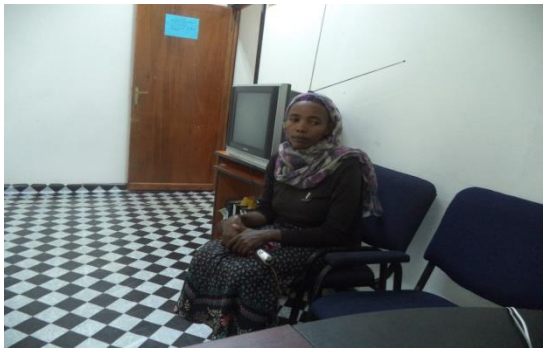
	creditor of 11559 birr as the termination was illegal						to a payment of 11559 birr as compensation
11	**Aster Abera** • Our client and the defendant were living in an irregular union • They got one child during their union • The defendant has left his child and the partner alone after a certain moment • The center has represented our client and enabled her to get maintenance payment of 400 birr monthly together with unpaid 1400 birr	w	Maintenance	Representation	Jimma woreda	40502	A monthly payment of 400 birr and accumulated unpaid maintenance of 1400 birr
12	**Amina Abbamecha** • The contention was upon partition of property following divorce • The center has proved with evidence that the properties denied actually exist and belong to both of them. Then after the court remanded the case to woreda court, and finally our client has been entitled to half of the property.	F	Property (family)	Representation	Jimma zone high court	38846	200000 birr and a house were proved to be common property and this reversed an earlier judgment of a woreda court

10. Some notable cases

A. Hussein Jemal

Our client Hussein Jemal is a resident of Jimma town. Currently he is a laborer at a woodworking workshop. His case was about property rights. His parents passed away long time ago. Neighbors of his family were appointed as guardians and tutor by the time. His parents left a house with a thousand (1000m2) land as an inheritance which the guardians were empowered to administer. The guardians sold 500m2 of this land by preparing false title deed and claimed the remaining land as their own. The guardians expelled the boy and left him to streets. Just a year after the guardians dissolved their marriage by divorce, they started to partition a land which belongs to our client. Our client got this information and approached our center. The center represented him before the court and after a lengthy court proceding the center won the case. The decision of the court was an order to the guardians to demolish the house they built on the land and hand over the land to our client.

B. Almaz Gebre



W/o Almaz Gebre was an employee at one of the cafeterias in Jimma town. She served in the cafeteria for more than nine years. She was finally dismissed from her job for a reason she doesn't know. After the dismissal, she begged her employer to write her work experience and give her some money, which she claimed was three hundred birr. Her employer refused to effect any payment and simply write her four years work experience. She was disappointed by the act of her employer and approached Jimma town labour and social affairs office. The office directed her to our center by writing her a letter of support. The center represented her before the court of law. The center finally won the case and the decision of the court was an order for the employer to pay 9,451 birr.

C. Sheik Nasir A/Mogga, Zara Sheik Nasir And Muhammed Sheik Nasir

These clients are family members and residents of jimma zone Gomma woreda. They were suspected of homicide and arrested on 26/09/2007 EC. After the investigation file was closed, they were sent to Jimma prison administration and spent there more a year without any charge. They don't have a relative who follows up their cases and they don't know also what to do to avoid this unlawful detention. They approached our center at the prison administration and narrated the story to our students working there. The students took the case and communicated the facts to Jimma zone justice office. They didn't get concrete response and then took the case to Jimma zone high court. The court, after hearing the application, ordered our clients to be released from detention. They finally went home on 15/10/2008 EC. This was another wonderful job done by our law school students working at the center and an instance where justice is actually served.

11. Challenges

JUSL-LAC is rendering an exemplary community service and equipping law students with practical skills. This, however, is not without challenges. There are a number of challenges which hinder the center's service delivery. The followings are the major challenges, among others.

- Financial constraints - the existing finance is not sufficient, timely and sustainable
- High turnover- there is high turnover of center lawyers due to low salary
- Transportation – lack of adequate transportation for students and supervisors
- Busy schedule
- Lack of responsiveness from some stakeholders

Summary

The center is providing legal services for children, women who are victims of domestic violence, peoples living with HIV, people living with disabilities, etc. In addition, the center admits students for clinical courses and externship program and they acquire basic knowledge of the practical world. Moreover, the center is providing basic legal education to hundreds of thousands of residents of Jimma Zone via Jimma Community FM Radio. Capacity building training was also given to lawyers working at the centers.