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The Continuing Quest for Inclusive Democratic Governance in Ethiopia

Getachew Assefa Woldemariam ♣

Abstract

As early as the 18th Century, James Bruce, a European Traveller, observed that bad government was the most important source of the problems that plagued the Ethiopian society. Centuries on, political and ethnic mistrust and polarization, insecurity, human rights abuses and armed conflict characterize the Ethiopian body politic. The rule of law and democracy are far from taking roots. This article –pointing out the most outstanding governance deficits of the Emperor Haile Selassie, Derg and EPRDF-*cum*-PP's (Prosperity Party) governments– argues that the lack of inclusive democratic governance remains at the core of Ethiopia's socio-political crises. It will offer suggestions on democratic governance options that, if adopted, can help deal with Ethiopia's long-time political ills.

Key terms:

Inclusive democracy · Ethiopia · Democratic governance · Question of nationalities · EPRDF

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1. Introduction

Ethiopia has existed as a polity in different sizes and shapes for centuries. It largely acquired its present geographical and socio-demographic composition towards the end of the 19th century and the beginning of the 20th century[1]. Until the 1974 popular revolution swept the last monarch –Emperor Haile Selassie I (r. 1930-1974), out of power– the main state power had been monarchical, with various kings or kings of kings succeeding one another at the helm of state power. Before the largely successful efforts of Emperor Menelik II (r. 1889-1913) to bring the several semi-sovereign entities inhabiting the present-day Ethiopia under his central political authority, these entities had different types of traditional local governance in most cases and, most of the times recognizing the suzerainty of the distant monarch who often was represented by his officials in the various localities.[2]

The sphere of influence of the semi-sovereign entities had never been constant, expanding and shrinking as were the territories and peoples under the direct, close control of the monarch had as well been. It suffices to mention here the expansion in the 16th and early 17th centuries of the Oromo clans and Ahmed Ibn Ibrahim (more commonly known as "Ahmed Gragn": Ahmed the left handed). These expansions traversed the entire Ethiopia, including the present day Eritrea. In the course of these expansions, conquering and being conquered by the locale; advancing and being pushed back until the balance

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[1] See, Bahru Zewde (2001), *A History of Modern Ethiopia: 1855-1991*, James Currey.

[2] For example, historical records show that during the first half of the 16th century, the monarch's representative in different parts of the country was known as "Azmatch"; Yilma Deresa (2006), *Ye etiopia Tarik be asra sidistegnaw kifle-zemen* (in Amharic: A history of Ethiopia in the 16th century), Addis Ababa, Mankusa printing, at 227.

of power squared out to end up in the present territorialisation of the dominant ethno linguistic groups of the country.

The centralization of power by successive governments, starting with Emperor Menelik II, ignored local interests and uprooted local authorities and modes of governance. The centralization of power was intensified under Emperor Haile Selassie, especially from 1942 onwards till the end of his rule in 1974. The Derg that came to power following the 1974 revolution took the centralization of power to the highest level, which no doubt was aggravated by its leftist political orientation.

The TPLF (Tigray People's Liberation Front), the most committed of the anti-Derg movements, waged a consistent armed struggle against the Derg till 1991. The EPRDF (Ethiopian Peoples' Revolutionary Democratic Front), the coalition of four that the TPLF created and led, finally overthrew the Derg and assumed power in May 1991. As shall be elaborated later in the article, the TPLF held the view that Ethiopia's political ills resulted from the oppression of nationalities by the Amhara (particularly the Shewan Amhara). Once it assumed power, it quickly moved to attempting to implement its political program and ideology it held starting from its founders' student days at the Haile Sellassie I University (now Addis Ababa University) in the 1960s and early 1970s. These included reconstituting the country as a federation of nationalities, and granting each of them an 'unconditional right to self-determination', including the right to a 'full measure of self-government' within the federation and the right to secession if any of the nationalities so wishes. As highlighted in Section 2 (pages 8-9), this paradigm traces its roots to a radical pre-revolutionary version of the Leninist-Stalinist right to self-determination which was believed to eventually give way to proletarian internationalism.

In this article, I will attempt to refute the diagnosis made by the TPLF and its likes that the main political problems of Ethiopia emanated from national oppression. I will argue that the lack of inclusive democratic governance which affected every Ethiopian citizen, regardless of the ethnic group to which she/he belongs, is the main reason for the socio-political ills of the country. Although the article is not intended to delve into the theoretical analyses of the notion of inclusive democracy, its arguments are positioned within the conceptual frame of inclusive democracy, interpreted based on the realpolitik in Ethiopia.

The notion of inclusive democracy can be understood in different ways. The now famous theory of "consociational democracy" popularized by Arend

Lijphart[3] provides for the basic elements of the concept. Consociational democracy is an alternative to majoritarian –for or against–democracy[4] practiced in old democracies like the USA and the UK. According to Andeweg, "inclusion of representatives from all social segments" characterizes consociational or inclusive (non-majoritarian) democracy[5].

Lijphart originally held that consociational democracy has two important components: grand coalition of major political players in running government business, and segmented autonomy for territorially concentrated minorities. But he later included other two elements: proportional representation electoral system and the possibility of veto-power for minorities in decision-making bodies on matters concerning their interests.[6] Further elements such as bicameral legislative arrangement, proper checks and balances between the legislature and the executive, and well-functioning judicial review system have also been imputed to inclusive democracy by other theorists.[7]

This article adopts the theoretical exposition of inclusive democracy summarized above but goes beyond that. In Ethiopia, where, ethnic, linguistic and religious diversities abound, inclusion, in the decision-making and the officialdom, of political actors organized on ethnic, ideological and other grounds is critical. Therefore, the political arena has to be open to all these actors so that decision-makers are elected and appointed through free and fair elections. Power-sharing must apply to all important political and economic institutions and positions from the national level down to the local level. This article will show that the lack of such inclusive institutional setup has been the harbinger of the political ills that continue to plague the country.

2. Explanations on the political crises of the 20th Century

Scholars –local and international– and political actors sought to explain the political crises of modern Ethiopia from different perspectives. The diagnosis of the problems made were also followed by prescription of solutions for the diagnosed problems. I will briefly summarize these diagnoses as follows.

The first thesis explaining the political crises of Ethiopia is a class oppression thesis. The thesis views the problems of the Ethiopian masses –

[3] Arend LijPhart (1969), "Consociational Democracy" 21(2) *World Politics* 207.
[4] See Arend Lijphart (2012), *Patterns of Democracy*, Yale University Press, at 9-29
[5] Rudy B. Andeweg (2000), "Consociational Democracy" 3 *Annual Rev. Pol. Sci.*, 509, at 512.
[6] See Arend Lijphart (2004), "Constitutional Design for Divided Societies" 15(2) *Journal of Democracy* 96.
[7] See Andeweg, note 5.

wherever they might be located– as emanating from the oppression of the peasantry and other exploited classes by the ruling/feudal/semi-bourgeoisie class. This latter class, as the case may be, comes from the nobility, the aristocracy, the privileged soldier-settlers in the southern part of the country and other landlords. Although the oppressor class was not ethnically defined (nor was it an ethnic-exclusionary group), the point put forth was that a "state-related" oppressor class did evolve, especially in the south.[8] The proponents of this view, mostly originating from the student Marxists, including the Ethiopian People's Revolutionary Party (EPRP), argued that ethnic and regional irredentism by ethnic nationalists were expressions of local resentment at the economic exploitation and political autocracy imposed by the imperial regime.[9] We need to be reminded in this connection that the military government (Derg) which subscribed to Marxism Leninism also stated that "ethnic contradictions have no objective existence once class contradictions are resolved".[10]

The second explanation of the country's political problem depicts it as a problem of colonial relations between the Ethiopian state on the one hand, and on the other the societies that were incorporated into the state during the end of the 19th century and the beginning of the 20th century. This explanation was first proffered by the Eritreans in the 1960s when, as earlier noted, the Ethio-Eritrean federation was dissolved by Emperor Haile Sellassie in 1962.[11] This view has also been entertained by some Oromo intellectuals associated with the Oromo Liberation Front (OLF).[12] The OLF itself, at least previously,

[8] Getachew A. Woldemariam (2018), 'The Constitutional Right to Self-Determination as a Response to the "Question of Nationalities" in Ethiopia' 25(1) *International Journal on Minority and Group Rights* 1, at 31-32.

[9] Christopher Clapham (2009), 'Post-war Ethiopia: The Trajectories of Crisis', 120 *Review of African political Economy*, at 182.

[10] John Markakis (1994), 'Ethnicity and Conflict and the State in the Horn of Africa', in K. Fukui and J. Markakis (eds.), *Ethnicity and Conflict in the Horn of Africa*, Oxford, James Curry 217, at 235.

[11] Merera Gudina (2003), Ethiopia: Competing Ethnic Nationalisms and the Quest for Democracy, 1960–2000, Chamber Printing House, Addis Ababa, p. 100.

[12] See, eg., Asafa Jalata (1993), *Oromia and Ethiopia: State Formation and Ethnonational Conflict*, 1868–1992, Lynne Rienner Publishers, Boulder; Bonnie K. Holcomb and Sisai Ibssa (1993), *The Invention of Ethiopia: The Making of a Dependent Colonial State in Northeast Africa*, Rutgers University Press, New Brunswick.

subscribed to this proposition. Members of the Ogaden Liberation Movement and its ideologues also have subscribed to this position.[13]

As an explanation of the state crises of the 20th century, the colonial thesis does not have many proponents other than the ones indicated above. Though I cannot go into the detail here, in my view as well, one can show its hollowness by drawing on abundant socio-historical facts and evidence. This completely denies the centuries of interaction between the Oromos –as conquerors and as conquered; as victors and as losers; expanding and being pushed back, traversing the whole country including the present-day Eritrea– and other linguistic communities of Ethiopia in war, in peace, in trade, because of other manmade calamities and natural disasters. As Professor Clapham averred, this claim can be dismissed as "ridiculous".[14]

The third thesis explaining the 20th century state crises of Ethiopia is what we can call the "power and resource inequity thesis". The state power that seems to be held in the cultural and religious overture of the Amhara has neglected other nationalities, leading them to believe that there is an ethnic dimension to the political exclusion.[15] As Clapham observes, this view understands that although the Ethiopian system of rule and power in practicality functioned as an inegalitarian, "it carried no 'premise of inequality'".[16]

The fourth explanation of the state crises is the national oppression claim. This claim singles out the Amhara as the oppressor group and the other nationalities as the oppressed. This thesis accuses the Amhara of promoting their culture and language at the expense of all other cultures and languages. It is held here that as a result of the identification of the Ethiopian state with the Amhara, all other groups were required and forced to assimilate into the Amhara cultural ethos in order to be recognised as Ethiopians. The most outspoken of the proponents of this position, the TPLF, maintains that the 'Shewa' Amhara have exercised a monopoly over political and economic powers in Ethiopia during the past century in exclusion of all other groups.[17]

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[13] Teshale Tibebu (2008), 'Modernity, Eurocentrism, and Radical Politics in Ethiopia, 1961–1991', 6(4) *African Identities* 345, at 347.

[14] Christopher Clapham (2002), 'Rewriting the Ethiopian History', 18 Annals de'Ethiopie 37, at 50.

[15] Markakis, *supra,* note 10.

[16] Christopher Clapham (1988), *Transformation and Continuity in Revolutionary Ethiopia*, Cambridge University Press, Cambridge, at 22.

[17] See interview by Paul B. Henze with Meles Zenawi (in 1990), <Meles Zenawi's interview with Paul Henze 1990 | Ethiopia (wordpress.com)> (accessed on 18 June 2022).

The TPLF and other ethnic-based movements that emerged in the early 1970s sprang from among the student revolutionaries who, from the second half of the 1960s, had embraced leftist political orientation. As Professor Bahru (2014) observes, the issue of nationalities had been discussed by sections of the student revolutionaries from around 1967, in connection with skirmishes between students on the basis of regional origin, such as between Eritreans and non-Eritreans. Randi R. Balsvik (2005) also notes that the national question was discussed among the Ethiopian student organizations in America and Europe before the famed piece by Wallelign Mekonnen on "the question of nationalities in Ethiopia" made its appearance in 1969. As Bahru and Balsvik observe, the interpretation of the sources of Ethiopian social ills became hotly debated among the student revolutionaries who thought the main sources as class problem, and those who held the view that national oppression was the main culprit.[18]

The sections of the student revolutionaries that held the position that Ethiopia's political, social and economic problems emanate from national oppression maintained that the country's problems could be resolved by dealing with the issue of national oppression.[19] Most of the students that branched out into the various political organizations in the early 1970s, including the TPLF, had already adopted Marxism-Leninism as their governing ideology in the late 1960s.[20] The national oppression thesis was given a cogent intellectual expression by the earlier noted piece entitled "the question of nationalities in Ethiopia" written by Wallelign Mekonnen. He opined that the Amhara and to some extent the Amhara-Tigre have dominated Ethiopia. According to him, what is considered as the Ethiopian culture, language, religion, and national dress are all the Amhara (and to some extent Amhara-Tigre) culture, language, religion, and dress.

[18] These two positions and other positions advanced by various components of the student revolutionaries and the party formations that sprang from them will be discussed latter in the article: See, Bahru Zewde (2014), *The Quest for Socialist Utopia: The Ethiopian Student Movement c. 1960-1974*, James Currey; Randi Ronning Balsvik (2005), *Hatile Sellassie's Students: The Intellectual and Social Background to the Revolution, 1952-1974*, Addis Ababa University Press.

[19] The two Eritrean movements, the ELF and the EPLF, in fact adopted a different position regarding the relationship between Ethiopian and Eritrea, namely, that the former colonized the latter and that the struggle therefore was a decolonization one.

[20] Andargachew Tiruneh (1993), *The Ethiopian Revolution, 1974–1987: A Transformation from an Aristocratic to a Totalitarian Autocracy*, Cambridge University Press, Cambridge, at 29.

It is possible to take issue with what Wallelign so confidently asserted. For one, this obviously does not accurately reflect the accommodative approach exercised by the political power –in both social and political spheres– towards all linguistic groups of the country. Second, the association of the political power squarely with the Amhara and placing the blame on the Amhara for the policies of the Ethiopian state, which should be viewed separately from the Amhara misses a lot of points.

In any case, one should note the striking similarity between how Wallelign framed his arguments in the piece referred to above (and subsequently developed and practiced by the TPLF), and the Marxist[21] but more so Leninist and Stalinist approaches to the question of nationalities. As the studies made on the Leninist-Stalinist theory of the question of nationalities show, the theory took a definite shape starting from 1903 framed more broadly in the beginning for the purpose of intensifying the socialist revolution against Tsarist Russia.[22] The theory framed the Russians as oppressors and the various regional and linguistic communities under the Tsarist Empire as oppressed groups. As such, therefore, Lenin and Stalin promised independence to those geographical and linguistic communities under the Tsar in order to garner their support for the revolution.

Although Lenin endorsed the right of nations to secession, he in principle was against supporting separatist movements. He is often quoted as saying that "the right of divorce is not an invitation for all wives to leave their husbands".[23] In reality, Marxism-Leninism holds that communism and nationalism are ultimately incompatible. However, Marx and Lenin believed in the necessity of appealing to nationalism in the pre-revolutionary period. They condoned the manipulation of the national question to further the revolutionary movements. In fact, the Leninist national policy asserts that "the struggle to overcome nationalism in the communist movement is the most important task of Marxist-Leninists".[24] Thus, the Marxist-Leninist theory holds that nationalism –loyalty to one's nation or nationality– on the part of the masses is acceptable in a pre-revolutionary situation but must give way to

[21] Graham Smith, says that classical Marxism had little to say about the national question and offered no advice on the issue of national self-determination; Graham Smith 'Nationalities Policy from Lenin to Gorbachev' in Graham Smith (ed) (1994) , *The Nationalities Question in the Former Soviet Union*, Longman 1, at 2.

[22] See, Walker Connor (1984), *The National Question in Marxist-Leninist Theory and Strategy*, Princeton University Press, 1984; Smith, *Ibid.*

[23] Smith, *ibid.*

[24] Connor, *Ibid.*, at 11.

proletarian internationalism or socialist patriotism in the aftermath of the revolution.[25]

Another anomaly about the proposition of the question of nationalities in Ethiopia is the lack of clarity between the three terminologies: nation, nationality and people. In the Marxist-Leninist discourse, some kind of distinction has been drawn. Thus, a "nation" was described as "large", "historical", "great" and peoples of "undoubted vitality" such as poles, Germans, Italians and Hungarians. The discourse thus holds that there is no doubt about the right to an independent statehood of such peoples.[26] Whereas a "nationality" was described as "people in pre-nation stage of development; people who for whatever reason have not yet achieved (and may never achieve) the more august station of nationhood. It might also refer to a segment of the nation living in another state severed from its kin-nation.[27] Nationalities therefore cannot be entitled to independent statehood.

The TPLF that drove home the idea of the right to self-determination of nations, nationalities and peoples (NNP) in Ethiopia chose rather to use these terms interchangeably (defining them identically), bestowing all the elements of the right to self-determination, that it constitutionally recognised, on each one of them. It is therefore difficult to pin down the notion as adopted by Ethiopian ethno-nationalists because, for sure, it is not articulated in the same way as done in Marxism-Leninism as the latter maintained distinction between the notions. Nor have the Ethiopian ethno-nationalists adopted their own definitions of the terms. The constitutional dispensation that inherited the TPLF's notion of the question of nationalities at present is that all NNPs are sovereign and each NNP has the right to self-determination up to and including secession.[28]

In fact, the TPLF did not seem to bother about the theoretical or intellectual clarity of the notions. It was singularly interested in the instrumentality of the question of nationalities. As alluded to earlier in the context of the Marxist-Leninist theory of nationalism, what most interested the TPLF was the organizing power of the question of nationalities. As Young, observes, although the number of the Amhara in Tigray had always been negligible, the atmosphere of Amhara cultural dominance was felt in the province by the use of the Amharic language by state functionaries –the police, governors, court

[25] Connor, *ibid*, at 49.
[26] *Ibid.*, at 12.
[27] *Ibid.*
[28] Arts 8, 39, Constitution of Ethiopia (1995).

personnel, tax collectors.[29] The TPLF carefully theorised about the perceived existence of discriminatory treatment against the Tigreyans carried out by the 'Shewan Amhara' elite. Again, Young correctly observes that the ideology of the TPLF was not formed on the basis of the ethnic nationalism prevalent among the Tigreans; it was rather culled from the Leninist-Stalinist theory of nationalism embraced by the student movement in which the TPLF's founders were active participants.[30]

It is necessary to note here the position on the question of nationalities of the other political organizations that emanated from student revolutionaries. The Major ones were the Ethiopian People's Revolutionary Party (EPRP) and All Ethiopian Socialist Movement (AESM, better known by its Amharic acronym መኢሶን (Me'ison)). During the early 1970s, both the EPRP and AESM were inclined to endorse the right to self-determination of nations/nationalities including secession. For example, in its program of March 1975 AESM stated bluntly that "the right of nationalities to self-determination up to and including secession is recognised".[31] These parties however made some reflections in the subsequent years. In this regard the EPRP was seen to have focused more on the issue of class struggle in the spirit of Marxism Leninism as the solution to Ethiopia's problems while AESM engaged in the consideration of federal/regional issues as central to Ethiopia's political problems.[32]

3. Analysis of the Socio-historical and Governance Conditions (to-date) of Ethiopia

On the backdrop of the above explanations offered by student revolutionaries, scholars and political practitioners, I will now attempt to offer an assessment of the socio-historical and governance realities of the country to advance my argument that bad governance is primarily responsible for the continuing suffering of the Ethiopian public and the multi-faceted crises being experienced; and this includes: governments not representing the diverse socio-cultural and political viewpoints; governments of unlimited power; governments fostering exploitative economic relations; governments lacking accountability and transparency; governments trampling on rights and freedoms of citizens without any accountability for their violation of rights;

[29] John Young (1997), *Peasant Revolution in Ethiopia: The Tigray People's Liberation Front, 1975–1991*, Cambridge University Press, Cambridge, at 31.
[30] *Ibid.*, at 32.
[31] Clapham, *supra*, note 16, at 198.
[32] Andargachew, *supra*, note 20, at 139.

and unelected governments or governments elected without meeting the standards of free and fair elections.

Two sets of arguments can be advanced as to why the explanation of the Ethiopian political crises of the 20th century as emanating chiefly or solely from national oppression cannot be sustained. The first one can be termed socio-historical and cultural while the second has to do with the nature of the governance system that was established and sustained by the governments in question.

It is an established fact that there has been social discrimination against certain groups in the society on different grounds. This discriminatory treatment is widespread throughout the country regardless of cultural or religious differences. A ready example is the discriminatory treatment of the artisans in the north (including the *felasha*). These people were not allowed to mix with the so called Abyssinians by intermarriage or in other social forms. Nor were they allowed to own land in any form.[33] The northern peasantry included both tenants ('chisegna' in Amharic) and landowning peasants.

Tenant-landlord relationship was not unique to the southern part of the country placed under the central administration in the early 20th century, although there were some important differences between the north and the south. One such difference being that in the north not all peasants were tenants while the bulk of the southern peasants were tenants. Whether land-owners or not, peasants in both north and south were *gebars* (tribute-paying units) to the overlords, such as the nobility.

Areas that resisted Menelik II's expansion to the south, such as Arusi, Wolayta, Gurage, Keffa, Harer, and partly Bene Shangul, were treated differently from those that submitted without military confrontation, such as Jimma and Wollega. In the former case, state-sponsored soldiers were implanted in the areas as part of the effort to sustain state authority. These soldiers had to be garrisoned after the conquest in order to maintain state authority. The 'implanted' soldier-settlers (known commonly as *neftegna*) were transformed into a privileged and hereditary class.[34] This gave rise to a new social relationship between the local people and the new privileged class. They and the local *balabat* (local nobility) were assigned *gebbars* (local farmers) who provided them with determined amounts of services and

[33] Gebru Tareke (1996), *Ethiopia: Power and Protest, Peasant Revolts in the Twentieth Century*, Red Sea Press, Asmara, at 65.

[34] Harold G. Marcus (1975), *The Life and Times of Menelik II: Ethiopia 1844–1913*, Clarendon Press, Oxford, at 192.

produce. Lands that were not cultivated until the conquest became in principle, 'Emperor's lands' and were sold to buyers principally from the north. Settlers on these latter lands were not owners of the lands as in the previous case, but tenants who worked on the lords' lands.[35]

Another social fact to note relates to negative stereotypes. Such stereotyping was mutual. Regional and cultural symbolism and stereotypical depictions were common but there seems to be an agreement that the northern aristocrats in charge of the southern conquest were characterised as considering themselves more dignified than all other groups, north and south. By looking at them from the northern cultural perspective, they considered the people of the new south as uncivilised and hawkish.[36] However, as time went by, social assimilation continued with increased interaction.

Although most aristocrats and landowners were those that came with the incorporating state machinery, the view that there was a coincidence between class and ethnic origin in the south would be misleading. For one, the ruling aristocracy was made up of different groups of Amhara, Oromo, Gurage, Tigre and others who displayed the culture and religion of the imperial state. One should also note that there were many wealthy and powerful locals, and poor and helpless settlers at the same time.

As earlier noted, in the parts of the south (Nekemt, Kelem, Bene Shangul, Jimma, Gubba and Aussa) that recognized the imperial state willingly, power decentralisation akin to older times was allowed to continue. They were made tributaries with their autonomy and local rulers kept intact. In these provinces, there were no imperial settler-soldiers (*neftegna*) or imperial governors. The hereditary chiefs or governors in place were allowed to continue, in return for their tribute payments, with their power to impose taxes and all other administrative and judicial decisions.[37] This arrangement continued until it was ended by Emperor Haile Sellassie in 1932 foreshadowing his zeal for centralisation of power that was to follow.

The third relationship concerns what can rather be termed as a 'weak-relationship' between the state and the lowland inhabited by the pastoralists and hunters-gatherers. These are made up of the mostly Muslim population of

[35] Donald Donham, 'Old Abyssinia and The New Ethiopian Empire: Themes in Social History', in Donald Donham and Wendy James (eds.) (1986), *The Southern Marches of Imperial Ethiopia: Essays in History and Social Anthropology*, Cambridge University Press, Cambridge, at 41.

[36] Marcus, *supra*, 34, at 193.

[37] Allesandro Triulzi (1986), 'Nekemte and Addis Abeba: Dilemmas of Provincial Rule', in Donham and James (eds.), *supra*, note 35, at 58.

Somali, Afar, parts of the Oromo people, and those inhabiting the south-western and western lowlands bordering the Sudan and the present South Sudan. The failures of the imperial state were most starkly shown in its relation to these people, as it generally remained much less engaged with them. The lack of the state's presence in these areas had kept the interaction between the state (and its bureaucratic apparatus) and the lowland population at a minimum level until some symbolic changes came after 1974. Although most of the time these people generally accepted their positions as tributaries, they reacted dramatically when they were able to do so as they did under Ahmed Gragn in the 16th century.

Writing about the situation of peasants in the northern and central Ethiopia during the middle ages, Richard Pankhurst observes that the peasants are so grievously exploited by the lords so much so that they had no incentives to produce.[38] Furthermore, they received added misery from soldiers' exactions that plundered the homes and fields of the peasantry as well as from the responsibility to provide food and shelter to soldiers and other passers-by. The abusive treatment the peasants received at the hands of the soldiers and the travelling lords who would come with many entourage would leave the peasants demoralized and dishonoured. Credible historiographical sources document that throughout the Middle Ages, even before the Christian kingdom's major confrontation with emirs of Adal and the expansionist movement of the Oromo clans, there had been constant conflicts in the different parts of the country.[39] This phenomena, its destructive effects aside, no doubt have contributed to the intermixture of the various communities of Ethiopia. This situation of war and conflict continued and, with it, the misery of the peasants and the exactions well into the second half of the 19th century.

In this connection, Levine says that at least for the last two millennia the various linguistic communities inhabiting Ethiopia today have been in more or less constant interaction through trade, warfare, religious activities, migration, intermarriage, and exchange of special services.[40] People of diverse origins and backgrounds crisscrossed "Greater Ethiopia" and met, interacted and traded for centuries not only in numerous sub-regional markets but also in the larger regional markets such as Aksum (in the North), Harar (in the

[38] Richard Pankhurst (1992), *A Social History of Ethiopia: The Northern and Central Highlands from Early Medieval Times to the Rise of Emperor Tewodros II*, The Red Sea Press, at 9.

[39] *Ibid*, at 12.

[40] Donald N. Levine (1974), *Greater Ethiopia: The Evolution of a Multi-ethnic Society*, University of Chicago Press, Chicago, at 29-32.

Southeast), Gonder in the Northwest, and Bonga (in the Southwest).[41] Drawing on historical evidence, Levine aptly characterises the act of the late 19th century by which the modern Ethiopia was formed as "an ingathering of peoples with deep historical affinities".[42]

It is well documented that Emperor Haile Selassie came with progressive ideas, to open up the country to modern education, to modernize the economy and improve its international relations.[43] This started off with the enactment of the 1931 Constitution on the first anniversary of his coronation. But at the same time, he was predisposed to centralizing power in his hands. He was not happy with the semi-autonomous nature of the regional governors who were in charge of their mini-armies. He abolished hereditary noblemanship and centralized security and armed forces.[44] After the restoration of his administration in 1941, after the defeat of Italy, he continued the centralization drive more vigorously.

The 1942 Decree on provincial governments brought a fundamental paradigm shift that put an end to centuries-old system of power relations in which regional rulers were masters of their own territories, with only tribute-paying relations to the king of kings at the centre.[45] Regional rulers were deprived of the control on provincial finance and taxes. The Decree made the administrative regions it created directly accountable to the centre. It gave the Emperor the power to appoint all governors-general of provinces (Teklay Guizats), governors/directors for the sub-provinces (Awraja Guizats), as well as for the districts (Woreda Guizats) throughout the Empire.

Bit by bit, Emperor Haile Selassie concentrated power in his hands, giving it a more solid constitutional expression in the 1955 Revised Constitution which gave the Emperor undisputed and indisputable executive, legislative and judicial powers, leading him to single-handedly make, among others, such ill-advised measures like the dissolution of the Eritrean federation (with Ethiopia) in 1962. The constitutional declaration of the Ethiopian Orthodox Church as "the Established Church of the Empire … supported by the state"[46]

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[41] *Ibid*, at 41.
[42] *Ibid*, at 28.
[43] See, Bahru Zewde (2002), *Pioneers of Change in Ethiopia*, *James Currey*; Tekle-Hawariat Tekel-Mariam (2006), *Auto Biography* (in Amharic), Addis Ababa University Press.
[44] Gebru, *supra*, note 33, at 18.
[45] James C.N. Paul and Christopher Clapham (1972), *Ethiopian Constitutional Development: A Sourcebook*, Haile Selassie I University, Addis Ababa, at 552.
[46] Art 126, 1955 Revised Constitution of Ethiopia.

also no doubt alienated the Muslim community and followers of other Christian variants all around the country.

Furthermore, with the conviction to mould "one nation" out of the multitudes of ethno-linguistic communities in the country, the imperial regime had taken successive measures that undermined the cultural and linguistic autonomy of the groups. For example, the official or public use of the Tigrigna language for communication as well as for schools even in Tigray and Eritrea were proscribed.[47] Markakis notes that other indigenous languages (than Amharic) were not allowed "to be printed, broadcast, or spoken in public functions, and attempts to study the culture and history of other groups were decidedly discouraged". One could say that the history of autonomous self-rule by the Tigray province had been on the decline from Emperor Menelik's time. Added to that was the clear lack of development in the Tigray province during the entire reign of Emperor Haile Selassie, thereby lending credence to the idea of ethnic-based nationalism in that province.

Added to the above measures and decisions by Haile Selassie's government that undermined the traditional governance system as well as cultural and linguistic self-expressions of the various groups were the increasing bureaucratization, nepotism and corruption in the imperial government. The ruling oligarchy became massively engaged in amassing private gains through businesses like import–export trade and other private investments with expatriate business persons while holding office.[48] As a result, in the first half of the 1970s, in Kafa, Arsi, Illubabur, Gamo Gofa and other places in the south, the people demonstrated and demanded the removal of the governors-general citing incompetence, eviction of tenants and embezzlement of public money.[49] Undoubtedly also, there was unbalanced and inequitable distribution of schools and other social services, disproportionately concentrated in Addis Ababa and Eritrea.[50]

Haile Selassie's government was debased because of the concerted opposition to it by student revolutionaries and other sections of the society. There was unity in portraying what was believed to be the main failures of the imperial administration, chief among which include, the authoritarian political culture, the exploitative social relations, lack of democratic representation,

[47] Markakis, *supra*, note 10, at 230.
[48] Harold Marcus (2002), *A History of Ethiopia*, University of California Press, Oakland, at 167-69.
[49] Andargachew, *supra*, note 20, at 46.
[50] Marcus, *supra*, note 48, at 165.

and the miserable economic conditions of the peasantry[51], most starkly demonstrated by the devastating famine in Wollo province in early 1970s. "'Education for children of the poor," "bread for the hungry," "land to the tiller," and "down with monarchical rule"' were the popular slogans of the student revolutionaries.[52] The quest for representative government (*hizbawi mengist yimesret)* was loud and clear. Restrictions on the ethnic and cultural self-expressions made by the imperial regime were also highlighted during the opposition to the regime.

Soon after its assumption of power, although it took such welcome measures as the redistribution of land to the farmers by nationalizing rural and urban land in 1975, the Derg started to implement sweeping measures that were against freedom and political pluralism. Already by 1976, it declared, through what it called "program of national democratic revolution", its commitment to vanguard proletariat party. It stamped out all kinds of dissent and opposition starting with the "red terror" campaign it waged against generations of students and other educated sections of the country. It made any alternative voice, association or party illegal. It ruled the country with a litany of proclamations, regulations, circulars, edicts and orders for 13 years till 1987 when it enacted the PDRE (People's Democratic Republic of Ethiopia) constitution which unequivocally instituted the Workers' Party of Ethiopia (WPE) –"guided by Marxism-Leninism"– as the vanguard party of the working people.

It has also declared the notion of "democratic centralism" and command political structure as its modus operandi. Power was tightly centralized in the hands of Mengistu Haile-Mariam. Only lip-service was paid to the demand for cultural and linguistic rights of the ethno-linguistic communities feeling excluded by the Ethiopian state. The last desperate attempt at decentralization was far from genuine and was hollow, as all other decisions of the regime were. Decided by the WPE without grass-roots participation, the autonomous regions created by law (Proclamation No. 14/1987) which divided up the country into twenty-four administrative and five autonomous regions were not given any meaningful powers.

In the final analysis, through its socialist principle of economic and political centralism the military government ended up becoming more

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[51] Gebru Tareke (2009)*, The Ethiopian Revolution: War in the Horn of Africa*, Yale University Press, at 27; Assefa Meheretu (2017), 'Delegitimization of the Collective Identity of Ethiopianism' 11 (1&2) *International Journal of Ethiopian Studies* 45, at 47.

[52] Bahru, *supra*, note 18, at 153-54; Gebru, *ibid.*

absolutist than the imperial regime had been. It ruled out political pluralism in favour of a one-party system; it sought to deal with all demands for autonomy and self-rule militarily. Its single important achievement of land redistribution was rendered nugatory by its forced sale of products to the parastatals. Finally, its northern war for which young men were forcefully conscripted into the army eroded the support of farmers, speeding up its downfall. The joint military operations of TPLF and EPLF, coupled with Derg's loss of popularity internally and financial support externally, brought about its ultimate demise in 1991.

The Ethiopian state, although it speaks the Amharic Language and (till Emperor Haile Selassie I) professed Orthodox Christianity, it does not represent any one ethno-linguistic group. Again, with Emperor Haile Selassie I as its last monarch, all the preceding ruling class came to power with military power and the claim to hereditary rulership, such as the Solomonic line (and of course with some tactical smartness outplaying rivals and convincing followership). The Derg, as it is well known, was comprised of junior army officers that have come from different ethno-linguistic backgrounds brought together by sheer happenstance and thereafter stuck together by common purpose, establishing itself as a new ruling group without any pedigree such as the Solomonic line[53] nor the representation of any one ethno-linguistic group. It is my argument therefore that the past Ethiopian governments (representing the Ethiopian state in its political sense) should be distinguished from any one Ethno-linguistic group and be judged on its own. They were oppressive and authoritarian. They cannot be taken to be "x" or "y" ethno-linguistic group's government. Because they were not.

As a further testimonial to this, the popular discontent to the imperial as well as Derg's governments were happening in most places of the country without fallowing any ethnic lines. For example, in 1968, the people of Gojjam, (a province in the present day Amhara region) staged protest against the imperial regime angered by the imposition of agricultural tax and because of the bad administration of a Shewan governor (an Amhara from Shewa). The rumour that the government was planning on the dissolution of the communal *rist* ownership of land in the area was also one of the catalysts of the rebellion.[54]

[53] Even if we take this as credible story, King Solomon was an Israelite (who never set foot in Ethiopia), and Queen Sheba or Saba was a certain 10th century BC Queen. Who would she represent ethnically?

[54] Gebru, *supra*, note 33, at 84.

Likewise, the peasants of Bale (in the present-day Oromia region) rebelled in the 1940s and 1960s. The causes were a combination of resentments resulting from the unfair distribution of political and economic resources, land alienation, unfair taxation, and ethnic and religious discrimination.[55] Similar uprisings occurred in the present day Southern and Sidama regional states in the 1960s protesting the serfdom and land alienation by the capitalists associated with the imperial ruling class.[56] In Tigray there were already rebellion in 1943 because of resentment against the appointment of a non-Tigrean governor and the introduction of Amharic as a medium of communication in all state institutions.[57] There were also other rebellions in 1958 Wollo (in present-day Amhara region); and in 1947 and 1958 in Hararghe (in present-day Oromia and part of Somali regions).[58] These rebellions that took place in different parts of the country underscore the overwhelming similarity of the situations of the peasants, semi-pastoralists and the pastoralists in the Ethiopian society and the targets being the state not a particular ethnic group.

It is my view that the above discussion demonstrates that the oppressive mode of governance of the pre-1991 governments and their inability to deliver economically and socially were the main sources of the political crises contemporaneously experienced. If this view is correct, it equally means that the national oppression thesis, by the TPLF and its likes, for explaining the 20th century governance crises of the Ethiopian state was erroneous.

4. The Political Solutions Prescribed by the EPRDF and its Problems

We have noted earlier in this article that the TPLF was the most ardent proponent of the question of nationalities. Waging a rural-based armed struggle starting from the mid-1970s, the Coalition it formed and led –the EPRDF– assumed state power under its leadership in May 1991. At the end of the 1980s, the goal of the TPLF was set to be the restructuring of the

[55] *Ibid*, at 125.

[56] Charles W. McClellan, 'Coffee in Centre-periphery Relations: Gedeo in the early twentieth century', in Donham and James (eds.) (1986), *The Southern Marches of Imperial Ethiopia: Essays in History and Social Anthropology*, Cambridge University Press, Cambridge, at 5.

[57] Gebru, *supra*, note 33, at 77.

[58] *Ibid*, at 35.

Ethiopian state, although earlier it concentrated on liberating the Tigray people from the oppression of what it calls "Shewan Amhara ruling class".[59]

When it assumed power in May 1991, it, with the alliance of some other organizations that purported to represent various ethno-linguistic communities of the country, quickly moved to putting into effect the legal and institutional structures to realize its political program of the right to self-determination, including secession, to every NNP in the country. This right was recognized in the 1991 Transitional Period Charter. As noted earlier in the article, the 1995 Constitution also entrenched the various elements of this right more strongly. The Constitution created nine states as members of the federation but left the door open for any NNP to request for its own federating state unit.[60] In fact, over the last two years, three additional regional states – the Sidama regional state, the South-western Ethiopia Peoples' regional state and South Ethiopia Peoples' regional state– broke away from the multi-ethnic Southern NNPs regional state thereby making the number of states 12.[61]

Now, the key question is 'have the social and political problems of the Ethiopian NNPs been resolved by the constitutionally entrenched self-determination rights and the institutional structures created by the TPLF-EPRDF?' The state of reality of the country at the present time would definitely answer this question in the negative. The federal government is at war with the TPLF for close to two years now. It has also been waging low intensity military campaign against the OLA-Shene (Oromo Liberation Army) since late 2018. Thousands have been displaced from Oromia region because of the latter conflict. Massive ethnic-based displacements have taken place between Oromia and Somali regions in 2017, and between Oromia and the Southern region in 2018. They have been happening in the Beneshangul-Gumuz region almost regularly.

People who have been rendered "not persons of the soil" because of the ethnic territorialisation of the country have been relegated to second-rate citizenship in the regions or sub-regional units, in which they reside, for decades now. Political organizations, other than those in the ruling coalitions

[59] See, Aregawi Berhe (2008), *A political history of the Tigray People's Liberation Front (1975-1991): Revolt, ideology and mobilisation in Ethiopia*, PhD thesis, University of Amsterdam.

[60] Art 47, the 1995 Constitution of Ethiopia.

[61] At the time of the writing of this article, discussions on these matters have been underway, and the final agreement has not been conclusively reached on the fate of the truncated Southern NNP regional state.

–EPRDF and allied parties previously and the PP since 2019– who purport to represent titular groups, including the major ones like the Oromo, the Amhara, Somali, Tigre, Sidama, Afar, Wolayta, Gedio and others have never stopped pointing out that all is not well with the rights of their respective peoples and the overall democratic governance of the country.

Seven elections took place during the tenure of the EPRDF: 1992 (regional council election during the transitional period); 1994 (for the constituent assembly to ratify the Constitution); 1995 (first general elections under the Constitution); and the four subsequent general elections of 2000, 2005, 2010 and 2015. One (delayed) general elections took place in 2021 under the tenure of the PP. Objective assessments of all the EPRDF's elections documented that none of the elections came close to meeting the minimum international standards of free and fair elections. Although the 2021 general elections depict major departure from the previous ones, holistic-election cycles-based assessment will no doubt give it a fail mark from democratic electoral standards' point of view.

Three decades after the right to self-determination and ethno-linguistic based federal arrangement have been rolled out as a panacea for, among others, the political ills that plagued the Ethiopian body politic, most of the political problems of the mid-20th century remain unaddressed, while, as noted shortly above, more problems have been added on top. My contention is that the political and legal solutions designed by the TPLF-EPRDF were results of wrong diagnosis of the real political problems of the country. The legal-institutional structures, including the 1995 Constitution, that have been put in place by the TPLF-EPRDF were not properly designed. Principles and rules of the constitution have not been carefully and objectively designed to serve as bulwarks against manipulation by big or small ethno-linguistic groups, unilaterally or in a cliquish manoeuvre. Similarly institutions that serve as enablers of inclusive democratic governance for ethno-linguistically divided societies, like Ethiopian, were not comprehensively put in place. At the same time, the Constitution contains near-utopian declarations like the right of every NNP to found its own state within the federation which, owing to its impracticality, have become sources of conflict.

Major issues such as executive power-sharing at national and sub-national levels and the effective participation of the NNPs in other national and sub-national bureaucratic and governmental economic institutions have been ignored. "In reality, what [the] constitutional design has done (and continues to do) is to put the fate of the bulk of the [ethno-linguistic communities] in charge of one or two or a few [NNPs] who control the balance of power at a

given time".[62] This seems to lend credence to comments to the effect that the whole ethnic federal self-determination scheme of the post-1991 period were put in place by the TPLF as mere 'divide and rule' tactic. Now, this seems inherited by the Oromo political elites that control the reins of power since April 2018 under the banner of the PP.

5. Conclusion and Implications

I believe the facts and arguments presented above can show that the legal, political and institutional solutions put in place by the TPLF-EPRDF –on the backdrop of its diagnosis of Ethiopia's political problems as emanating from national oppression– have not fixed most of the problems while they have generated new types of problems. Hence my argument that inappropriate institutional design and the democracy deficit have been the real problems. The unfounded "national oppression" thesis that guided TPLF-EPRDF's institutional design has taken our attention away from the real problem: the inability to install a representative democratic government answerable to the people. This therefore calls for an honest assessment of the problems and taking of appropriate measures which include renegotiating the relevant parts of the constitutional design.

The first important step that needs to be taken is to ensure the existence of genuine democratic dispensation whereby citizens and political organizations can freely take part in the political life of their country, advancing their preferences and viewpoints. This in my view is the key to fixing all other problems. As part of the democratic exercise, all political actors should engage in a genuine dialogue to identify the problems and come to consensus on how to resolve them.

As noted earlier, some of the outstanding problems cannot be fixed without the redesign of the relevant parts of the Ethiopian Constitution. Constitutional provisions and institutions that ensure equal citizenship of all Ethiopians at every corner of the country need to be defined in the Constitution. Furthermore, I believe that there is the need for putting in place appropriate ways by which the democratically mandated representatives of the Ethno-linguistic communities and other ideologically based political parties equitably share in the executive power at the national and sub-national levels. The same holds true for equitable representation of the ethno-linguistic communities in other national and sub-national bureaucratic and

[62] Getachew A. Woldemariam (2014), *Constitutional Protection of Human and Minority Rights in Ethiopia: Myth v. Reality*, PhD Thesis, The University of Melbourne, at 82.

governmental economic institutions. The army and the security apparatus cannot be left out as well.

For doing this, instructive examples from well-functioning federal systems, such as Belgium, Switzerland, India and Nigeria could be assessed. In particular, I find the Nigerian "Federal Character Commission" very relevant for dealing with the equitable representation deficit of the current Ethiopian arrangement.

As it is well known, there are more than 300 ethno-linguistic groups in Nigeria, including the Hausa Fulani, Ibo and Yoruba, the three major groups.[63] The Nigerian Constitution provides for state and local balance in the appointment of government officials by proscribing predominance of persons from any few states or any few ethnic or other sectional groups in the society.[64] The Nigerian Federal Character Commission is an institution established by the Nigerian Constitution to realize this constitutional policy. Rutimi Suberu observes that the federal character principle is '[t]he most innovative and remarkable feature' of Nigerian federalism.[65] Suberu further notes:

> Indeed, the federal character principle has spawned a vast repertoire of more or less informal consociational practices that are designed to distribute, balance and rotate key political offices among the country's states, ethnicities, religious groups, regions and other cultural or geographical constituencies, including the six quasi-official geo-political zones (northwest, northeast, and middle-belt in the north, and southwest, southeast, and Niger delta or south-south in the south).[66]

The Federal Character Commission is empowered to implement the federal character principle through, among others, working out an equitable formula, subject to the approval of the national assembly, for the distribution of all cadres of posts in the public service of the federation and of the states; the armed forces of the federation; the Nigerian police force; and other government security agencies, government owned companies and parastatals of the states. It is also charged with the responsibility to promote, monitor and

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[63] See, Allswell Osini Muzan, 'The Nigerian Constitution and Minority Rights Guarantees ' in D A Guobadia and A O Adekunle (eds), Ethnicity and National Integration in Nigeria: Recurrent Themes (NIALS Press, 2004) 213.

[64] Arts 14(3)-(4), Nigerian Constitution (1999).

[65] Rutimi Suberu, 'The Nigerian federal system: performance, problems and prospects' 28(4) *Journal of Contemporary African Studies* (2010) 459, at 465.

[66] *Ibid*, at 466.

enforce compliance with the principles of proportional sharing of all bureaucratic, economic, media and political posts at all levels of government.

Moreover, it has the power to take legal measures, including the prosecution of the head or staff of any ministry or government body or agency which fails to comply with any federal character principle or formula prescribed or adopted by it. The Commission is empowered to ensure that every public company or corporation reflects the federal character in the appointments of its directors and senior management staff, regardless of any contrary stipulation in other laws. A design of an institution along this line can go a long way in curbing the prevalent arbitrariness in Ethiopia regarding equitable representation.

Electoral system redesign is another matter that needs attention. True, the plurality variant of the majoritarian electoral system in place for parliamentary elections in Ethiopia has not been genuinely practiced. In that regard, the problems with past elections have not been linked to the electoral formula. But, given the ethno-linguistic and other political diversity extant in the country, an appropriate variant of proportional representation electoral system or a hybrid one is believed to suit Ethiopia better.[67] Deliberation and agreement by the major political actors on a more suitable electoral formula have to be made.

Strengthening the institutional structure for the protection of human and minority rights has to also be prioritized. I believe several gaps exist in the current constitutional dispensation in this regard. But I point out just two here. The first one is the need for the incorporation of the notion of "federal paramountcy" in the Constitution which is now missing. Constitutions of the US, Switzerland, Russia and Germany do specifically incorporate the principle of the paramountcy of federal laws over state laws either in relation specifically to rights or in all cases.[68] This principle is necessary to, among others, make sure that all Ethiopian citizens and people enjoy comparable rights and quality of life. The second important principle that need to be included in the federal Constitution is an explicit provision that prohibits states from making any discriminatory treatment or preference between any

[67] See, eg., Arend Lijphart (2004), 'Constitutional Design for Divided Societies' 15(2) *Journal of Democracy*, 96; Andrew Reynolds et al. (2005), *Electoral System design: The New International IDEA Handbook* <ESD_del1 (anfrel.org)> (accessed on 18 June 2022).

[68] See, eg, United States Constitution, art 6; Swiss Constitution, art 49; German Constitution, art 31; Russian Constitution.

of their citizens on any grounds, such as ethnic or place of origin or any other status, nor to restrict or abridge their rights or privileges on such grounds.

The need to revisit the constitutional review system of the country put in place in the current constitutional arrangement has been hammered by many commentators. It is also my view that there is a need to put in place a judicial body that will be guided by judicial independence principles and become an impartial and competent arbiter of constitutional disputes. It can be fashioned along the constitutional court proto-types or even along the French *Council Constitutionel* with the adaptations and nuancing that will be needed.

The final implication I want to draw from the main claim made in this article is the need to redesign the parliament of the federal government. As it is one of the basic rules of federal arrangements, the parliament has to have two (bicameral) legislative chambers. This should be done by redefining the mechanisms of constituting the House of Federation which will not anymore have a constitutional review power as per the suggestion made earlier. As in other federations that are well functioning, the upper house could be designed in such a way that it protects the interests of the federating units of the federation at the federal level and takes part in other shared-rule responsibilities. ■

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Ethiopia's Criminal Justice System relating to Children in Conflict with the Law: Interrogating the Legal Framework on Measures and Penalties

Belayneh Berhanu Nega [♣]

Abstract

This article critically examines the provisions of the Criminal Code governing measures and penalties relating to children in conflict with the law in light of the principles of 'detention or imprisonment as a measure of last resort' and 'for the shortest period'. The assessment shows that the Ethiopian criminal justice system does not adhere to the principle of 'detention as a measure of last resort' since corrective detention and home arrest are measures of first resort. Imprisonment on the other hand is a measure of last resort as it applies after the failure of the measures for the most serious crimes and if the child is incorrigible. The system is not designed to ensure full compliance with the principle of 'detention or imprisonment for the shortest appropriate period'. The article also identifies lack of clarity in the provisions of the Code which can exacerbate the preceding problems. Therefore, the Criminal Code provisions need revision to adhere to the principles and must clarify the existing provisions.

Key terms:

Ethiopia · Child Justice · Criminal Code ·Measures · Detention · Imprisonment· Last Resort · Shortest Period

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1. Introduction

The aim of child justice is the rehabilitation of the child and making them assume a constructive role in society. Accordingly, the Convention on the Rights of the Child (CRC) considers custodial response as a measure of last resort (Art. 37(b)). Hence, a child justice system should provide a wide variety of dispositions that are non-custodial to be imposed on a child found guilty of a crime. Further, the imposition of certain forms of penalties on children –such as death penalty and life imprisonment without parole– are prohibited.

Ethiopia has ratified the CRC, and in effect, this standard constitutes an integral part of Ethiopian law by virtue of Article 9(4) of the FDRE

Constitution.[1] The implementing law, the Criminal Code, contains detailed rules regarding measures and penalties applicable for children aged from nine to fifteen years. The special measures and penalties provided in the Code (Arts.158-169) and suspension of sentence (Art.171) are principally applicable to this group of children.

This article focuses on the measures and penalties applicable for children aged from nine to fifteen years. Throughout the article, the words 'child' and 'children' refer to this group of children. The article is doctrinal and it critically examines these measures and penalties in light of the international and regional standards that govern child justice.[2] To this end, the article first highlights the guiding principles in sentencing children as enshrined in the CRC and other relevant standards.

2. Dispositions in the Child Justice System: Brief Overview of the Guiding Principles

According to the general principle of the child justice system provided under Article 40(1) of the CRC, the treatment of children in conflict with the law (CICWL) shall be 'in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others'. The same provision requires the treatment to take 'into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.' In line with this grand principle, the following principles are applicable in sentencing children found guilty of the offence.

2.1 Detention or imprisonment as a measure of last resort

Article 37(b) of the CRC provides that imprisonment of children shall only be used as a measure of last resort. Similarly, Rule 17.1(b) of the Beijing Rules provides that restrictions on the personal liberty of a child shall be imposed only after careful consideration and shall be limited to the

Frequently used acronyms:

CICWL	Children in conflict with the law
CRC	The Convention on the Rights of the Child

[1] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, Federal Negarit Gazeta, Year 1st, No.1, Art.9 (4).

[2] The article focuses on doctrinal legal research and it can facilitate pursuits of future research that include empirical data to corroborate the arguments.

minimum.[3] Thus, non-custodial measures should be the norm, and detention can only be used where they are not considered appropriate or effective.[4]

Rule 17.1(c) of the Beijing Rules provides that children should not be deprived of their liberty unless they are guilty of committing a violent offence against a person or have been involved in persistent serious offending and that there is no other appropriate response. The phrase 'no other appropriate response' should not be interpreted as an absence of alternative measures, but to situations where other measures are not suitable or beneficial to the child.[5] In other words, a custodial sentence should not be imposed on a child just because there is no other suitable placement.[6] Courts must give due consideration to whether a custodial sentence is the last resort.[7] That means they must first consider all reasonable alternatives to detention.[8] This is one of the most fundamental principles underpinning a rights-compliant child justice system.[9] To give effect to this principle, a national child justice system should make available a wide variety of non-custodial measures (Art. 40, Sub-article 4 of the CRC and Rule 18 of the Beijing Rules).

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[3] United Nations Standard Minimum Rules for the Administration of Juveniles Justice (Beijing Rules), adopted on 29 November 1985, Resolution 40/33, Rule 19; See also United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), adopted on 14 December 1990, Resolution 45/113, Rules 1 &2.

[4] Ursula Kilkelly (2011), 'Measures of Deprivation of Liberty for Young Offenders: how to enrich International Standards in Juvenile Justice and promote Alternatives to Detention in Europe?' International Juvenile Justice Observatory Green Paper on Child-Friendly Justice, p. 21.

[5] Ton Liefaard (2019), 'Deprivation of Liberty of Children' in Ursula Kilkelly and Ton Liefaard (eds) International Human Rights of Children, Springer Nature, p.331.

[6] Carolyn Hamilton (2011), Guidance for Legislative Reform on Juvenile Justice, UNICEF, pp.91-92; United Nations Office on Drug and Crime (UNODC) (2013), Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary, United Nations (Model law on Juvenile Justice), p. 109.

[7] UNODC, ibid.

[8] John Tobin and Harry Hobbs (2019), 'Article 37: Protection against Torture, Capital Punishment, and Arbitrary Deprivation of Liberty' in John Tobin (ed), The UN Convention on the Rights of the Child: A Commentary, Oxford University Press, p. 1471.

[9] Ursula Kilkelly, Louise Forde and Deirdre Malone (2016), Alternatives to Detention for Juvenile Offenders: Manual of Good Practices in Europe, International Juvenile Justice Observatory, p.13.

2.2 Detention or imprisonment for the shortest appropriate period

When detention or imprisonment of CICWL is inevitable, it must be for the shortest appropriate period.[10] What constitutes the 'shortest appropriate period' has to be directly linked with the length of time considered to be appropriate to reintegrate the child and help him or her assume a constructive role in society.[11] Legal provisions providing that a sentence for a child shall be half of that of an adult or some other proportion do not fulfill this purpose. In all cases, legislation should require a court to determine the period needed to provide the child with the required intervention.[12]

Recognizing the harm caused to children by deprivation of liberty including its negative effects on their prospects for successful reintegration, the Committee on the Rights of the Child recommends states parties set a maximum penalty for CICWL that reflects the principle of the 'shortest appropriate period' as contained in Article 37 (b) of the CRC.[13] Concerning the minimum sentence, the Committee considers mandatory minimum sentences as incompatible with the child justice principle of proportionality and with the requirement that detention shall be a measure of last resort and for the shortest appropriate period, and recommends that courts should start with a clean slate.

To ensure observance of the principle that detention or imprisonment should be for the shortest appropriate period, conditional release of children or parole needs to be entrenched in the national child justice system. The Beijing Rules explicitly recognize the early release of children from detention centers[14] upon evidence of satisfactory progress towards rehabilitation. This applies also to a child who had been deemed dangerous

[10] Convention on the Rights of the Child, adopted on 20 November 1989, entered into force 2 September 1990, resolution 44/25, Art. 37(b); Beijing Rules, Rule 17.1 (b) & (c) and 19; Havana Rules, Rules 1 and 2; Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines) (Recommended by ECOSOC Res 1997/30), para. 18.

[11] Hamilton, *supra* note 6, p. 93; Eva Manco (2015), 'Detention of the Child in the Light of International Law- A Commentary on Article 37 of the United Nation Convention on the Rights of the Child', Amsterdam Law Forum, Vol.7, No. 1, p. 63; Liefaard, *supra* note 5, p. 332.

[12] Hamilton, *supra* note 6, p. 93.

[13] Committee on the Rights of the Child, General Comment No.24, Children's Rights in Child Justice System (18 September 2019) CRC/C/GC/24, para. 77.

[14] Rule 28.1.

at the time of their institutionalization.[15] The nature or seriousness of the offence is not the relevant consideration to release the child conditionally.

Although the CRC does not mention conditional release in its Articles 37 and 40, the Committee incidentally touched on this issue in its latest general comment under the rubric of 'deprivation of liberty including post-trial incarceration'. In spite of its caption, the explanatory paragraphs talk much about pretrial detention.[16] The Committee simply obliges states to provide regular opportunities to permit early release from custody[17] without further delving into what should be the period to be served before release or the interval of time for review; the conditions that can be imposed while on probation; supervision and assistance to be provided for the child; and effects of breaches of the conditions.

3. Measures under the FDRE Criminal Code

3.1 Measures as first resort

After finding a child aged nine to fifteen years guilty of a crime, the court is required to order one of the measures incorporated in the Criminal Code depending on the circumstances of the child concerned and the nature of the crime. Article 157 of the Criminal Code provides that:

> In all cases where a crime provided by the criminal law or the Law of Petty Offences has been committed by a [child] between the ages of nine and fifteen years (Art. 53), the Court shall order one of the following measures having regard to the general provisions defining the special purpose to be achieved (Art. 55) and after having ordered all necessary inquiries for its information and guidance (Art. 54).

The word 'shall' in this provision indicates that it is mandatory to impose one of the measures[18] provided in the Code. This provision, when read together with Article 166 of the same Code, indicates that imposition of one of the measures is a measure of first resort irrespective of the gravity of the crime.

[15] Commentary to Rule 28.1 of the Beijing Rules; emphasis added.
[16] Committee on the Rights of the Child, General Comment No. 24, paras. 82-88.
[17] Id., para. 88.
[18] Nonetheless, a combination of reprimand and other measures can be ordered. See Article 160 (2) of the Criminal Code of the Federal Democratic Republic of Ethiopia, Proc. No. 414.

Unlike in the repealed 1957 Penal Code (Art. 161), the term 'law of petty offences' is omitted in the Amharic version which may send an impression that the measures only apply to ordinary crimes. This is not, however, the case because the Code of Petty Offences recognizes school or home arrest (Art. 750 (2)).[19] In addition, the nature of some measures justifies their applicability to a child who commits petty offences. In this regard, it is possible to argue that reprimand and admission to curative institution can apply to a convicted child who committed petty offences. This is because it is proper to reprimand a child who transgresses the code of petty offences.

Admission to a curative institution is required when the condition of a child requires treatment due to his/her mental development, health, or addiction to drugs or other substances.[20] Therefore, there is no reason to exclude this measure where a child commits petty offences. I argue that the rest of the measures (corrective detention and supervised education) do not apply to petty offences because corrective detention is applicable for serious crimes (Art. 162, Amharic version), and supervised education results in the removal of the child from his/her family, which should be a measure of last resort[21], and handed to a relative (Art.159 (1)), second alinea).

3.2 Admission to curative institution

This measure (of admission to a curative institution) in accordance with Article 158 of the Criminal Code applies to a child whose condition requires treatment and where s/he is feeble-minded, abnormally arrested in his development, suffering from a mental disease, epileptic or addicted to drink, abuse of narcotic and psychotropic substances or other plants with similar effect. The court shall order admission to a suitable institution where s/he shall receive the medical care required by his/her condition. This provision must be read together with Articles 48, 49, and Articles 129 and that follow it. That means, for a child to be subject to this measure, they[22] must be responsible for their actions. In other words, the underlying conditions mentioned in Article 158 must not deprive of their faculty. The child must at least be partially responsible. This is because, according to Article 53(2) of

[19] However, as argued below in this paper, in light of the principle that detention shall be a measure of last resort, home arrest shall not be a measure of first resort for ordinary crimes, let alone for petty offences.

[20] *See* Article158 of the Criminal Code.

[21] Beijing Rules, Rule 18.2.

[22] Singular they/ their/ them etc. is used in this article to avoid repeated usage of his/her, etc.

the Criminal Code, the measures including this cannot be ordered unless the child is convicted.

3.3 Supervised education[23]

If the child is morally abandoned or is in need of care and protection or is exposed to the danger of corruption or is corrupted, measures for their education under the supervision of their relatives, or any reliable person or organization shall be ordered. As the term 'shall' indicates, ordering such measures is mandatory. This indicates the protective and rehabilitative approach taken by the Ethiopian criminal justice system. It is the condition of the child that matters here. Thus, one may argue that this measure is applicable irrespective of the nature of the crime.

The measure does not necessarily entail requiring the child to attend regular education. This is because requiring the child to regularly attend school is one of the conditions that may be attendant to the original measure as provided under sub-article 2 of the same provision. If that is the case, the question is what kind of education or measure can be taken against a child found in the situations mentioned in the provision? I argue that the education that is envisaged is a kind of moral and ethical education under the supervision and care of the above-mentioned persons or institution. This can be inferred from the situation of the child in which s/he is found i.e. morally abandoned or not properly reared or exposed to moral corruption (corrupted).

That means if a child is in such situation, the proper response is to place them under the care and supervision of the supervisors and receive moral education, and be properly reared to address the causes of criminality. To that effect, as a condition, a child may be required to regularly attend a school or undergo apprenticeship pursuant to sub-article 2. This can be inferred from the Amharic version of sub-article 1 which includes 'proper upbringing' as an element of the measure and paragraph 3 of the same sub-article that obliges the supervisors to ensure the good behavior of the child.

Requiring the child to attend school regularly is possible if the child who was/is attending school fails to entirely or regularly do so. The term ‘regularly’ indicates that the child has had access to education previously. On the other hand, an order to undergo apprenticeship can work for those who have no access to education at all.

Another issue as regards the order of attending school or apprenticeship is who should cover the educational/apprenticeship expenses if the child had

[23] Id., Art. 159.

stopped the education/was out of school due to poverty. Is it the government or supervisors that are obliged cover the cost? As can be inferred from the obligation of the supervisors stated in the same provision they are required to undertake to see to the good behavior of the child. Though the provision also provides that if relatives are incapable, the child shall be entrusted to another person, the term 'incapable' refers to their legal capacity to discharge the above-stated obligation and not to any financial capacity. This can be inferred from the Amharic version, which does not mention incapability to ensure the child's education as used in the English version.

The child shall be entrusted either to relatives or if s/he has no relative/s or if the latter are proved to be incapable of ensuring the child's education[24], the child shall be entrusted to a person (guardian or protector), a reliable person, or organization for the education and protection of children.[25] The supervisors shall undertake in writing before the court that they will, under their responsibility, see to the good behavior of the child entrusted to them.[26] The local supervisory organization mentioned in Article 208 of the Criminal Code shall be responsible for the control of the measure.[27]

Another relevant issue relates to why the provision deprives the child of family care without indicating the absence of parents or legal guardians of the child or their incapability or unworthiness to discharge the obligation of guardianship and care of the child. This is because; the fact that the child is morally abandoned or not properly brought up does not necessarily mean that the child has no parents or guardians. On the contrary, the term 'morally abandoned' or 'not properly brought up' indicates that the child has parents who have abandoned their child or fail to provide proper guidance towards proper upbringing. This is because the proper upbringing of a child is the primary duty of parents.

In line with this interpretation, the provision needs to indicate whether the child has parents and their incapability or unworthiness to continue in their guardianship and that it is necessary to deprive the child of his family environment after hearing his/her view. A step must be taken to entrust this obligation to parents under a court order and when it is in the best interest of the child, instead of placing the child under the supervision of outsiders.

[24] This term is omitted in the Amharic version and seems to refer to the incapability of ensuring the good behavior of the child, which is the principal obligation of the supervisors.

[25] Criminal Code, Art.159 (1), second alinea.

[26] Id., third alinea.

[27] Id., fourth alinea

Entrusting the child without these safeguards is against the principles and aims of child rights/justice standards. That is, a child should not be deprived of a family environment unless it is necessary for the interest of the child.[28]

Furthermore, it is not clear whether these persons (relatives and other reliable persons) are duty-bound to take the responsibility of caring and supervising the child. It can be contended that other reliable persons cannot be obliged to do so as it is unlikely for the court to require them to take the responsibility of supervising the good behavior of the child whom such persons do not know. Relatives may on the other hand be obliged to take responsibility. Nonetheless, entrusting a child to unwilling relatives will, in the end, result in failure of the measure unless it is backed by a stringent liability for failing to do so.[29]

3.4 Reprimand; Censure[30]

This measure will be imposed where it seems appropriate and designed to produce good results having regard to the child's capacity of understanding and the non-serious nature of the crime or the circumstances of its commission. The measure requires the court to direct the attention of the child to the consequences of their act and appeal to their sense of duty and the determination to be of good behavior in the future. It may also be coupled with any other penalty or measure when the court considers it expedient to do so. By virtue of this provision, the Ethiopian criminal justice system recognizes the imposition of more than one measure, and measure and penalty. Therefore, if the court considers it expedient, a reprimand may be ordered together with a measure of supervised education, school or home arrest or with a measure of admission to a corrective institution.

This measure applies to crimes that are not serious in gravity. In other words, it is applicable for minor crimes (indicated in the Amharic version). Nonetheless, it is not clear what crimes constitute 'minor' for this purpose. In the face of such silence, reference can be made to Article 89 of the Criminal Code which defines minor crimes as those that entail simple imprisonment not exceeding three months or fine not exceeding One Thousand Birr. This provision is found in Book II of the Code that deals with the determination of punishments and measures, and in the section that

[28] Beijing Rules, Rule 18.2; Penal Reform International & Interagency Panel on Juvenile Justice (2012), Ten-Point Plan for Fair and Effective Criminal Justice for Children, p. 1; Commentary to the Model Law on Juvenile Justice pp.105-106.

[29] A recall or admonishment is the only measure that can be taken against the supervisors; see Art. 159 (3).

[30] Criminal Code, Art.160.

deals with general provisions applicable for both adult and child justice cases. The fact that the Code then deals with punishments for each group of the offender (adult and children) in separate sections supports this interpretation.

Nonetheless, applying the Article 89 parameter to children is not tenable for the following reasons. First, applying the same measurement for the gravity (or minor nature) of the crime to children and providing that crimes of the nature defined in Article 89 committed by children entails reprimand is redundant. This is because the punishment in both cases is a reprimand. In other words, stating the minor nature of the crime for children in view of the definition under Article 89 with the same punishment (and the absence of cross-reference to this Article) indicates that the gravity of the crime mentioned under Article 160 is different from the one in Article 89.

Second, since a child justice system is premised on the favorable treatment of children compared to adults in a similar situation, one can challenge this interpretation and recommend for courts to apply the measure to crimes of a nature higher in gravity than the ones mentioned under Article 89. For this reason and in the best interest of the child, I argue that courts shall use crimes that entail simple imprisonment as a benchmark.

3.5 School or home arrest[31]

In cases of crimes of small gravity and[32] when the child seems likely to reform, the court shall[33] order that they be kept at school or in their home during free hours or holidays and perform a specific task adapted to their age and circumstances. In light of strict interpretation of criminal law, the conjunction 'or' excludes concurrent imposition of both school and home arrest. Further, imposing both at a time unduly intrudes on the liberty of the child.

The term 'holidays' seems to refer to public holidays. In the Amharic version, however, this word is translated as rest days, which refers to both weekends and holidays. According to this provision, a child sentenced to school arrest shall be kept at a school during free time. The term 'kept at a school' indicates requiring the child not to leave the compound of the school, and not requiring them to stay in the class during breaks. Hence, this measure only works for schools that allow their students to go out of the

[31] Id., Art.161.
[32] Emphasis added. The conjunction 'and' is used in the Amharic version.
[33] Indicated in the Amharic version.

compound and the word 'compound' applies to the entire area which includes all open spaces in addition to building premises.

According to the Amharic version, if the conditions are fulfilled, the court must order this measure. It is not, however, clear as to what type of crime committed under what circumstances would qualify as crimes of 'small gravity'. Nonetheless, as mentioned above, it may include petty offences prohibited under Part of the Criminal Code that embodies the Code of Petty Offences. Moreover, one may invoke Article 89 of the Criminal Code. However, this can be challenged by virtue of the principle of equality and favorable treatment of children. This is because, while the penalty for minor crimes to be imposed on adults under Article 89 is reprimand, the measure is home or school arrest for children. Home or school arrest results in interference in the liberty of the child while reprimand does not, which is not compatible with the principles of the child justice system. Therefore, crimes of small gravity for home or school arrest shall include crimes higher in gravity than the ones mentioned under Article 89 of the Criminal Code.

As indicated in the case of reprimand, the court can use the definition of crimes that would entail simple imprisonment as a parameter. According to Article 106, simple imprisonment may extend from 10 days to three years, and in exceptional cases, to five years. Hence, courts shall use these Articles (89 and 106) together in that the minimum term of simple imprisonment for school or home arrest should not be lower than three months. For crimes punishable below this, the court may order reprimand, which is less intrusive than school or home arrest. This does not mean that reprimand should only be ordered for this degree of crime i.e. if the court deems that it would produce a good result; it may reprimand a child who committed a crime punishable with a term of imprisonment exceeding three months.

The other parameter that can be used to order school or home arrest, or reprimand is the personal circumstances of a child. It is to be noted that a measure of school or home arrest can be imposed for students or children who have homes. The stipulation that the child shall be arrested in the school during their free time supports this interpretation. However, the child who committed crimes of the nature defined above may not be a student nor have a home. In such a case, the court may reprimand the child if it thinks it would produce a good result. The fact that the child is out of school does not necessarily mean that s/he is corrupted or abandoned; the child may be doing life-supporting activities like shoe shining or selling chewing gum, biscuit, mobile cards, and so forth in the streets. Home arrest can thus be unproductive to such child's survival, and hence reprimanding them would suffice.

Considering measures and penalties from the lightest to the most severe ones is the duty of courts as provided under Article 88(3) of the Criminal Code. Thus, having (or not having) a home should not be the only consideration in determining either of the two measures. These situations which children can be found in lead one to suggest for a provision to include the appropriateness of home arrest, instead of merely considering its rehabilitative capacity.

3.6 Admission to corrective institution[34]

A child may be admitted to a special institution for correction and rehabilitation taking into account the bad character, antecedents or disposition of the child and the gravity of the crime and the circumstances under which it was committed.[35] The child shall there receive the general moral and vocational education, and other skills needed to adapt him/her to social life and the exercise of an honest activity.[36]

The term '*may*' implies that the imposition of this measure is not mandatory. The question then is what measure could a court, exercising this discretion, impose on a child under these conditions? This provision is distinct from the previous provisions. Unlike the provisions of Articles 160 and 161 which apply to minor crimes, it deals with serious crimes. Similarly, unlike Article 159 which deals with a child who is morally abandoned, in need of care and protection or exposed to corruption or corrupted, Article 162 applies to a child with a bad character or antecedent who has committed a serious crime. Hence, in the face of the presence of an exhaustive list of measures, it is not clear as to what measure could the court impose if it wants to exercise the discretion envisaged by the term 'may'.

This vagueness can be ameliorated by examining the status of the suspension of penalty under the Criminal Code. Suspension of penalty is provided under the 'common provisions' i.e. provisions common to measures and penalties. This can be interpreted as making suspension of penalty both a measure of first and last resort depending on the case.[37] The question again is when it should be a measure of first resort when pitted against this measure (corrective detention).

Its nature of first resort can be justified by taking the rule of the child justice system when it comes to dispositions. In the international child

[34] Id., Art.162.
[35] Emphasis added
[36] Emphasis added; and included in the Amharic version.
[37] For more, see *infra*, section 4.

justice system, detention or imprisonment shall be a measure of last resort. Therefore, suspension of imprisonment shall be ordered as a first measure instead of sentencing a child to corrective detention. In other words, as the provision of the Criminal Code stands, deprivation of liberty of the child in the form of corrective detention shall be confined to serious cases (Amharic version)[38], and in other cases, suspension can be ordered. It can be argued that the fact that the law sets a limit on the nature of a crime, the sentence of which can be suspended (Art. 171) –while not doing the same for a measure of corrective detention (Art. 162)– is informed by the difference in the effect of the measures on the liberty of the child. That means, if a measure would deprive a child of his/her liberty, no limit on the seriousness of the crime may be made while the contrary may be.

Then, the corollary issue is how serious the crime should be to entail admission to a corrective institution and what crimes would entail suspension of a sentence. The provision does not make any qualification as to the measurement of the seriousness of the crime for corrective detention. Hence, our recourse is Article 108 of the Criminal Code which deals with rigorous imprisonment and what sorts of crimes deserve it. According to this provision, rigorous imprisonment applies only to crimes of a very grave nature committed by criminals who are particularly dangerous to society. It extends from one to twenty five years, and in exceptional cases, to life imprisonment. Therefore, it can be argued that the court shall use this as a benchmark to sentence a child to corrective detention. In this regard, Rule 17.1(c) of the Beijing Rules provides that children should not be deprived of their liberty unless they are found guilty of a violent crime against a person.

However, the court needs to consult Article 171 of the Criminal Code to choose between corrective detention and suspension of sentence. This provision puts a limitation in that crimes punishable with rigorous imprisonment for ten or more or with death are not eligible for suspension. Hence, for choosing between corrective detention and suspension, the benchmark of seriousness should be the one provided under Article 171; and it is to be noted that for crimes that fall in this category, the court may impose a measure of corrective detention[39] and for those crimes punishable with rigorous imprisonment below the stated threshold, a suspended sentence could be ordered.

[38] By this interpretation, the author is not justifying the provision of the code that makes detention in corrective centers a measure of first resort.

[39] *See* Elias N. Stebek (2013), *Principles of Ethiopian Criminal Law* (Addis Ababa), p. 223.

3.7 Measures and the principle of 'Detention as a last resort'

According to Article 37(b) of the CRC, detention of a child shall be a measure of last resort. In furtherance of this rule, Article 40(4) of the same Convention requires states to make available a wide variety of non-institutional dispositions. The Criminal Code does not explicitly restate these principles. The term detention here is used to refer to other forms of deprivation other than imprisonment as used in the CRC.

The measures envisaged in the Code (particularly the measure of home arrest) do not comply with this principle. According to the human rights committee (HRC), deprivation of liberty involves a severe restriction of motion within a narrower space than mere interference with the liberty of movement and includes, inter alia, house arrest.[40] The measure of admission to a corrective institution seems to satisfy the test by requiring bad character or antecedent of the child as a condition in addition to the seriousness of the crime. That means it will not be imposed on a child who comes in conflict with the law for the first time irrespective of the seriousness of the crime, as s/he has no bad antecedent. However, the lack of precision on what constitutes bad character or antecedent would make the measure fail the test. It may not necessarily mean the presence of prior conviction. In that sense, a child with a history of bad character may face this measure even though s/he comes in conflict with the law for the first time by committing a serious crime.

As discussed above, the imposition of corrective detention is not mandatory. However, the type of measure that the court may impose is not clear in the Code. The only measure that relates to corrective detention is supervised education as it can be imposed for even serious crimes, and the character of the child is a determining factor. However, the condition of the child differs in the two cases. In the case of Article 159, the child is exposed to the risk of developing a bad character; while in the case of Article 162, the child has already developed that character. The other measures cannot apply as they apply for minor crimes or to a child in need of medical treatment.

As indicated earlier, courts in the exercise of their discretion may suspend a sentence as a measure of first resort instead of sending the child to a corrective institution. However, it is not clear in the law when to impose corrective detention and when to suspend imprisonment. Therefore, the

[40] Human Rights Committee, General Comment No.35, Article 9 (Liberty and Security of a Person) (16 December 2014), CCPR/C/GC/35, para. 5.

failure of the laws to expressly state the last resort nature of deprivation of liberty, the exhaustive list of measures under the Code, and the lack of clear demarcation between scenarios that would warrant corrective detention and suspension of sentence will not enable the measure to be a measure of last resort as courts wishing to exercise their discretion would not foresee any other measure than imposing corrective detention. This is the case when a child who is not under one of the conditions mentioned under Article 159 commits a crime punishable with ten or more years in which suspension is not allowed as provided under Article 171.

3.8 Duration of the measures and the principle of 'Detention for the shortest appropriate period'

Measures for the treatment (admission to a curative institution) and supervised education shall 'be applied for such time as is deemed necessary by the medical or supervisory authority' and may continue in force until the child attains 18 years old. 'They shall cease to be applied when, in the opinion of the responsible authority, they have achieved their purpose' (Art.163 (1)). In other words, these measures are enforceable until they achieve their goal but not after the child attains majority. The justification here is the inability of the court to fix the duration as the measures are dependent on the personal circumstances of the child such as mental state, addiction, moral abandonment or exposure to a danger of corruption or being corrupted. The court cannot reasonably forecast when the measures will address the root causes of criminality.

This position of the law can adversely affect the liberty of the child unless a caveat is made. If, for example, a child aged ten is sentenced to a measure of curative detention, this period will continue until the authority deems appropriate towards achieving its purpose or until the child attains 18 years of age. Thus, the child may be in this institution for eight years, which is too long and would fail to fulfill the test of 'shortest appropriate period'.

Moreover, the Code does not entrust the court with the power to supervise the enforcement of the measures or review them except that it is authorized to vary the orders upon the recommendation of the management of the institution (Art.164). Thus, the measure shall continue until the authority considers that it has achieved its purpose and apply to the court for variation[41] or until the child reaches 18 years of age. This will subject children to unsupervised prolonged detention.

[41] This is more explicit in the Amharic version of Article 164 (1), second alinea.

This risk can be eased to some extent by Article 180 of the CPC which allows the court to vary the order on its initiation. However, this provision is not a guarantee unless the law specifically mandates the court to supervise the enforcement of this measure by, for instance, requiring the supervising authorities to regularly report the status of the child under their mandate.

The duration of admission to a corrective institution, as a general rule, is from one to five years.[42] The phrase 'as a general rule' signifies the possibility of releasing the child before serving the full length (conditional release) and review of the duration by the court through variation so that the duration may be reduced. This period shall in no case extend beyond the coming to age of the child. The question, here, is what does this mean? (i) Does it mean that the detention ends after the child attains majority irrespective of its result on the reformation of the child? Or, (ii) Does it mean that if the period extends beyond the coming to age of the child, the child will be transferred to penitentiary detention or fined if s/he is not completely reformed?

The maximum period to be served in corrective detention is five years unless the child is released conditionally[43] or unless the sentence is varied and reduced by the court under Article 163 of the Criminal Code and/or Article 180 of the Criminal Procedure Code. Given the interpretation of 'serious crimes' that this author gives for corrective detention, the period of corrective detention can be considered as the 'shortest period' and complies with the principle as enshrined under the CRC.

A child under corrective detention can be released conditionally after serving one year (Art. 163(2)). The precondition of serving one year of detention is favorable to children in some respect where the detention period is longer compared to adult cases where two-thirds of the imprisonment must be served (Art. 202). Fixing the minimum period to be served at one year may also have negative repercussions. For instance, a child sentenced to one-year detention may not be released conditionally although the requirements set down under Article 202 are fulfilled. This may be regrettable given the principle of 'detention for the shortest appropriate period' recognized under international standards governing child justice.

The duration of school or home arrest is not addressed in Article 164 of the Criminal Code; rather it is provided in Article 161. Accordingly, the Code requires the court to 'determine the duration of the restraint in a

[42] Criminal Code, Art. 163(2).
[43] Id., third alinea.

manner appropriate to the circumstances of the case and the degree of gravity of the crime committed'. However, one may ask why the Code makes it open for the court to determine while it fixes the duration of corrective measure.

School or home arrest deprives a child of his/her liberty and thus, it should be for the shortest appropriate period. It is not specified whether the duration should be fixed in days, months or hours. It is left to the discretion of the court to choose one. However, it must be noted that fixing the duration of home arrest in days is not appropriate for the reason that a child should not be required to stay the whole day in the home.[44]

4. Penalties

4.1 The Principle: Penalties as measures of last resort

Article 166 of the Criminal Code provides that the court may sentence a child to one of the penalties (fine, corrective detention or imprisonment) where measures have been applied and have failed and after having ordered such inquiries to be made as may seem necessary. However, a child within the age of nine to fifteen years will not be subject to one of these penalties, irrespective of the seriousness of the crime[45], before s/he is first subjected to one of the measures and failed to reform.[46] The plural term 'measures' and the phrase 'have been applied and failed' indicate that penalties are measures of last resort. That means, the court shall try the available measures (one after the other in the same case or a different case, as a case may be) before imposing a penalty on a child.[47]

What constitutes failure is imprecise. Does it include a break of conditions for instance attached to supervised education? Does it only refer to commission of a further crime while undergoing or after having undergone the measure? The Amharic version seems to include a breach of conditions or any other faults as it stipulates for the court to determine the degree of fault. Had the Code intended to confine 'failure of the measures' to the commission of a new crime, it would have explicitly done so. For instance, punishing a child who is undergoing measures (such as school or home arrest) for breach of conditions or even for breach of the measure itself or who has undergone one of the measures may invite the issue of double

[44] UNODC, supra note 6, p. 38.
[45] Stanley Z. Fisher (1970), 'Criminal Procedure for Juvenile Offenders in Ethiopia', *Journal of Ethiopian Law*, Vol.7, No.1, p. 122.
[46] *See* also Dejene Girma (2013), A Handbook on the Criminal Code of Ethiopia, p. 78.
[47] Ibid.

jeopardy. However, the stipulation that children sentenced to one of the measures are not considered as punished under the criminal law (Art. 165) may be used in defense of this position.

Fisher, on the other hand, argued that failure means the commission of a new crime and conviction for that crime.[48] This seems to exclude breach of conditions of measures or any other fault from being considered as an indication of the failure of the measure. However, it may be inconceivable not to punish a child if, s/he persists in the same behavior in spite of different measures to ensure that the child observes the measure imposed such as supervised education, increasing the duration of the measures, or changing one measure for the other (e.g. reprimand with home or school arrest supervised education to home arrest). In such a case, a court would punish a child by imprisonment or corrective detention, if the first crime falls under Article 168, or to fine for other cases. If such a course is not taken, the role of the child justice system will solely be confined to trying to reform the child by imposing one of the measures. But, it must use punishments as a measure of last resort to ensure the security of others as it should not ignore the security of the society.

Whether the failure is due to breach of conditions or commission of a new crime, one thing that must be clear from the principle of 'detention or imprisonment as a measure of last resort' and the provision of Article 166 is that the first failure of the measure should not necessarily result in the automatic imposition of a custodial sentence.[49] If a single failure to comply with the condition of the measures or commission of another crime leads to automatic imposition of custodial measures, detention is taken as a 'second resort', not as a last resort. It is for this reason that Article 166 of the Criminal Code (Amharic version) gives the court the power to assess the gravity of the fault. The fact that a child has committed a new crime while undergoing or after having undergone a measure or committed any other fault is not by itself an indication of the failure of the measure. This is because the circumstances under which each measure is imposed are different.

For instance, a child who committed a crime with a mental problem and is admitted to a curative institution may commit a crime after s/he recovers from the trauma. If after release the child becomes an addict, for instance, to

[48] Fisher, *supra* note 45, p. 121.

[49] *See* Model Law on Juvenile Justice, Art.54 (13); United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), adopted 14 December 1990, Resolution 45/110, Rule 14.3.

drink or other substances (Art. 158) s/he should be given another chance of being subjected to the same measure. Similarly, a child who served corrective detention or who served a measure of supervised education may later commit a crime and be in need of treatment due to addiction to a drink or other substances. In such cases, the child shall be admitted to a curative institution instead of being fined or imprisoned. In short, the circumstances under which s/he committed the first and the later crime shall be the same or at least similar. Even the seriousness of the crime is not a sole consideration to rule that the measure has failed. This is clearly indicated under the chapeau of Article 168(1), and 168(1)(b) in that for the child to be imprisoned for the commission of such serious crime, s/he must be incorrigible and a cause of insecurity to others.

Further, when a child who has been admitted to a corrective institution commits another crime of minor nature, it is difficult to conceive that the measure has failed to reform the child. This is because reformation may not necessarily mean that the child will never commit a crime in the future. The fact that the subsequent crime is of a minor nature may, on the contrary, be taken as a success of the first measure in reforming the child to some extent. In such a case, the court may try another measure instead of sending the child to penitentiary detention.

The most extreme effort to comply with the principle of 'detention as a last resort' may also require the court to give a second chance to a child by subjecting them to similar measures for the new crime. In this regard, Fisher also argued that the first conviction for the crime (after serving a measure or while undergoing it) will not result in the imposition of a penalty.[50] In such a case, a child may be subjected to similar measures with stringent conditions. This is typically the case for supervised education in that if the child was subject to lenient conditions, more stringent conditions may be attached if the court believes that the first measure with lenient conditions failed to reform the child.

In exercising the discretion given under Article 166 (as the term '*may*' indicates), courts must take into account all these caveats/considerations to make imprisonment or detention a measure of last resort in the Ethiopian criminal justice system.

[50] *Supra* note 45, p.120.

4.2 Fine[51]

Fine is one of the penalties that can be imposed on CICWL based on the principle set under Article 166 of the Criminal Code. That means fine is a measure of last resort, which is difficult to justify. Given the fact that there are measures that deprive a child of his/her liberty and are measures of first resort such as corrective detention and home or school arrest, there is no foreseeable reason to make fine that does not have such effect a measure of last resort. Is there any justification to sentence a child to corrective detention for five years even though s/he is capable to pay the fine and will understand its imposition? Under international child rights/justice standards including the Tokyo Rules (Rule 8(2)(d)), fine is included as a non-custodial measure that states should make available in their child justice laws.

It may be imposed in cases where the child is capable of paying a fine and of realizing the reason for its imposition (Art. 167(1)). I argue that fine can be imposed on a child for a crime even though the Special Part of the Code does not provide fine as a penalty. If it shall be imposed on a child when the Special Part provides fine as a penalty, there is no special treatment accorded to a child according to the general tenet of the child justice system. It is to be noted that special treatment is accorded to children in case of imprisonment since the minimum duration is one year with regard to crime that is punishable with a minimum of ten years. Hence, similar special treatment concerning fine is expected.

An interpretation that fine can be imposed only when the special part provides so works against the child because fine is a penalty of first resort for adults. Hence, this author contends that the phrase 'keeping the rule that fine shall be paid when the special part provides so' is meant to say that the provision (Art 167) does not intend to maintain the rule that fine shall be provided as a penalty in the special part.

One may tend to counter argue by invoking the principle of legality in that courts shall not impose a penalty not provided by law (special part). However, the provisions of the Code from Articles 157-177 are special parts for children's cases. This is because, despite the violation of the special part provision that provides a specified penalty, we cannot impose it on a child; rather we impose one of the measures. Even for imprisonment, the duration is lower than what the crime could entail. The same can be said about fine in that Article 167 is a special provision and can be imposed even though fine is not provided as a penalty in the provision violated.

[51] Criminal Code, Art.167.

Further support for this line of interpretation can be derived from the reading of paragraph 2 of Article 167(1) which provides that fine may be imposed in addition to other penalties. This sub-provision does not cross-refer to the adult counterpart provisions of Articles 91 and 92(2) that govern the situations where fine can be imposed in addition to imprisonment. This absence of cross-reference indicates that the rule is special to the child justice system. Had the intention been to confine the payment of fine only where the special part provides so, there would have been no need to provide that fine may be imposed in addition to other penalties –as there are many provisions in the special part of the Code that provide fine as an additional penalty to imprisonment.[52]

Given the above argument, an issue arises regarding the crimes on which fine can be imposed. Article 167 does not indicate the nature of the crime for which a child may be fined. Thus, it is apparent to argue that fine can be imposed even for serious crimes. However, the Amharic version of Article 168 which makes the imposition of corrective detention or imprisonment mandatory may entail a qualified interpretation. Therefore, according to this version, fine may not be imposed for a crime punishable with ten or more years. Further support to this line of argument can be inferred from the reading of the same Article that does not provide fine as an alternative penalty where a child in corrective detention attains majority or s/he is not reformed (Art. 168(2), second alinea). The alternative in such a case is transfer to prison. This leads to an interpretation that this position of the provision is informed by the seriousness of the crime.

Fine may be imposed in addition to imprisonment, corrective detention, or probation as probation can be a measure of last resort because it falls in the section titled 'common provisions'. However, cumulative imposition of fine and imprisonment can be criticized from the perspective of the principle of 'minimum' intervention. Combining non-custodial measures, however, is allowed under the Beijing Rules (Rule 18.1).

Given the above argument, the issue of when to impose fine with other penalties is worth mentioning. Unlike the adult counterpart which envisages that it is the special part that can provide for fine as an alternative to imprisonment (Art. 91) and 92 (2), Article 167(1) makes the possibility of fine open thereby leaving it to the discretion of the court which can create differential treatment. The provision does not provide guidance as to when the court would impose fine in addition to imprisonment except that the

[52] *See* for instance, Arts. 350, 351, 353 (1), 366 (1), 371 (1(, 384 (1), 385 (2), 391, 393, 447, 448 (2), 466 (1), 478 (1) & (2), 481(1), 488 (2), etc.

child is capable of paying and understands the reason for its imposition. In other words, unlike Articles 91 and 92(2) of the Criminal Code that governs the situation where fine may be imposed in addition to imprisonment, Art. 167(1) does not specify the circumstances under which it can be imposed with other penalties. Nor does it cross-refer to Articles 91 and 92 (2).

4.3 Admission to corrective institution

Article 168(1)(a) of the Criminal Code states that when the child "has committed a serious crime which is normally punishable with a term of rigorous imprisonment of ten years or more or with death, the Court [shall][53] order him to be sent" to "a corrective institution (Art. 162) where special measure for safety, segregation or discipline can be applied to him in the general interest." This is the second type of penalty available for children in the Ethiopian criminal justice system. Reading this provision with Article 166 and reference to Article 162 seems to imply that the child must not be subject to this measure earlier as there is no point to send the child back to the same institution which failed to reform them. However, although the same institution is referred to under this Article and Article 162, the manner of enforcement of the detention is different because under this Article a child can be subject to special measure for safety, discipline or segregation.

With regard to the length of this detention, an issue arises whether it shall be from one to five years as per Article 163(2), or from one to ten years as provided under Article 168(2). According to Article 168(2), 'the court shall determine the period of detention […]' in which case the same term 'detention' is used to refer to penitentiary detention in its sub-article 1(b). This is more explicit in the Amharic version. Therefore, the duration mentioned in sub-article 2 does not apply to corrective detention, and the duration stated under Article 163(2) applies to it.

4.4 Imprisonment

4.4.1 Imprisonment as a last resort

Under the Ethiopian criminal justice system, imprisonment of a child can happen in two cases. First, when the crime is punishable with rigorous imprisonment of ten or more or with death and if the child is incorrigible and is likely to be a cause of trouble, insecurity or corruption to others (Art. 168(1)(b). This condition illuminates what constitutes 'failure of a measure' under Article 166. Thus, this provision, when read together with the principle set under 166, indicates that imprisonment is a measure of last

[53] Provided in the Amharic version.

resort. Article 168(1)(b) pushes the principle one step further by requiring that crime shall be serious. In other words, a child will not be imprisoned after the failure of the measures unless the crime is the one provided under this Article.

Other children must be sent to corrective detention, and will be transferred to penitentiary detention if their conduct or the danger they constitute renders such a measure necessary (Art. 168(2), second alinea)). This is the second scenario to imprison a child. This provision clarifies the effort made by the Ethiopian criminal justice system to make imprisonment a measure of last resort. Accordingly, a child who has been subjected to one of the measures which failed to reform them will not face imprisonment before being sentenced to a corrective institution as per Article 168(1)(a). This effort is more visible when a child commits a crime defined under Article 168 and is sentenced to a corrective detention as a first resort while the child is not under one of the circumstances mentioned in Article 158 or 159. If this measure fails to reform the child, there are no other measures to try as the seriousness of the crime excludes them. Yet, the child must not be transferred to prison immediately before being subjected to the measure of discipline or segregation in the same center (Art. 168(1)(a)).

The transfer is mandatory as the word 'shall' indicates. This may be justified by the fact that the child has failed to be reformed at least for the second time. However, this may diminish the last resort nature of imprisonment for two reasons. First, the transfer is possible even before the child has served the detention period fixed by the court and without trying extension of the duration or imposing stringent conditions. Second, the criterion is too general and vague which is susceptible to misinterpretation.

The transfer is mandatory even upon the child's attainment of majority and the period of detention extends beyond that period irrespective of the length of the time left. According to this provision, the result achieved is considered for the determination of the time to be served in prison, and not to decide whether the transfer is necessary. However, it is plausible to consider the result achieved in deciding whether a transfer is necessary if the child has shown good progress during their stay in the corrective center and if the time left is too short. Furthermore, if the time left is less than ten days, there is no need to transfer the child to prison as the minimum terms of simple imprisonment is ten days according to Article 106 of the Criminal Code.

4.4.2 Crimes that can entail imprisonment

The court shall[54] impose imprisonment when the child (as stated in Section 4.4.1) has committed a serious crime which is normally punishable with a rigorous imprisonment of ten years or more or with death, and if s/he is incorrigible and is likely to be a cause of trouble, insecurity or corruption to others (Art.168(1)(b)). In line with the interpretation of 'failure of measures' as including both a commission of a new crime and other faults, the crime which Article 168(1) refers to may be a new crime or the first crime to which a child was subjected to the measures that have failed. It does not include crimes that may be punishable by ten years or more like 'crimes punishable with rigorous imprisonment for not less than seven years'; 'not exceeding ten years'; 'not exceeding fifteen years'; and so forth. The terms of imprisonment shall be ten years or more.[55]

To subject a child to corrective detention or imprisonment, the crime must be serious which is normally punishable with rigorous imprisonment for ten or more years, or with death. The question then is what course of action would be taken against a child who committed a lesser crime than those provided under Article 168(1). Depending on the case, fine and probation are the options. The other issue worth mentioning is when a child commits concurrent crimes both or all of which are punishable with a term of less than ten years. A question thus arises whether the punishment can be cumulated towards ten or more years (where two or more crimes punishable with less than ten years) are committed.

4.4.3 Imprisonment for the shortest appropriate period

The period of detention to be undergone under Article 168 shall be determined according to the gravity of the act committed and having regard to the age of the child at the time of the crime. It shall not be for less than one year and may extend to a period of ten years (Art. 168(2)). However, it is not clear whether the duration shall be kept the same irrespective of the number of crimes that the child has committed.

The crime is normally punishable by rigorous imprisonment of ten years or more or with death, and the Code, by fixing the minimum imprisonment to one year and a maximum to ten years, gives wide discretionary power to the court regarding the period of imprisonment. This helps in complying with the principle of 'detention for the shortest appropriate period'. Full

[54] According to the Amharic version.

[55] *See*, for example, Articles 240 (1) (b), 241, 247, 249 (2), 251, 252 (2), 269, 270, 275, 506 (5), 512 (1), 539 (1) & (2), 573 (3), 596 (3), 620 (3), 627 & 631 (1) (b).

compliance with this principle requires courts to equate the actual penalty stated under Article 168(1) to the one provided under Article 168(2). That is, one-year imprisonment shall be imposed for crimes punishable with ten years of rigorous imprisonment and the duration shall increase when the penalty increases and the maximum period of ten years shall be for crimes punishable with death.

Conditional release of a child is recognized under the Code (Art. 168(3)); and is a means to comply with the principle that imprisonment is for the shortest period. This provision simply cross-refers to Article 113 which again cross-refers to Article 202. This in other words means that there is no special privilege accorded to children and that the ordinary rules applicable to adults apply to children. For instance, a child has to serve two-thirds of the imprisonment before being conditionally released even though their behavior is significantly improved and warrants the assumption that s/he will be of good conduct when released. However, this position can be challenged by virtue of the principle of 'detention for the shortest period', and the negative effect of detention on children. For this reason, the law could have provided a different and lesser threshold of a served sentence for the child than Article 202.

In case of transfer from corrective detention, the period to be served in prison shall be determined by taking into account the time spent in the corrective institution and the results thereby obtained (Art. 168(2), third alinea). This is the case for both grounds of transfer, i.e., conduct of the child in question, and attainment of majority. The cumulative nature of these considerations indicates that the period to be served in prison may not always be equal to the time left at the time of the transfer. For instance, if the period of corrective detention left is one year, it does not mean that the period of imprisonment shall also be one year. It may be more or less than one year. This is because the provision requires courts to also consider the result achieved.

If the child's pace of reform is fast during the corrective detention, the court may not order the child to serve the same period as left at the time of transfer due to attainment of majority. On the other hand, if the child was not reforming as expected during their stay in the corrective detention or if the child is acting in a way that warrants transfer to prison, the court may order the child to serve a period of imprisonment greater than what is left at the

time of transfer. In such a case, the length of period that the court can impose is not clear.[56]

The difference in the regime under which corrective detention and imprisonment are undertaken is not provided as one consideration in determining the period to be served in prison after being transferred from corrective detention. As the name indicates, corrective centers are places where children are detained and re-educated to make them law-abiding citizens in the future. As such, they are not serving a punishment. On the other hand, prisons are places to enforce a sentence of imprisonment and it works in a way to achieve the purpose of criminal law by facilitating various purposes of punishment which include incapacitating convicted persons or making their punishment a lesson for others.

This does not, however, mean that reform and rehabilitation are not among the purposes of punishment. Yet, the core objective of corrective detention in the case of children in conflict with the law is different from the multi-tier purpose of punishment for other offenders. This difference in the condition of enforcement of the two detentions is particularly worth raising in case of transfer to prisons when a child attains majority. Therefore, consideration should have been paid to this difference without resort to equivalent conversion of the time left in corrective detention to a prison term.

5. Suspended Sentence (Probation)

Article 171 of the Criminal Code governs the suspension of sentences in child justice cases. It provides that:

> The general rules regarding the suspension of the sentence or of its enforcement with submission for a specific time to a period of probation under supervision (Arts. 190-200) shall, as a general rule, remain applicable to [children] if the conditions for the success of such a measure seem to exist and subject to the rules concerning serious crimes as defined in Article 168.

The exception clause implies that crimes the sentence of which could not be suspended are those specified under Article 168 and the nature of crimes

[56] Nonetheless, increment of the period over the one left at the time of transfer is problematic when pitted against the principle of prohibition of double jeopardy, and given the difference in the regime of detention in corrective institution and prison.

indicated under Article 191 or 194 is not a parameter in this regard. This interpretation can be supported with two justifications. First, unless interpreted this way, the seriousness exception indicated under Article 171 would be redundant to the stipulation of Article 191 which provides that suspension is applicable for non-serious crimes. Second, the general rule – that children should be treated more favorably than adults– supports this interpretation and that a sentence of imprisonment for crimes not punishable with rigorous imprisonment for ten or more years or with death can be suspended provided that the other conditions are fulfilled.

By this, the Code makes a differential treatment for children by confining the exception –to this rule– to crimes of serious nature. However, when pitted against the rule of child justice that mandates the primacy of non-custodial measures (including probation) –irrespective of the nature of the crime– the Ethiopian criminal justice system fails this test by prohibiting the application of probation for all children and crimes as probation does not work for children who committed crimes punishable by rigorous imprisonment for ten years or more.

Nonetheless, it is not clear whether suspension of imprisonment in child cases is a measure of first or last resort in the Ethiopian criminal justice system.[57] The question is worth raising in the face of the dichotomy of 'measures as first resort' and 'penalties as last resort' as discussed above. To answer this question, let us first see the arrangement of the Code. Article 171 falls under the sub-heading, 'common provisions' that are common to both measures and penalties. This can be interpreted as making suspension both a measure of first resort and last resort depending on the circumstances. The question again is when it can be a measure of first resort when pitted against the measures and when can it be a last resort when pitted against imprisonment and fine.

Its first resort nature can be supported by the principle that detention shall be a measure of last resort which implies that suspending a sentence is more appropriate than ordering admission to a corrective center or home arrest. In other words, deprivation of liberty of the child (through home arrest, or corrective detention) should have been confined to serious cases[58], and in other cases, suspension can be ordered. Regrettably, however, home arrest applies for minor crimes in the Ethiopian criminal justice system.

[57] It is important to note that probation is one of the non-custodial measures in the Beijing and Tokyo Rules.

[58] By this interpretation, the author is not justifying the provision of the code that makes corrective detention as a measure of first resort.

It can be inferred from Article 171 that the provision excludes its applicability for serious crimes as defined under Article 168. In light of the absence of such limitation for the imposition of a measure of admission to a corrective institution (detention), this implies that the limitation is informed by this deference in effect on the liberty of the child (which again is informed by the principle of child justice), and not to indicate the secondary nature of the suspension. That means, if a measure would deprive a child of their liberty, no limit on the seriousness of the crime may be made while the contrary may be.

This article has briefly demarcated the scenarios that could warrant a measure of corrective detention *versus* suspension of penalty as a measure of first resort in the section that deals with the measure of corrective detention. We can further demarcate suspension *vis-à-vis* a measure of school or home arrest and reprimand.[59] It is stated that measures of school or home arrest and reprimand are applicable for a minor crime, which as has been argued above, extend up to five years of simple imprisonment under Article 106 of the Criminal Code and the need to accord children special protection over adults.

Likewise, it is argued that suspension of sentence shall apply to all crimes that fall below the threshold stated under Article 168 via Article 171. However, the Criminal Code provisions relating to suspension of a sentence should not apply to crimes that would entail a measure of school or home arrest or reprimand. In other words, suspension of a sentence shall not apply to crimes punishable by simple imprisonment, and this again means that it should be confined to crimes punishable with rigorous imprisonment which are below the threshold set under Article 171.

This interpretation can be supported by Article 88(3) of the Code that mandates courts to try from the light to the severe punishments because measures do not entail criminal conviction (Art. 165) while probation (suspension of enforcement of penalty) does so. This implies that measures are lighter than probation. This argument is made based on the Code's provision even though the author, as argued earlier, is critical on the Code's position that makes home arrest a measure of first resort and worse, for minor crimes which is against the principle that detention shall be a measure of last resort.

[59] On the other hand suspension of sentence has no point of conflating with supervised education as the latter is a personalized measure in that it applies for abandoned children or for children in need of care and protection.

As a measure of last or second resort, suspension of a sentence can be ordered where the measures of reprimand, school or home arrest or supervised education fail to reform the child (Art. 166).[60] However, this is not clearly stated under Articles 166 *ff* of the Code. The only expressly stated penalties of last resort are fine, imprisonment or admission to a corrective institution as a penalty. As indicated under Article 168, the crime must be serious for the court to order admission to a corrective institution (as a penalty) or imprisonment. The measure or penalty that would be taken against a child for less serious cases is not specified under the section of the Code that deals with penalties (Arts. 166-68). As discussed above, fine can be the option if the child has the means and is capable of understanding the reason for its imposition. The question again is what if one of the conditions is missing? Therefore, suspension of imprisonment can be an answer to this question. This helps the Ethiopian criminal justice system to conform to the principle of detention as a measure of last resort.

6. Conclusion

Ethiopia is a party to the Convention on the Rights of the Child. As a state party, it takes legislative measures to comply with its obligation to ensure the realization of children's rights in the criminal justice system. A principal legislation among these laws is the 2004 Criminal Code which has provisions on measures and penalties that can be imposed on children found guilty of the crime. The measures include measures of admission to a curative center, supervised education, reprimand, home or school arrest, admission to a corrective center, and as discussed in this article, probation. These measures should be considered before subjecting a child to imprisonment, a penalty of corrective detention or to fine. In other words, measures are the first resort while penalties including imprisonment are the last resorts. The duration of corrective detention and imprisonment is required to comply with the principle of 'shortest period' in accordance with the interpretation of 'serious crimes' discussed above because there is a need for caveat in this regard.

As discussed in the preceding sections, the Ethiopian criminal justice system has problems so far as measures and penalties for children are concerned. *First*, detention is a measure of first resort while fine is a

[60] Admission to a corrective center is omitted because as argued, it should be applicable for more serious crimes as defined under Article 168, and a child not reformed while in detention (while receiving education and instruction) will not likely be reformed by placing him/her under probation in which the supervision and control is loose.

measure of last resort. This is a case for corrective detention and home or arrest. Moreover, home arrest is applicable for minor crimes. The *second* problem relates to the lack of diversity of the measures. They are only five in number which may not as such help to practically ensure observance of the principle of detention or imprisonment as a last resort. A great miss in this regard includes community service and restorative justice measures including diversion.

The *third* problem identified in this article relates to the lack of clarity in the specific provisions dealing with each measure. For instance, the parameter for reprimanding the child or subjecting them to a measure of home or school arrest is the lower tier in response to the minor nature of the crime. On the other hand, admission to a corrective measure can be ordered by taking the gravity of the crime (serious crime). However, these qualifications are not clear and are susceptible to variation in interpretation by different judges which again can lead to discriminatory treatment. Finally, the duration of detention may fail the test of 'shortest period' in the case of curative detention as the court is not empowered to supervise the measure.

Therefore, the Ethiopian criminal justice system needs revision to meet the needs of children by adhering to the principles and making the existing provisions clear. The law should also demarcate the circumstances under which each measure (*vis-à-vis* others) could be applied. ■

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Inter Communal Conflicts (2017-2018) and the Protection of IDPs in Ethiopia:
The Need for Specific Legal and Institutional Regime

Rabel Desalegn ♣

Abstract

The increasing number of Internally Displaced Persons (IDPs), and the gap in the legal and institutional framework for the protection scheme, remains a concern in Ethiopia. It is well established that inter-communal conflict forced thousands of people to flee their homes. This article assesses the adequacy of the national framework for the protection of IDPs. Specifically, it investigates whether the national response for disasters accommodates the needs of inter-communal conflict induced IDPs. In this context, the term IDPs is defined as provided in the UN Guiding principles on Internal Displacement. In order to determine how the national response works for plight of IDPs, questionnaires were distributed to the concerned government authorities, and the joint reports of government and international organizations was reviewed from online data sources. Results showed that there was no comprehensive legal and institutional framework and coordination system to address the protection and assistance needs of inter-communal conflict induced IDPs in Ethiopia in the year 2017-2018. These results suggest that the needs of IDPs could be addressed more effectively, with a national action plan or policy framework, and institutional scheme for IDPs.

Key terms:

IDPs · Communal Conflict · Protection · Assistance · Durable solutions

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Contents

1. Introduction

The increasing number of displacement and its grave impact on human rights protection is undeniable. Yet the concept of internal displacement as a distinct category that necessitates a separate protection and the definition of *Internally Displaced Persons* (herein after IDPs) are at the heart of the many debates that surround the concept of IDPs.[1] Despite the different opinions of scholars on

Frequently used acronyms:

CRC	Convention on the Rights of the Child
EHRC	Ethiopian Human Rights Commission
ICRC	International Committee of the Red Cross
IDPs	Internally Displaced Persons
IOM	International Organization for Migration
IPA	International Peace Advisors
NDRMC	National Disaster Risk Management Commission
NRC	Norwegian Refugee Council
OCHA	Office for the Coordination of Humanitarian Affairs
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees

the definition of IDPs, the definition in the Guiding Principles on internal displacement which was devised by the former UN Secretary-General's Representative on IDPs, Francis Deng is usually used.

The Guiding Principles are based on a non-state negotiated compilation of existing International Human rights law and International Humanitarian Law that are relevant for the protection of the internally displaced.[2] There is no binding international legal instrument on IDPs except the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)[3] and the Great Lakes regional Protocol on the Protection and Assistance to Internally Displaced Persons[4]. The UN Guiding Principles define internally displaced person as: -

> Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.[5]

The Kampala Convention and the Great Lakes protocol also adopt this same definition; reiterating that leaving habitual residence or home involuntarily and remaining in the territory of their own country marks the two definitional elements of IDPs. The involuntary nature of the displacement differentiates an internally displaced person from those who leave their homes willingly; and on the other hand, the fact that they do not cross internationally recognized

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[1] Roberta Cohen "Key Policy Debates in the Internal Displacement Field", PP. 84-99, at 87, Available at <http://www.mcrg.ac.in/rw%20files/RW32/5.RCohen.pdf,> accessed on February 28, 2016.

[2] David Turton (2011), "The politics of internal displacement and options for institutional reform", *Deportate, esuli, Profughe (DEP), Venetiarum Universitas in Domo Foscari*, No.17, available at <www.unive.it> accessed on 20 March 2016.

[3] African Union (23 October 2009), *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (herein after Kampala Convention), entered in to force on Dec. 12, 2012 available at: <https://www.refworld.org/docid/4ae572d82.html> accessed on 6 April 2020.

[4] International Conference on the Great Lakes Region (November 2006), Protocol on the Protection and Assistance to Internally Displaced Persons, available at <https://www.refworld.org/pdfid/52384fe44.pdf > accessed on 6 April 2020.

[5] *The UN Guiding Principles on Internal Displacement* (herein after the Guiding Principles), U.N. Doc. E/CN.4/1998/53/Add 2 (1998), Introduction, Para. 2., available at <www.brookings.edu/projects/idp/gp_page.aspx> accessed on 01 April 2016.

borders distinguishes internally displaced persons form refugees.[6] The fact that the IDPs are far from their home or habitual residence but still within their own state denotes that the primary responsibility to provide protection and assistance for the IDPs is the national obligation of such state. Nevertheless it may be challenging to impose such responsibility in the absence of a binding legal instrument. Furthermore in some instances the state itself could involve in creating the causes of displacement directly or indirectly[7] in which case international protection for internally displaced seems feasible.[8]

The international community is much more concerned with internal displacement as a result of inter-state or intra-state armed conflicts. Yet, inter-communal conflict which falls short of the armed conflict threshold also causes a great number of internal displacements. Africa is the first in line of continents that deal with the suffering of ethnic (Inter-Communal) conflicts.[9] In particular the Horn of Africa is characterized as a place of ongoing inter-state and intra-state conflicts ingrained in the 'economic, social, political and historical grounds' but the major reasons can be attributed to 'boarder and territorial conflicts and ethnic and religious polarization'.[10]

Inter communal conflicts are the major aspects of intra-state conflict in Africa.[11] The ethnic structure of the entire region of Sub-Saharan African countries is the most favorable setting for ethnic induced conflicts that

[6] UNHCR, Global Protection Cluster Working Group, "Handbook for the Protection of Internally Displaced Person", at 8, available at <www.unhcr.org>, accessed on 28 February 2016.

[7] Internal Displacement Monitoring Center (IDMC) and Norwegian Refugee Council (NRC) (2007) "Internal Displacement: Global Overview of Trends and Developments in 2006", at 6, available at <www.internal-displacement.org>, accessed on 28 February 2016.

[8] Katja Luopajarvi (2003), "Is there an Obligation on State to Accept International Humanitarian Assistance to IDPs Under International Law?", *International Journal of Refugee law*, Vol.15, No. 4, pp. 678-714, at 687., Available at <www.ijrl.oxfordjournals.org>, accessed on 20 March 2016.

[9] Abraha Tesfay (2012), "Dynamics of Inter-Communal Conflict in North-East Ethiopia: The Case of Wejerat People and Their Neighboring Afar", *Anthology of Peace & Security Research, Institute for Peace and Security Studies* (IPSS), Addis Ababa University and Friedrich-Ebert-Stiftung (FES), Vol. 3, at 4.

[10] Muhabie Mekonnen (2015), "The Root Causes of Conflicts in the Horn of Africa", *American Journal of Applied Psychology*, Vol. 4, No. 2, pp. 28-34, at 28, available at <www.ajap.com> accessed on 23 December 2016.

[11] Abraha Tefay *supra* note 9.

generate a great number of internal displacements.[12] Being part of this region, Ethiopia has –at numerous occasions– experienced inter-communal conflicts that are different in terms of magnitude, 'causes and actors in the communal conflicts'.[13] It is not the concern of this article to discuss the root causes of inter-communal conflict in Ethiopia, it rather aims at highlighting the IDPs plight, Protection schemes and gaps.

In April 2005, the Project on Internal displacement by Brookings Institution-University of Bern has developed a framework on national responsibility of a state towards IDPs[14]. And in the absence of international binding instrument, this article found it reliable, persuasive and relevant to use it as a parameter to go through the Ethiopian national response to IDPs. The framework contains twelve yardsticks as benchmarks of national responsibility against which a national response to IDPs can be measured, and this article explores the Ethiopian Institutional and legal regime for IDPs, based on these yardsticks.

The next section of the article highlights the plight of IDPs in Ethiopia based on the realities of the inter-communal conflicts in the year 2017 and 2018. Section 3 briefly discusses the imperatives of policy, legal and institutional frameworks for the Protection of IDPs in Ethiopia. The fourth section discusses the role of the government to prevent internal displacement, its obligation in finding durable solutions, and the participation of IDPs in decision making. Section 5 analyzes the adequacy of resource allocation, and the duty to seek international cooperation and assistance in response to inter-communal conflict induced IDPs.

2. The 2017-2018 Inter Communal Conflict and IDPs Plight in Ethiopia: A Brief Overview

There are numerous factors that result in displacement including inter communal conflict.[15] The existence of multiple causes coupled with the

[12] John Oucho (1997), "The Ethnic factor in Internal Displacement of Populations in Sub-Saharan Africa", *Africa journal of political science*, Vol. 2, No. 2, pp. 104-117 at 104.

[13] Abraha Tesfay*, supra* note 9.

[14] The Brookings Institution Project on Internal displacement, University of Bern (April 2005), "Addressing Internal Displacement: A Framework for National Responsibility", available at <https://www.brookings.edu/.../addressing-internal-displacement-a-framework-for-national-responsibility> accessed on 10 October 2017.

[15] UNHCR, (September 2013), "Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report", *Universal Periodic Review: Ethiopia.*

challenges of identifying economic migrants and pastoral migrants whose movement is seasonal from the forcible displaced population have also enhanced the difficulty in the definition of IDPs as set out in the instruments[16] thereby causing practical challenges in identifying who is an IDP in the country.

The total number of IDPs in Ethiopia due to natural and manmade causes, the larger share being inter communal violence was estimated to reach 2.5 million in 2018.[17] The inter-communal conflict in Gedeo and Guji zones since April 2018 forcibly displaced more than 900,000 people from their homes.[18] However, according to IOM this number reached its peak of 3.04 million in March 2019, the main cause of the displacement being Conflict, which resulted in 1,233,557 numbers of people to flee their homes across the country.

Following this massive displacement, the government started return initiative since April 2019, and IOM Village Assessment Survey Tool showed that 1,400,892 IDPs returned to their villages, and 95% (1,328,652) of them were displaced due to a conflict.[19] Subsequently, the number of IDPs in Ethiopia was more than 1.8 million in September 2020[20]. Yet the conditions in the villages to accommodate the returning IDPs, and the availability of services, livelihoods and reintegration needs further attention. Besides majority of the IDPs are in protracted displacement situation.

Available at <http://www.refworld.org/docid/5283488c4.html> accessed on 10 June 2017.

[16] The Office for the Coordination of Humanitarian Affairs (OCHA), The Disaster Prevention and Preparedness Commission (DPPC), The International Organization for Migration(IOM), Pastoral Communication Initiative Project (PCI) and the Norwegian Refugee Council (NRC), (May 24-25, 27 (2004), "Workshop and Policy Forum on The UN Guiding Principles on Internal Displacement", Addis Ababa, Ethiopia, at 4, available at <http://www.internal-displacement.org/publications/2016/workshop-report-/> accessed on 10 June 2016.

[17] European Commission, European Civil Protection and Humanitarian Aid Operations (19 Jun 2018) "Ethiopia – Conflict and forced displacement" *ERCC PORTAL*, available at < https://erccportal.jrc.ec.europa.eu/ECHO-Flash/ECHO-FlashList/yy/2018/mm/6 > accessed on 29 August 2018.

[18] *IOM (24 July 2018) "IOM Launches USD 22.2M Appeal for Gedeo, West Guji Displacement Crisis in Ethiopia",* available at <https://www.iom.int/news/iom-launches-usd-222m-appeal-gedeo-west-guji-displacement-crisis-ethiopia> accessed on 08 August 2018.

[19] IOM, available at <https://www.iom.int/news/iom-report-ethiopia-records-more-18-million-internally-displaced-2020> accessed on 20 January 2021.

[20] Ibid.

The effect of conflict is not only displacement but also loss of life and property.[21] Though the exact instigations of this conflict are not disclosed, border clashes embedded on border demarcations and resource dispute over land were the driving forces of the communal conflict between the regions of Oromia (Guji) and SNNP (Gedeo).[22] The nearby woredas/local host communities are usually the preferable IDPs settlement spots in their search for safe haven to escape violence and this is also true for IDPs from Gedeo and West Guji Zones. Such local host communities are flooded with an increasing number of populations with the mass arrival of IDPs. These host communities were facing food insecurity and acute malnutrition which already makes it impossible for them to have the resources or any mechanism to deal with such inflow of IDPs. [23]

The other places where these IDPs settle in are collective sites such as public buildings including schools, and other buildings that are incomplete or not being used in urban settlement areas.[24] However these IDPs sites are not suitable accommodations. As the ICRC's Assessment Team Leader Shirin Hanafieh observed: "People are struggling to live in anything resembling basic dignity. They are crowded into schools, office buildings, and churches, sleeping on the floor without mats and blankets."[25] The July 24, 2018 statement of IOM on the situations also states that "the collective sites are overcrowded with thousands of people sheltering in buildings not fit for habitation and thousands more are sleeping outside on the muddy ground with only a sheet of tarpaulin to protect them from the cold and wet weather"[26]

Although moving from one place to another is the normal way of life for pastoralists, such movement causes conflict over resource in locations where grazing land is less plentiful.[27] In Somali regional state, there are many

[21] Dawit Endeshaw (15 May 2018) "Latest conflict intensifies No. of IDPs" *The Reporter*, available at <www.thereporterethiopia.com/index.php/article/latest-conflict-intensifies-no-idps> accessed on 08 August 2018.

[22] ACAPS Briefing Note, OCHA (22 June 2018) "Displacement in Ethiopia, Displacement in SNNP and Oromia regions", available at <https://reliefweb.int/sites/reliefweb.int/files/resources/20180622_acaps_start_ethiopia_displacement_0.pdf > accessed on 08 August 2018.

[23] European Commission, *supra* note 17.

[24] IOM (24 July 2018), *supra* note 18.

[25] ICRC (12 July 2018), "Violence Driving Displacement crisis as rainy seasons sets in", available at <www.icrc.org/en/document/> accessed on 08 August 2018.

[26] IOM (24 July 2018), *supra* note 18.

[27] Internal Displacement Organization, DG ECHO (Directorate General European Civil Protection and Humanitarian Aid Operations), UN OCHA (United Nations Office for the Coordination of Humanitarian Affairs), NDRMC, ECHO Daily Flash (19 June

instances where tensions over accessing resources by pastoralists intensified into inter communal clash over resource ownership[28] with neighboring woredas of Oromia regional state. Oromia and Somali regional states share a border line of more than 1,400 km (870 miles).[29] Competitions over territories and border disputes are susceptible to conflict over resources.[30] In spite of the 2004 referendum to resolve the border dispute between the two regions, the problems have persisted.[31] The November 2017 IOM Displacement Tracking Matrix points out that close to one million people were displaced as a result of the Oromia-Somali inter communal conflict at the border. The majority of this displacement was caused by the September 2017 inter communal conflict between which led to the displacement of 700,000 people.[32]

These IDPs were scattered around 400 locations including spontaneous or planned IDPs camp sites in the border areas, collective centers at the border areas, in city and rural towns across the two regions and Harari regional states, Dire Dawa and Addis Ababa city.[33] According to the National Disaster Risk Management Commission (NDRMC), those who are at spontaneous sites or camps were mainly pastoralists. Having fled with nothing at their disposal, lack of food and water created extensive malnutrition, and the deficiency of access to health care heightened the vulnerability of IDPs to health risks.[34]

The fact that displacement interrupts children's education is also an existing problem for IDPs at every location.[35] Considering their situation, access to livelihoods, reinstatement to their land and property as well as sufficient standard of living remains the most demanding essentials of these IDPs.[36] Local government and civil society organizations specifically Ethiopian Red

2018) "Ethiopia-conflict and forced displacement", available at <www.internal-displacemnt.org/countries/ethiopia> accessed on 08 August 2018.

[28] Ibid.

[29] Kalkidan Yibeltal (18 September 2017) "what is behind clashes in Ethiopia's Oromia and Somali regions?" *bbc News*, available at < https://www.bbc.com/news/world-africa-41278618> accessed on 08 August 2018.

[30] Ibid.

[31] Ibid.

[32] OCHA (23 January 2018), "Ethiopia: Conflict Displacement Situation Report", available at <https://www.humanitarianresponse.info/en/operations/ethiopia/document/ethiopia-conflict-displacement-situation-report-23-jan-2018> accessed on 8 August 2018.

[33] Ibid.

[34] Internal Displacement Organization, *supra* note 27.

[35] Ibid.

[36] Ibid.

Cross Society were the organs that were engaged in the assistance pursuits.[37] Even though food distribution was carried out by NDRMC,[38] the IDPs mainly relied on the host communities and local authorities for most of other humanitarian assistance.[39] International organizations such as ICRC, World Vision, Save the Children, and NRC participated in humanitarian relief.[40] OCHA had also organized and directed the humanitarian response in Oromia region.[41]

In general the lack of food security, potable water, and severe living conditions within host communities who do not have much to give, the lack of education services and the need for peace and security for IDPs were identified as the major problems during the period 2017-2018.[42] It has become apparent that IDPs in Africa do not mostly settle in camps, but are rather dispersed within host communities both in rural and urban settlements.[43] This is also the reality of Ethiopian IDPs where the majority of the displaced stay within 'the region of origin and few [reach] the capital.'[44].

3. The Need for Comprehensive National Response

Guaranteeing durable solutions for IDPs remain in principle the national responsibility of the state. The most significant characteristics of a national response to all needs including protecting and assisting IDPs is being inclusive, in terms of all causes, all groups including displaced women and children, and all phases of displacement i.e. prevention, protection and ensuring durable solutions. And all affected areas should include efforts to access, protect and assist those IDPs outside the effective control of the government and the national responses of the state should be mainstreamed at all levels of government.[45]

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[37] ACAPS Briefing Note, (22 June 2018), *supra* note 22.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] UNHCR (Sep. 2013), *supra* note 15.
[43] Elizabeth Ferris (2-4 May 2012) 'Internal Displacement in Africa: An Overview of Trends and Opportunities'*, The Ethiopian Community Development Council Annual Conference on African Refugee and Immigrant Lives: Conflict, Consequences, and Contribution,* available at <https://www.brookings.edu/wpcontent/uploads/2016/06/0503_displacement_africa_ferris.pdf > accessed on 10 February 2018.
[44] Ibid.
[45] The Brookings Institution (April 2005), *supra* note 14 pp. 9-11.

Although Ethiopia does not have specific Comprehensive national response mechanisms for IDPs, the national response to disasters in general can be grasped from the Ethiopian National Policy and Strategy on Disaster Risk Management (herein after the National Policy). The policy, is at the center of disaster prevention, response and sustainable solutions, and its objectives include reducing and eventually preventing disaster risk and vulnerability, and focusing on and implementing activities to be carried out before, during, and after the disaster period. The objectives of the National Policy further include mainstreaming and ensuring the implementation of disaster risk management into development plans and programs across all sectoral institutions. Moreover, the National Policy aims to ensure that all disaster affected persons are provided with recovery and rehabilitation assistances; to reduce dependency on and expectations for relief aid by bringing attitudinal change and building resilience of vulnerable people.[46]

Though the policy sets excellent objectives, it has some gaps. For example, even if it states various categories of persons such as women, children, elderly, persons with disability (PWD), and people living with HIV/AIDS as vulnerable groups requiring special attention,[47] the policy does not expressly provide its concern for the vulnerability of IDPs population. Yet, the last phrase of the paragraph shows that the list is not exhaustive, and the term 'other social issues' could be inferred to be inclusive of IDPs and their vulnerability.

It is to be noted that the legibility of IDPs for humanitarian assistance could be in question as the Policy states '*Free emergency relief assistance* and recovery and rehabilitation support will only be provided to those who are poor elderly, infirm, pregnant and lactating women, persons with disability as well as to those people confirmed unfit for work due to illness.'[48] Those who are able and fit to work are legible for humanitarian assistance on the basis of early warning and disaster assessment only if 'it is linked to development activity.'[49] Clearly the policy –while setting the strategies– should have given due attention to the heightened vulnerability of IDPs in comparison to the general affected population. On the other hand, the overall focus of the policy is humanitarian assistance to victims of disasters and does not mention a concern on the wellbeing, security and human rights protection of the victims

[46] The Ethiopian National Policy and Strategy on Disaster Risk Management (2013) (National Policy), Specific Objectives, pp. 4-5.
[47] Id, p. 12.
[48] The National Policy, *supra* note 46, p. 7.
[49] Ibid.

beyond its generally expressed principle that 'no human life shall be lost due to lack or shortage of provision of relief assistance in times of disaster.'[50] The following sections deal with *specific legal and institutional regimes relating to IDPs.*

3.1 National legal framework upholding the rights of IDPs

Protection is a legal concept and it cannot be secured in the absence of a national legal framework. Thus a national legal framework safeguarding the rights of IDPs is a significant manifestation of national responsibility and a means of its realization.[51] Whatever approach the country may adopt, having a national legislation on internal displacement is vital in defining IDPs, spelling out their rights and the respective duty of governments.[52] Considering the demanding situation of IDPs, there are major legal developments for the protection of IDPs in the African continent particularly the 2009 AU Kampala Convention, the 2006 protocol for the protection of IDPs by the Great Lakes region of East, Central and Southern Africa, the Khartoum Declaration on IDPs which is the result of the 2002-2003 ministerial conference on IDPs in the IGAD sub region.

Ethiopia signed the Kampala Convention in October 2009, ratified it on February 2020,[53] and is also a signatory to the non-binding Khartoum Declaration on IDPs.[54] Quite a few African countries have taken inspiring steps in response to the problem of internal displacement; Uganda is the best example to adopt a good policy [55]whereas Kenya has adopted a comprehensive law on IDPs.[56] There is neither a separate national policy nor a specific law to regulate internal displacement in Ethiopia. Yet, with respect to human rights guarantees, the general human right provisions under chapter

[50] Id, p. 13.
[51] The Brookings Institution (April 2005), *supra* not*e* 14, p. 16.
[52] Ibid.
[53]African Union Convention (Kampala Convention) for the Protection and Assistance of Internally Displaced Persons in Africa Ratification Proclamation No. 1187/2020.
[54] Khartoum Declaration: Ministerial Conference on Internally Displaced Persons in the IGAD Sub-Region, available at <https://www.brookings.edu/wp-content/uploads/2012/04/DecKhartoum.pdf> accessed on 24 September 2022.
[55] Elizabeth Ferris (2-4 May 2012), *supra* note 43*,* p. 5.
[56] 'Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities'*,* Act, No. 56 (2012), The National Council for Law Reporting with the Authority of the Attorney-General, available at <www.kenyalaw.org> accessed on 10 October 2016.

three of the FDRE Constitution are equally available for IDPs, and international human right instruments ratified by Ethiopia apply to IDPs. [57]

Accordingly, the UDHR (Universal Declaration of Human Rights), ICCPR (International Covenant on Civil and Political Rights), ICESCR (International Covenant on Economic, Social and Cultural Rights), CRC (the Convention on the rights of the Child), CEDAW (Convention on the Elimination of All forms of Discrimination against Women), ACHPR (African Charter on Human and Peoples' Rights) and ACRWC (African Charter on the Rights and Welfare of the Child) are the major international human rights instruments ratified by Ethiopia[58] that are pertinent for IDPs protection. However, with the magnitude of inter communal conflict in Ethiopia, the existing general human right instruments that does not specifically spell out the protection needs of IDPs seem to be insufficient or incapable of addressing the plight. Moreover, there is the need for the domestication of the Kampala Convention, and the experiences of other African countries show the significance of having a national law for the prevention, protection and assistance of IDPs and affected communities. Therefore, it is critical for Ethiopia to adopt IDPs specific national legislation stipulating the specific rights and freedoms of IDPs, the respective obligations of the state and duties of other individuals or groups for the prevention, protection and assistance to IDPs.

3.2 National policy or plan of action on internal displacement

Adopting a national policy or plan of action is a separate, though supplementary, 'measure to the enactment of national legislation.'[59] A policy on IDPs allows the state to stipulate a comprehensive response to internal displacement; and to put forth responsibilities of national and local institutions, the roles and responsibilities of different branches of the government and the mechanisms of coordination.[60] Although there is no IDPs specific national policy or plan of action, the National Policy on disaster risk management recognizes the issue of internal displacement in Ethiopia. The

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[57] The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazeta, 1st Year No.1, 1995, (FDRE Constitution), under Art. 9(4) envisage all international agreements ratified by Ethiopia essentially forming part of the law of the country.

[58] Office of the National Human Rights Action Plan, Federal Attorney General (December 2016), 'The Second Ethiopian National Human Rights Action Plan', at 17, available at <https://www.refworld.org/pdfid/60af61884.pdf> accessed on 10 September 2022.

[59] The Brookings Institution (April 2005), *supra* note 14, p. 17.

[60] Ibid.

Policy acknowledges the existence of a disaster risk posed by conflicts in the country.[61] The Policy is an amendment of the 1993 National Policy on Disaster Prevention and Management with the objective of 'establishing a comprehensive and coordinated disaster risk management system in the context of sustainable development.'[62]

However, the Policy only provides for the definition of internal displacement as 'the process of people being forced to move from their homes to other places because of a natural hazard, war/conflict, or other human-made action.'[63] Apart from such recognitions and derivations made above, the Policy does not embody deliberate and tangible principles or strategies directed towards IDPs in general or inter communal conflict induced IDPs in particular.

Furthermore, the first National Human Rights Action Plan/NHRAP (2013-2015) and the second (2016-2020)[64] explain the human rights and fundamental freedoms enshrined in the FDRE Constitution; and in the international human rights instruments ratified by Ethiopia. It also forwards the respective institutional arrangements that enforce and oversee the implementation of the action plan. However, the action plan does not include the human rights or any other concerns of IDPs in its category of vulnerable groups. The action plan fails to recognize the Kampala Convention as human rights instrument for IDPs in the Ethiopian human rights regime.

Therefore, it is imperative for Ethiopia to consider adopting a multi stakeholder plan of action to reduce and resolve internal displacement through prevention, protection and devising durable solutions in line with regional and international IDPs specific legal instruments. The National Human Rights Action Plan (NHRAP) could serve as a guide for priority issues, more strategic, coordinated and collaborative national action on internal displacement. The third draft of the NHRAP prepared in 2021 should thus be reviewed in line with the rights of IDPs.

3.3 National institutional focal point for IDPs

Establishing a national institution designated for IDPs is crucial to secure sustained responsiveness and to benefit from an effective coordination among the government organizations as well as domestic and international partners.[65]

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[61] The National Policy (2013), *supra* note 46, p. 3.
[62] Id., p. 4.
[63] Id., p. 20.
[64] The Second NHRAP (2016), supra note 58.
[65] The Brookings Institution (April 2005), *supra* note 14, p. 18.

However there is no specific institution established in response to IDPs plight in Ethiopia.

Even if the number of IDPs is escalating, there is no specific government agency or ministry accountable to responding to IDPs[66] thereby impeding a coordinated and comprehensive national or international protection. Article 89(3) of the FDRE Constitution states the responsibility of the Federal government to prevent and respond to disasters including establishing a disaster preparedness and response system. Notwithstanding such provision, the National Policy introduces a decentralized disaster risk management system at the Regional, Zonal, and Woreda levels. Each level of government 'undertakes an activity ranging from prevention to rehabilitation using their own capacities. And response operation that exceeds the capacity available at any level of government is undertaken by the next higher level of government.'[67]

On the basis of this, any undertaking which aims at the prevention of inter communal conflict-induced internal displacement is the responsibility of every level of the government. The same pattern of responsibility applies for preparedness for response, the measures to be taken when conflict materializes and displacement occurs, and for the tasks of devising durable solutions that are tenable to the situation. At the Federal level, NDRMC responds to any sort of IDPs situation upon the request of the local or regional government.[68] NDRMC has established a Disaster Response and Rehabilitation Directorate within its internal work departments and this directorate aspires to work on the quest for durable solutions and rehabilitation for IDPs. Yet during the 2017-2018 inter communal conflict, NDRMC was only working on Humanitarian Assistance.[69]

Furthermore the National Policy lists various organs which also includes the then Ministry of Federal and Pastoralists Affairs (now Ministry of Peace) to undertake operations of monitoring and response for disasters relevant to their respective sectors.[70] It is the mandate of the NDRMC to mobilize and

[66] Internal displacement monitoring center and Norwegian refugee council (2009) 'Ethiopia: Human rights violations and conflicts continue to cause displacement, A Profile of the internal displacement situation', available at <www.internal-displacemnt.org>, accessed on 20 June 2016, pp. 8 and 153.

[67] The National Policy (2013) *supra* note 46, p. 14.

[68] Interview with Mrs. Zenit Ahmed, Disaster Response and Rehabilitation expert, Disaster Risk Management Commission., Addis Ababa, Ethiopia March 21, 2017.

[69] Ibid.

[70] The National Policy (2013), *supra* note 46, p. 16.

coordinate relevant sectoral offices while responding to any disaster.[71] The then Ministry of Federal and Pastoralists Affairs (hereinafter the Ministry) was the 'lead institution with respect to conflict related hazards and associated disasters.'[72]

The Ministry's intervention was envisaged in case disasters occur in (or affect) more than one region and if responding to such situation is beyond the capacity of the affected region/s; or when there is a high tendency for the disaster to spread rapidly and cover massive areas.[73] Pursuant to such arrangements the Ministry worked on pre-involvement in conflict prone areas, rapid response to conflicts and probing durable solutions for the conflicts.[74] With regard to the response, in the 2017-2018 inter communal conflicts, there was no special department for the IDP in the Ministry, and its response to IDPs plight was conducted through the general response mechanism for the conflict and affected population.[75]

During this period, the role of the Ministry was primarily to remind the responsibilities of the concerned authorities and to influence such authorities to respond to IDPs plight expeditiously. For the humanitarian response as well as human rights protection of the affected populations, the Ministry was mainly persuading the disaster risk management authorities at the woreda/zonal/regional/Federal levels based on the exigencies of the conflict and their capacity to respond.[76]

The Ethiopian government responded to the 2017 Oromia-Somali conflict and displacement through the operation of various government organizations. The response aimed at political resolution of the conflict to maintain security in the conflict areas and also on the delivery of humanitarian assistance to the IDPs. The Prime Minister convened a National Steering Committee to find out the effects of the Oromo-Somali conflict, in order to deal with the recognized needs, to change the situation back to normal and to ensure the continuation of service in the conflict locations.[77] The committee was established under the then Ministry of Federal and Pastoralists Affairs and included the NDRMC and the National Security Force as members.

[71] Mrs. Zenit Ahmed*, supra* note 68.
[72] The National Policy (2013), *supra* note 46, p. 16.
[73] Ibid.
[74] Interview with Mr. Haileab Getachew, Expert on Conflict Early Warning and Emergency Response Directorate, the then Ministry of Federal and Pastoralists Affairs Addis Ababa, Ethiopia, 21 March 2017.
[75] Ibid.
[76] Ibid.
[77] OCHA (23 January, 2018) *supra* note 32.

Moreover, OCHA, cluster members, donors and Line Ministries also participated in the weekly meetings organized by the Technical Focus Group under the chairmanship of NDRMC and co-chaired by OCHA.[78]

Although this experiment is appreciated considering the previous disaggregated responses to IDPs, it is evident that the temporary establishments of committees cannot be as effective as a permanent institution, and its functionality is a charity based approach rather than human rights based approach. Therefore, the problems and challenges of IDPs in Ethiopia call for permanent IDPs specific institution entrusted with the responsibility of enforcing national, regional and international instruments on preventing internal displacement, protecting, assisting and finding durable solutions for IDPs.

3.4 The role of national human rights institutions[79]

In recognition of the significant contribution provided by national human rights institutions in the promotion of human rights including that of IDPs in a given country, the UN Commission on Human Rights recommends states to establish such institutions.[80] The Ethiopian Human Rights Commission (herein after the Commission) is an independent and impartial institution established by Proclamation No. 210/2000, as amended by Proclamation No. 1224/2020. The most relevant mandates of the Commission for this discussion are the promotion, ensuring the respect, protection and fulfillment of constitutionally guaranteed human rights through monitoring and investigation of human rights violations and forwarding recommendations.[81]

As an institution entrusted with the task of ensuring the respect for the human rights of all citizens, the Commission should have been included in the lead agency lists of the National Policy. Yet, the Commission's tasks include receiving complaints, monitoring and/or investigating –of its own motion– human rights violations during inter-communal conflicts including those involving internal displacement. Like any other human right institution in a developing country[82], the Commission (during the period 2017-2018) was

[78] Ibid

[79] The Brookings Institution (April 2005), *supra* note 14, p. 19.

[80] United Nations Commission on Human Rights, Resolution 2004/55 (20 April 2004), at Para.18 and 21; and Resolution 2003/51 (23 April 2003), Para.18 and 21.

[81] *Establishment of Ethiopian Human Rights Commission*, Proclamation No.210/2000, Federal Negarit Gazeta, 6th Year No. 40, ADDIS ABABA, 4th July, 2000, at Art. 6. As amended by Proclamation No. 1224/2020

[82] Mario Gomez (2002) "National Human Rights Institutions and Internally Displaced Persons: Illustrated by the Sri Lankan Experience", *Brookings Institution-SAIS*

going through various challenges such as financial constraints, enforcement of its recommendations and the actual power to influence government organizations and the officials.[83] According to several critics, its institutional independence –during the pre-2018 period– was also among the major challenges with regard to effective response to the human rights situations of IDPs in Ethiopia. However, the institutional position of the Commission is tremendously changing positively following the 2018 political reform. The role of the Commission is tremendously changing positively as a result of its institutional reform, including broadening its mandate and ensuring its financial independence, following the amendment of its establishment proclamation in the year 2018.

In the National Policy, the Commission has no meaningful and direct undertaking designed for the human rights protection of IDPs. Yet, in areas where inter-communal conflict and gross human rights violation was recurring, the Commission undertook monitoring and investigations on its own initiation or upon receiving complaints; and it reported its findings to the public, and the House of Peoples Representative along with its recommendations.[84] Although the contribution of the Commission for the IDPs to find a redress was limited[85] due to institutional barriers as well as other contextual factors in the year 2017-2018,[86] it has made structural transformations after the 2018 reform.

This major change includes the establishment of IDPs specific thematic department. The Commission in the exercise of its protection and promotion mandate conducts monitoring and investigation, documenting and publicizing findings on the situation of IDPs.[87] Furthermore the Commission recommends and calls for immediate action from the concerned government and other

Project on Internal Displacement, available at <www.brookings.edu/fp/projects/idp/idp.htm> accessed on 21 June 2016.

[83] Interview with Mr. Wubshet Girma, *Human Rights Violation Investigation Directorate*, expert, Ethiopian Human Rights Commission/EHRC, on March 28, 2017.

[84] Ibid.

[85] The Brookings Institution (April 2005), *supra* note 14, pp. 19-20; Read for the ideal activities which a national human right institution should undertake.

[86] Mr. Wubshet Girma, *supra* note 83.

[87] *See* for example reports on IDPs situation in the EHRC-OHCHR (Office of High Commissioner for Human Rights) joint Investigation Report, available at <https://www.ohchr.org/sites/default/files/2021-11/OHCHR-EHRC-Tigray-Report.pdf >, see also <https://ehrc.org/ehrc-monitoring-civilian-displacement-in-amhara-afar-regions/>, accessed on 01 September 2022.

stakeholders through several consultations, campaigns, and capacity building activities as part of its advocacy work.[88]

On the other hand, the role of local CSOs on the protection of inter-communal conflict induced IDPs was limited or nonexistent in the year 2017-2018. It was only the Ethiopian Human Rights Council that made an effort to investigate and document the inter-communal conflict (which the council referred as ethnic based attacks and conflicts) and displacement. A call for the resolution of ethnic based attacks and conflicts was made in the 143th report of the Council.[89] The report was released on November 4, 2017 and it reiterated the need for the government to take policy and pragmatic measures to find a solution for ethnic based attacks and conflicts. The report also pointed out that gross human rights violations occur during such conflicts.[90] Therefore the national legislations and subsequent national action plans on internal displacement are expected to expressly provide meaningful roles to national human rights Commission and CSOs in the the protection and assistance needs of IDPs.

4. Obligation to Prevent Internal Displacement and Finding Durable Solutions to IDPs

4.1. Prevention: An overview

Prevention of internal displacement is the first and foremost responsibility of the government. The reading of the Kampala Convention and the Guiding Principles (Principles 5-9) connotes the national responsibility to prevent and avoid conditions that might lead to displacement of population. It further envisages the responsibility of states to explore alternatives and to reduce inevitable displacement, alleviate its adverse effects, and to ensure that any displacement does not continue longer than required by the circumstances.[91] Particularly, the national authorities should afford the utmost attention to arbitrary displacement. Identifying and properly handling the legal parameters

[88] Visit EHRC website for several reports and press statements on IDPs.

[89] Human Rights Council (May 2018), "Ethnic based attacks and conflicts should be resolved" 143th Special Report on Human Rights, available at <http://ehrp.org/ethnic-based-attacks-and-conflicts-should-be-resolved-hrc-143th-special-report/> accessed on 08 August 2018.

[90] Ibid.

[91] Kampala Convention, *supra* note 3, Art. 3 (1) (a). And The Guiding Principles, *supra* note 3, Art. 5-9.

on restriction of freedom of movement is important for national authorities to understand arbitrary displacement.[92]

As highlighted above, the National Policy is inclusive of prevention and reductions of disaster risks[93] which by interpretation includes inter communal conflict disasters. Yet, the prevention and mitigation of internal displacement should be expressly included in the prevention and mitigation strategies of disasters at every level of government. It can be said that the prevention and reduction are more practical for natural disasters such as drought and flooding, and yet not always feasible for man-made disasters including inter-communal conflict.

In order for the then Ministry of Federal and Pastoralists Affairs to prevent internal displacement that could occur due to inter-communal conflict, the timing when the request for intervention is received, was vital.[94] If the request for intervention or the information on the conflict reaches the office after the conflict has already commenced, then it is difficult to prevent the displacement. Thus the strategy should enable intervention in advance to prevent inter-communal conflict, in order to protect people from leaving their home or residence due to the conflict.

The Ministry had a specific directorate working on the prevention, response and finding durable solutions to conflicts including inter communal conflict. In the year 2017-2018, there were offices at the regional and zonal levels which are established for the purpose of receiving and collecting status about conflict or the likelihood of its occurrence. This is like an early warning system, a mechanism to gather information on conflict signs and/or incidents that could lead to a conflict among neighboring woredas. These offices report their assessment of the situation to the nearby authority; thereby enabling the Ministry to be ultimately involved.[95]

There were also peace committees in conflict prone areas where there is a persistent threat to peace such as Oromia, Somali, Gambella, Benshangul, Afar and SNNPR (Southern Nation Nationalities Peoples Representatives). The members of the peace committee are from neighboring woredas located

[92] NRC, IDMC (Internal Displacement Monitoring Center) and African Union (2014) "The National Responsibility to Protect IDP: The Kampala Convention", Workshop Report, 8-10 December, Addis Ababa, Ethiopia, p. 6, available at <http://www.internal-displacement.org/publications/2016/workshop-report-/> accessed on 21 December 2016.

[93] The National Policy (2013)*, supra* note 46, p. 4.

[94] Mr. Haileab Getachew*, supra* note 74.

[95] Ibid.

in different regional states. The committees held regular meetings to discuss issues that could lead to conflict and the Ministry used to provide supervision and support including training on conflict management and peace building every three months. These arrangements not always succeed in preventing inter communal conflict due to the multidimensional context of the conflicts as well as the cultural, political, social, economic and other aspects of the neighboring woredas. Yet, the relative peace witnessed in Moyale, for example, following the 2011-2012 conflict among the neighboring pastoralists and semi pastoralists[96] was considered the result of peace committee operation.

4.2 Potential overlap of mandate

On the basis of the FDRE Constitution, the House of Federation is entitled to resolve border disputes,[97] self-determination right of Nation, Nationalities and Peoples including the right to succession[98] and to find solutions to disputes and misunderstandings between or among regional states[99]. The mandates of the House includes a binding decision where negotiations fail between the contested parties to border disputes and other misunderstandings not pertaining to border issues.[100] Strictly speaking the mandate to pass a binding solution in resolving any of the above disputes solely vests on the House and not on the then Ministry of Federal and Pastoralists Affairs.

The Ministry was thus entrusted with a facilitation role in resolving disputes arising between or among regional states.[101] It was also entitled to develop and implement sustainable political solutions for disputes and conflicts arising within regional states; though this cannot be exercised contrary to any 'other relevant law' and the consent of the concerned regional states. The words 'other relevant law' can be understood to include the FDRE Constitution, the proclamation on the definition of powers and duties of executive organs of the

[96] Ibid.
[97] The FDRE Constitution*, supra* note 57, at Art. 48.
[98] Id., at Art.62(3)
[99] Id., at Art.62(6)
[100] Consolidation of the House of Federation and Definitions of its powers and responsibilities, Proclamation No. 251/2001, FEDERAL NEGARIT GAZETTA, 7th Year No. 41, Addis Ababa, 6th, July 2001 at Art.19 and the following provisions on self-determination and state formation; Art.27 and the following on border disputes; and Art.32 on other disputes and misunderstandings.
[101] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation No. 691/2010, FEDERAL NEGARIT GAZETTA, 17th Year No.1, Addis Ababa, 27th, October, 2010 at Art. 14 (b) and (c).

federal government and the proclamation on the powers and responsibilities of the House of the Federation.

Thus, the Ministry was expected to conduct conflict prevention and resolution activities in a manner that it could not infringe the powers of the House, thereby arguably causing challenges in the overlap of mandate. While resolving inter communal conflicts arising due to misunderstandings on administrative borders, the Ministry was engaged in the conduct of border demarcation even though such power is legally reserved for the House. The House of Federation on the other hand receives grievance which arise from border demarcations conducted by the Ministry.[102] The silver lining from this overlap of mandate is the forum shopping opportunity it provided for the victims pursuing a solution. Some argue that the risks and actual inter-communal conflicts are embedded in the state structure and how the regions are systematized, and the solutions are seemingly more of political rather than a legal one. Nevertheless, harmony can be attained in view of the overarching shared objectives in such a manner that a specific institution on IDPs can be mandated to prevent internal displacement and set up a coordination strategy among key stakeholders.

4.3 Durable solutions

National authorities are under obligation to institute the conditions and provide the means to ensure that IDPs get durable solutions. Safety and dignity are indispensable elements of durable solutions and particularly conflict-induced displacement calls for "an end to the conflict or fundamental change in the circumstances"[103] that initially triggered the displacement. For the 2017-2018 displacements, according to IOM "permanent reintegration and identification of durable solutions for IDPs in Ethiopia remains elusive due to insecurity and lack of socio-economic development in affected areas, where the majority remain in dire need of humanitarian assistance".[104]

A workshop conducted in May 2004 revealed that of all the alternatives to durable solutions, IDPs in Ethiopia prefer to return to their original settlement due to difficulties of establishing comfortable residence elsewhere. The major

[102] Interview with Mr. Girma Zewde, Conflict Resolution and Peace Building Directorate, expert, HOF, on March 28, 2017.
[103] The Brookings Institution (April 2005), *supra* note 14, p. 22.
[104] Ibid.

obstacles to return are insecurity particularly in conflict-induced displacements and the lack of livelihood opportunities.[105]

With regard to the 2017-2018 IDPs, finding durable solutions depended on the political willingness, commitment and the availability of resources in the concerned level of government.[106] In some cases particularly in conflict areas, situations took a longer time to calm down, and this was a challenge to durable solutions. The result of the delay to access durable solutions is that the IDPs are either exposed to prolonged and or secondary displacement or find a solution by themselves. For instance, during the 2015-2016 displacement situations in Oromia regional state, West Shoa Zone in Nono Woreda, the displaced were not able to find an immediate solution, and some were resettling in another place by themselves[107] while there were IDPs who suffered in dire situations. This depicts that finding durable solutions for inter-communal conflict induced IDPs remains a challenge in Ethiopia.[108]

Based on the experiences of the Ministry, those who left their home/residence usually *return* to their place of origin even in the long term.[109] The best example here is the 2015-2016, Bench-Maji zone Yeki woreda displaced people who were hosted at Sheko woreda but found their way back home several months later after the conflict was resolved. Though the Ministry imposed its influence on every concerned authority to find durable solutions for the displaced, *reintegration* in the host community/woreda or *resettlement* in another woreda is not a guaranteed option.[110] This is because the displaced are mostly farmers, pastoralists and/or semi pastoralists who are dependent on land and cattle for their survival.

More importantly return and resettlement usually cannot take place without "some transitional assistance, such as food to tide the IDPs over, while crops are replanted and tended."[111] The host community/woreda which provided a

[105] OCHA, DPPC (The Disaster Prevention and Preparedness Commission), IOM, PCI (Pastoral Communication Initiative Project) and NRC (May 24-25, 27, 2004)*, supra* note 16, p. 5.

[106] Mr. Wubshet Girma, *supra* note 83.

[107] Ibid.

[108] Ibid.

[109] Mr. Haileab Getachew, *supra* note 74.

[110] Ibid.

[111] David Fisher (2001) 'The Right to Humanitarian Assistance', in Walter Kalin, Rhodri C. Williams, Khalid Koser, and Andrew Solomon (eds.), *Incorporating the Guiding Principles on Internal Displacement in to Domestic Law: Issues and Challenges*, Brookings-Bern Project on Internal Displacement, the American Society of International Law, Studies in Transnational Legal Policy, No. 41, PP. 47-128, at 115.

temporal residence for the displaced could be unable or unwilling to arrange such resources and the same hindrance is there for resettlement. Looking at the patterns of the 2017-2018 inter communal conflict induced displacements, the following observations are made. Providing *resettlement* in another location is usually considered as the responsibility of the regional government whose nationalities are displaced, like Oromia regional state resettling Oromos who were displaced from Somali region. The regional government provided land where the displaced could settle and it provided a transportation services for the displaced to travel to such resettlement areas.

However, the lack of basic infrastructure, such as health clinics, clean water supplies and schools, as well as agricultural assistance or food assistance in the resettlement areas remained barriers for resettlements to be effective and feasible durable solutions. For example, it was challenging for IDPs to reintegrate and resettle as of right because the application of these responses depended upon the discretion of the concerned regional government and the then Ministry of Federal and Pastoralists Affairs.[112]

Furthermore, during the 2017 Oromia-Somali region inter-communal conflict, the government along with the community made efforts for the voluntary return of the displaced through peace building and reconciliation in the conflict areas. Such efforts were designated to reverse protracted displacement situations and to maintain the constitutionally guaranteed right of every Ethiopian citizen to dwell in a place of her/his choice irrespective of ethnic background, religion or any other status. However, the overall security situation and livelihood needs indicated a high degree of probability for the displaced population to continue in their displaced situation in the short and medium term, and this was happening in the displacement camps located in Somali region.[113]

In a continued response to the conflict and the IDPs from the Oromia-Somali regional states, the House of People's Representative sent a team to the displacement locations. And after receiving a report on the conditions of the displaced people from such a team, on January 4, 2018, it allocated ETB 500 million to rehabilitate over 500,000 IDPs. There was also additional fund through mobilization from governmental and private organizations for the relocation or local integration of the displaced.[114] On the other hand the regional government of Oromia focused on the relocation of IDPs in the rehabilitation effort. OCHA's statement during the period reads:

[112] Mr. Haileab Getachew, *supra* note 74.
[113] OCHA (23 January, 2018), *supra* note 32.
[114] Ibid.

> In Oromia region in particular, the regional government has started implementing a phased rehabilitation program. Accordingly, some 86,000 persons (14,000 households) are scheduled to settle in 12 towns of the region under phase 1. The resettlement program is based on the ongoing IDPs verifications exercise by Haromaya University. A regional committee has been set up to oversee the implementation of the IDP rehabilitation. Where extended families are known and/or traced, the government has been encouraging people to move-in with them, and where accepted, supporting transport to destination.[115]

On recent development, the Ethiopian government along with international and national partners adopted the Durable Solutions Initiative (DSI) in 2019.[116] It is a joint platform that engages the Ministry of Peace, chaired by NDRMC and co-chaired by IOM and the UN Resident Coordinator's Office (RCO).[117] The initiative provides operational framework and platform to design and implement durable solutions in support of IDPs through different policy, legislative, and institutional level interventions.[118] The Federal Durable Solutions Working Group that is envisioned in the framework takes the lead in coordinating the government, international and national partners in the implementation of the operational framework.

Based on such national initiative Somali regional state has also adopted a Durable Solutions Strategy for the period 2022-2025 which aims to find lasting solutions to the protracted and recurrent internal displacement in the region.[119] Although this can be a positive development, implementing the framework and institutionalizing the scattered activities still requires further structural measures. In the absence of a national normative framework that guarantees the right to find a durable solution, coupled with the non-existence of specific institution legally authorized to coordinate and respond to displacement and secure durable solutions for IDPs, it is unattainable for Ethiopian IDPs to get a long lasting relief. Hence the legal and institutional

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[115] Ibid.

[116] Ethiopia Durable Solutions Initiative, available at <https://ethiopia.un.org/sites/default/files/2020-01/DSI%20Ethiopia%20low%20res.pdf> accessed on 10 September, 2022.

[117] Id., Page 15.

[118] Id., Page 2.

[119] IOM, available at <https://ethiopia.iom.int/news/newly-launched-durable-solutions-strategy-seeks-resolve-displacement-ethiopias-somali-region-0> accessed on 10 September, 2022.

frameworks remain mandatory to realize durable solutions for IDPs in Ethiopia.

4.4 Participation of IDPs in decision making

One of the key recommendations of the UN special rapporteur on the human rights of IDPs is for the states to ensure the full participation of IDPs.[120] The inclusion of participation standard in the national protection framework on IDPs enables IDPs to forward their views to influence the authorities which are mandated with the task of decision making without the fear of being punished or the risk of harm.[121] The provisions on guarantees of prior information and consultation for IDPs in the Guiding Principles and the Kampala Convention deserve due attention in this regard. Informing and consulting IDPs on any response –either international or national– can considerably enhance its effectiveness.[122]

Though the Ministry did not devise IDPs specific response, the conflict management directorate firmly believed in the consultation and participation of the affected population in framing successful solutions to the conflict.[123] Any solution devised to resolve a conflict and its consequences cannot be effective without the participation of those affected and who are concerned.[124] Therefore such a belief and practical advantage should be institutionalized in the national legal and institutional frameworks as discussed above.

5. Allocation of Adequate Resource and the Duty to seek International Cooperation and Assistance

5.1. Allocation of adequate resources

Another underlining factor in the obligations of national authorities towards IDPs is the duty to allot, to the extent possible, resources (both human and financial) to fulfill the protection and assistance needs of IDPs.[125] This can be complemented by the possibility of international assistance in cases of shortage.[126] According to the Ministry of Finance, in the year 2017-2018,

[120] See UN, Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, UN, Geneva, A/HRC/38/39, 2018, available at <https://reliefweb.int/report/world/report-special-rapporteur-human-rights-internally-displaced-persons-ahrc3839-enarru> accessed on 10 September 2022.
[121] The Brookings Institution (April 2005), *supra* note 14, pp. 20-21.
[122] Ibid.
[123] Mr. Haileab Getachew, *supra* note 74.
[124] Ibid.
[125] The Brookings Institution (April 2005), *supra* note 14, p. 24.
[126] Ibid.

there was neither special IDPs fund nor a budget for IDPs program in the national budget stream of Ethiopia. Thus, the then Ministry of Federal and Pastoralists Affairs encountered shortage of resources both financial and human capacity to run their mandates and there were no contingency funds reserved. Nor did the Ministry receive any form of international financial assistance from governmental or non-governmental organizations (NGOs) in responding to inter-communal conflict induced IDPs.[127] Nevertheless, the NDRMC mobilized support from organizations located in the country including government sectoral institutions and international organizations such as OCHA and UNDP.[128] The recent improvements witnessed following the year 2018 on the involvement of international organizations and agencies in the aid of IDPs depicts the lifting up of the limitation by the government and its willingness to work together in order to overcome both financial and technical deficiencies.

In contrast to the previous inter-communal conflict induced IDPs situations of the country, the 2018 Gedeo and West Guji displacement (due to inter-communal conflict) involved support of fund from many international organizations with a relative freedom in funding and access to conflict sites. The Multi Sector Response Plan 1 set out by NDRMC and humanitarian partners revealed the urgent need for US $117.7 million to counter the Gedeo-West Guji displacement crisis.[129] Following such a call (July 2018 onward), the UNCERF (United Nations Central Emergency Response Fund) provided USD 15 million to increase the humanitarian support to people affected by the growing inter-communal conflict in Ethiopia.[130] On July 24, 2018, IOM also put forward USD 22.2 million in response to the suffering of the displaced from Gedeo and West Guji zones.[131] The Ethiopian Red Cross Society and ICRC visited one of the biggest displacement areas located in Kochere district,

[127] Mr. Haileab Getachew, *supra* note 74.

[128] Mrs. Zenit Ahmed*, supra* note 68.

[129] UN CERF (2018) "UN's Emergency Fund Releases US$15 Million for Lifesaving Assistance to Displaced People in Ethiopia", available at <https://reliefweb.int/sites/reliefweb.int/files/resources/PR_CERF_Ethiopia%20%281%29.pdf > accessed on 08 August 2018.

[130] Xinhuanet (2018), "UN migration agency appeals for aid to Ethiopia's displacement crisis", available at <http://www.xinhuanet.com/english/2018-07/24/c_137345771.htm> editor Mu Xuequan, accessed on 08 August 2018.

[131] IOM (2018)available at <https://www.iom.int/news/iom-launches-usd-222m-appeal-gedeo-west-guji-displacement-crisis-ethiopia> accessed on 08 August 2018.

Gedeo zone and also provided assistance to 100,000 displaced people gathered in the district.[132]

Other than such occasional and isolated relief to the displaced, the international community was not acquainted with the 2017-2018 displacement situations. For example, the ICRC's assessment team leader stated, "This crisis is completely off the radar of the international community and the consequence of this neglect could be dire. If humanitarian assistance is not scaled up quickly, people will be at risk of malnutrition and disease outbreaks, especially as the rainy season sets in."[133] William Lacy Swing, IOM's Director General also shared this concern and he particularly said the displaced people in West Guji zone are in desperate "need of humanitarian support to help them get through Ethiopia's cold and rainy season."[134] IOM also made it clear that the international community and the Ethiopian government need to make more efforts to respond to the plight of the IDPs.[135]

Likewise, eight international NGOs in a joint statement made on 19th July 2018; also stressed the fact that there was an increasing humanitarian need in the country due to fresh displacement including the September inter communal conflict between Oromia and the Somali Regional state.[136] The concerns of the humanitarian agencies can be grasped from the joint statement which reads:

> At least 1 million people, the majority of whom being women and children are in need of urgent humanitarian assistance following recent inter-communal conflict in Ethiopia. Aid agencies in Ethiopia are appealing for critical and urgent assistance for close to a million people that have fled their homes following inter-communal violence along the border of the Southern Nations, Nationalities, and Peoples' (SNNPR) and Oromia Regions of Ethiopia. Displaced communities in Gedeo and West Guji are facing critical gaps in accessing basic services as the majority left their houses with close to nothing. They are in need of food, shelter, water and psychosocial support. Aid agencies

[132] ICRC (2018), *supra* note 25.
[133] Ibid.
[134] IOM (24 July 2018) *supra* note 18.
[135] Ibid.
[136] Care International Organization (2018), "Joint INGO Statement: Fresh Displacement Increasing Humanitarian Needs in Ethiopia", available at <https://www.care-international.org/news/press-releases/joint-ingo-statement-fresh-displacement-increasing-humanitarian-needs-in-ethiopia> accessed on 20 August 2018.

> warn that without a scale up of assistance, the situation of the IDPs is likely to further deteriorate. The Government of Ethiopia together with humanitarian partners has launched lifesaving assistance for the IDPs. This is however in the face of major resource constrains challenging their ability to address significant gaps.[137]

On the other hand, limited resources are not the only obstacles against the assistance of the displaced. Continuous and sometimes intermittent tensions in conflict areas are also constraints to access humanitarian aid to the needy. Though situations in the majority of conflict areas were simmering, tensions and localized incidents that happen every now and then keep hindering access to reach some Kebeles for humanitarian assistance.[138] The lack of willingness on the part of regional authorities to cooperate with international relief organizations was another hurdle for humanitarian assistance not to reach the displaced on time.[139]

With regard to the September 2017 Oromia-Somali regions inter communal conflict, the resources of the humanitarian actors were not adequate enough as the resources were already long-drawn-out to cater for the imminent needs of the 2.5 million IDPs across the country.[140] This situation evokes the scholarly debate whether IDPs should be prioritized in the field of humanitarian assistance over other victims of calamity. The Ethiopia Humanitarian Fund, ECHO, OFDA (The Office of U.S. Foreign Disaster Assistance) and other quite a few donors have shown flexibility to redirect funds already allocated for drought response to be utilized for the needs of conflict IDPs.[141]

There was a new exercise coordinated by OCHA among humanitarian members of clusters which aimed at enlarging the responsibility of partners, through prioritization, towards conflict IDPs in areas where they already have a strong attendance. Moreover the new exercise, by utilizing the Round 8 of the IOM DTM (Displacement Tracking Matrix), allows answering the following questions:

> What response has been delivered, or could be delivered with existing resources used flexibly; what further response are partners ready to commit to provide if additional resources are

[137] Ibid.
[138] OCHA (23 January, 2018), *supra* note 32.
[139] ACAPS Briefing Note (22 June 2018), *Supra* note 22.
[140] OCHA (23 January, 2018), *supra* note 32.
[141] Ibid.

> made available; and are there impediments to providing a response in areas of proposed operations.[142]

Lack of infrastructure such as roads or bridges was also a challenge in humanitarian aid. The August 2017 and January 2018 access difficulty in Dawa zone, Somali region, to WFP (World Food Program) food distribution due to a road problem was an example that exhibited the infrastructure challenge. Furthermore, humanitarian assistance partners find it difficult to obtain services from the private sector, as such entities either stop or limit provision of services owing to security threats and harm while working in conflict affected localities.[143] Accordingly, as allocation of adequate resources is one of the critical obligations and of great practical significance to realize the rights of IDPs, Ethiopia should devise budget allocation specific to IDPs in the Country. The legal and institutional frameworks suggested above will not function without adequate financial resources.

5.2 Cooperation with international and regional organizations

When states are under inadequate capacity to provide protection, assistance and durable solutions to IDPs, they should "as an exercise of responsible sovereignty," request and receive international assistance and work in collaboration with international and regional organizations.[144] It is also one of the fundamental obligations of the state under the ICESCR (International Covenant on Economic, Social and Cultural Rights) to strive independently and through international assistance and cooperation to achieve the full realization of the rights.[145]

International cooperation and assistance either financial or technical is not a problem for natural disasters such as drought and flooding but it is a challenge for inter-communal conflict induced IDPs. International organizations including IOM are not at liberty to come to the rescue and support of inter-communal conflict induced IDPs. During the period before the 2017-2018 inter-communal conflicts, even though there was a great need for humanitarian assistance in the displacement areas, the government had limited the access of international humanitarian agencies to the affected

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[142] Ibid.

[143] Ibid.

[144] The Brookings Institution (April 2005), *supra* note 14, p. 24.

[145] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Art. 2 (1) available at <https://www.refworld.org/docid/3ae6b36c0.html> accessed 6 April 2020.

areas.[146] The enactment of the Charities and Societies Proclamation No. 621/2009 had also rigorously limited the activities of other national and international human right organizations; and "thus it was not possible for such organizations to assess the profile and needs of people displaced by conflict, violence or human rights violations".[147]

The relationship of the then Ministry of Federal and Pastoralists' Affairs with international organizations was limited.[148] It was only through capacity building undertakings that the Ministry cooperated with international governmental or non-governmental organizations. The capacity building undertakings usually by the UNDP, involved training and experience sharing initiatives on the prevention and resolution of conflict, and providing material/technical assistance for new offices established for such purposes.[149]

The House of Federation received technical support from GIZ (The Deutsche Gesellschaft für Internationale Zusammenarbeit) /CPS i.e. Civil Peace Service in the prevention, resolving and finding sustainable solutions to inter-communal conflicts.[150] The service had international and national peace advisors (IPA/NPA) working on resolution of conflict and peace building who provided professional assistance to the House on conflict matters regularly.[151]

UN agencies particularly UNDP used to provide some modest financial assistance to the Ethiopian Human Rights Commission whereas OCHA, the humanitarian coordinator in Ethiopia provided capacity building and technical assistance to the Commission through trainings on human rights protection, international principles and experiences.[152] Even though international human rights organizations and/or agencies including UNHCR –through its Protection Cluster– works independently for the protection and assistance of IDPs in the country "the lack of a government counterpart and a national strategic framework for IDPs hampers targeted protection interventions and well-tailored technical support."[153]

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[146] IOM Humanitarian Compendium (2018), Ethiopia, available at <https://humanitariancompendium.iom.int/appeals/ethiopia-2018> accessed on 10 April 2016.

[147] Ibid.

[148] Mr. Haileab Getachew, *supra* note 74.

[149] Ibid.

[150] Mr. Girma Zewde*, supra* note 102.

[151] Ibid.

[152] Mr. Wubshet Girma, *supra* note 83.

[153] UNHCR (September 2013), *supra* note 15.

In spite of these pre-2018 gaps, there are positive prospects on the part of the government –after the 2018 political reform– to cooperate with international organizations and agencies for the humanitarian assistance of IDPs. One of the reforms in the legal regime include the re-enactment of the new Civil Societies Organizations/CSOs proclamation (i.e., Organizations of Civil Societies Proclamation No.1113/2019) which provides opportunities.

The new post-April 2018 government has been acclaimed for its recognition of the presence of inter-communal conflict induced IDPs in Ethiopia, and this is a significant step in addressing their plight. The government also cooperates with aid agencies in response to humanitarian needs.[154]

Nevertheless it could be argued that the involvement of international governmental and non-governmental organizations in conflict induced IDPs, should be regulated based on a national normative framework pursuant to the Ethiopian ratification proclamation of the Kampala Convention. It is indeed important to balance the legitimacy of the national government and sovereignty of the country on the one hand, and the rights of IDPs and the respective international obligations of the state on the other. This balance requires a guideline in the national legislation or plan of action which, i*nter alia,* gives clarity to the engagement of international organizations and local CSOs in response to IDPs in order to overcome both financial and technical insufficiencies on the part of the government.

6. Conclusion

As discussed in the preceding sections, IDPs specific legal and institutional framework is imperative for adequate and comprehensive national response for the protection, humanitarian needs and assistance of IDPs. Though there is no IDPs specific law to guarantee the human rights and humanitarian assistance to IDPs, the existing Constitutional and international human rights principles apply for IDPs. Yet, such constitutional provisions are ineffective without subordinate legislation that is customized based on IDPs specific contexts. Although the existing national policy on disaster is commendable, it does not accommodate the protection and assistance needs of IDPs in general,

[154] GRID (2019), Global Report on Internal Displacement, Spotlight, Ethiopia, P. 14, available at <https://www.internal-displacement.org/sites/default/files/publications/documents/2019-IDMC-GRID-spotlight-ethiopia.pdf > accessed on 09 January 2021.

and does not make specific reference to inter-communal conflict-induced IDPs.

Therefore, a national normative framework that includes a legislation spelling out the specific human rights of IDPs and the obligations of the state is imperative for Ethiopia. Moreover, a national action plan or a policy is expected to guide specific government institutions in their strategic directions and expressly determined actions that aim at the prevention of internal displacement, protection, assistance and durable solution to IDPs, in the structural context of coordination mechanisms among stakeholders.

With regard to institutions, the NDRMC is an establishment for disaster risk management at the federal level. Although it has regional and local presence in its structure, its involvement in regional disasters depends upon the lack of capacity and invitation from the concerned regional government. The NDRMC only engages in humanitarian assistance; and the human rights protection of the disaster affected people including conflict induced IDPs needs clarity in contrast to the uncertain responsibility of the concerned local government.

The human rights protection here at least pertains to the tasks of respecting and defending the human rights of the affected population including IDPs; to put an end to the human rights violation acts and engaging in the investigation, apprehension and prosecution of those involved in the human rights violations. The Ethiopian Human Rights Commission is working towards the promotion and protection of IDPs rights since its institutional reform in the year 2018. Yet, Ethiopia needs to establish IDPs specific national institution authorized with the power to enforce national, regional and international human rights normative frameworks for the protection, assistance and durable solutions to IDPs. It is also important to expand the responsibility of such institution to ensure accountability for inter-communal conflict induced arbitrary displacements and other human rights violations.

Based on the lessons that can be drawn from the 2017-2018 inter communal conflict induced IDPs, there are practical measures that should be taken by policy makers and stakeholders. These measures include collection of disaggregated data on the number and conditions of IDPs, raising national awareness, training on the rights of IDPs both to the right holders and duty bearers, a role for the national human rights institution among sectoral stakeholders, cooperation with international and regional organizations, guaranteeing durable solutions for IDPs, and allocating adequate resources. Furthermore, major practical problems witnessed and lessons learned in the 2017-2018 inter-communal conflict induced IDPs include gaps in the national normative response and institutional framework on the protection of IDPs.

As discussed in the preceding sections, there was no comprehensive response and coordination system in addressing the plight of IDPs in the 2017-2018 inter communal conflicts, and these gaps have continued in other displacement settings. The absence of national normative standards and institutional framework have created the gaps in the protection of the IDPs. Owing to the escalating magnitude of internal displacement due to natural disasters, man-made internal strife –particularly inter-communal conflicts in some parts of the country– and the current armed conflict in the north, the lessons we have learned from the 2017-2018 clearly show the need for IDPs specific legal and institutional framework. All concerned state and non-state actors should thus continue to collaborate in order to develop human rights based response to IDPs plight, and the discussion in this article can indeed lead to further discoveries in the field. ■

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Prioritization of Water Use Rights in Ethiopia:
Exploring the Perspectives and Practices in the Governance of *Awash River Basin*

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Abstract

Water governance mainly strives to ensure equitable and efficient allocation and prioritization of use rights. The scarcity of water resources in any setting can be a cause for conflict, wastage, depletion, and/or pollution. Prioritization of water use rights is considered as important principle of water governance to protect the human right to water, accommodate interests, avoid conflict, wastage and allocate available volume of water to potential users. This article explores the perspectives and practices of prioritization approach of water governance in Awash River basin. Qualitative research approach was employed, and the findings indicate that there are multiple interpretations by the key actors of the priority ladder amidst general and insufficient policy and legal frameworks. The practice also indicates that water allocation plan for the medium and large-scale water users are stated on papers whereas actual allocations are made based on convenience. It is critical to devise water reform and set prioritizing principles and standards. Moreover there is the need to apply the most feasible and comprehensive approach in water governance and avail the essential resources and technologies.

Key terms:

Prioritization · Water use · Water rights · Bundle of rights approach · Categorization · Clustering · Integration

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Contents

1. Introduction

Projections show that 40% of the current global population lives in water-stressed river basins. OECD has indicated that the demand will rise by 55% in 2050.[1] Over-abstraction and contamination of aquifers worldwide will pose significant challenges to food security, the health of ecosystems and safe drinking water supply, and can increase the risk of subsidence, among other consequences.[2] In 2050, it is projected that 240 million people will remain without access to clean water, and 1.4 billion without access to basic sanitation.[3] The current situation of water scarcity and competition for water, therefore, necessitates equitable and reasonable utilization of water resource which can be implemented through properly instituted water governance system.[4]

Water governance relates to the rules, structures and powers of management and regulation of water. It is the system that regulates the determination of "who gets what water, when and how, and who has the right to water and its related services and their benefits"[5], based on the core principles of equitable and reasonable utilization in the distribution of water resources.[6] Governance implies management and regulation of the public good that goes beyond the centralized nation-state. Both the development and governance oriented definitions show us similarities in the contents of the elements. The governance dynamics can be affected by plurality of interests, power and politics.[7] In a water governance system, prioritization of water use rights is considered as one of the key principles.[8]

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[1] OECD. (2015). OECD Principles on Water Governance. *Directorate for Public Governance and Territorial Development, OECD Ministerial Council Meeting on 4 June 2015.* OECD.

[2] Peter P. Mollinga (2008), 'Water, politics and development: Framing a political sociology of water resources management', Water Alternatives 1(1) pp, 7-23.

[3] OECD(2015), *supra* note 1.

[4] Article 5 of the 1997 United Nations Water Course Convention (UNWC).

[5] Tony Allan (2001), The Middle East Water Question: Hydro Politics and the Global Economy.

[6] **A**bby Muricho Onencan & Bartel Van de Walle (2018), Equitable and Reasonable Utilization: Reconstructing the Nile Basin Water Allocation Dialogue. *Water Resources Research,* Vol.10, 707; doi:10.3390/w10060707.

[7] Eiman Karar (2017), *Freshwater Governance for the 21st Century*, Water Resources Commission, Springer, South Africa.

[8] Nowlan, L and K. Bakker. (2007), Delegating Water Governance: Issues and Challenges in the BC Context, *Program on Water Governance*, University of British Columbia.

The prioritization of water use rights must promote the goals of sustainable development.[9] There is a new development on which actors examine and approach any issue of water through multiple perspectives mostly attached with the efforts to promote sustainable development.[10] The specific prioritization of water use rights manifests the prioritization of the core elements of sustainable development. Sustainable development gives due attention to the protection of the environment (as one of its pillars) and environmental sustainability, *inter alia*, envisages the assurance of priority to environmental flow and the ecosystem.

Prioritization of water use rights may be introduced and installed to promote multiple purposes. Curbing water grabbing (direct or indirect, lawful or unlawful capturing or appropriation of water) may be considered as one of the multiple purposes. 'Water grabbing' manifests resource grabbing including land and water at the same time. 'Resource grabbing' refers to the "appropriation of natural resources, including land and water, and the control of their associated uses and benefits, with or without the transfer of ownership, usually from poor and marginalized to powerful actors".[11]

The absence of prioritization system can be a cause to frequent conflicts and discomforts in inter-basin water utilizations and issues of water governance.[12] The power division on *shared-rule* and *self-rule* aggravates the problem unless it is handled wisely. The setting of the prioritization system can be a cause to dispute in the vertical and horizontal division of power. Beyond, the questions such as 'why, what and how' federalism can be applied in relation to water resource management in general, and prioritization of water in particular.[13] They are subject to arguments and they may cause a complexity.

Awash River Basin is among the twelve legally recognized river basins stated under Article 2(1) of the FDRE River Basin Councils and Authorities

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[9] Andrea Ross (2009), 'Modern Interpretations of Sustainable Development, Economic Globalization and Ecological Localization: Socio-legal Perspectives', *Journal of Law and Society*, Wiley on behalf of Cardiff University, Vol. 36, No. 1, pp. 32-54.

[10] UNESCO Education Sector. (2012). *Learning about Water- Multiple- Perspective Approaches.* UNESCO- Education for Sustainable Development in Action Learning and Training Tools No. 5.

[11] James Fairhead *et al*, (2012), 'Green Grabbing: a new appropriation of nature?' Journal of Peasant Studies, 39:2, pp. 237-261.

[12] Zbelo Haileslassie Embaye (2016), The Quest for Standard Tests in Prioritizing Water Use Rights in Ethiopia, *Mizan Law Review*, Vol. 10, No.1, pp. 177-216.

[13] Nowlan & Bakker, *supra* note 8.

Proclamation No. 534/2007. At the central level, there was a Basin Development Authority (BDA) which is a legally authorized organ on the development, management and utilization of water resources in all the twelve recognized river basins. However, the organ is currently changed, merged and integrated with the new Ministry of Water and Energy.[14] Under the BDA, there is Awash Basin Development Office which is engaged in the actual governance, administration, development and management of the basin.

The basin holds different water use categories and it currently provides annual water needs of 4.114 billion cubic meters for 18.6 million human population, 34.4 million livestock, and 199,234 hectares of irrigated land (which accounts 83% of the total water use) and different commercial and industrial activities in the basin.[15] It has different types of tributaries flowing from different administrative jurisdictions and sources of water. The hydrological and administrative boundaries may not be demarcated at the same point. There are varying and inconsistent mandates, interventions, and practices in relation to the management, administration and governance of the Awash River basin.

In general, there are global, regional and country reports indicating the necessity of conducting research on the prioritization of water use rights under the general umbrella of water governance.[16] However, researches on exploring the practice of water governance in Ethiopia in general and in the Awash River basin in particular are limited. This obviously necessitates conducting research on the prioritization of water use rights under the general umbrella of water governance. This article explores and analyzes the practices and perspectives of prioritization principles in water use right governance in Ethiopia by taking cases from Awash Basin.

[14] FDRE A Proclamation to Provide for the Definition of the Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation no. 1263/2021, Art 16(13).

[15] AWBA (2017) Awash Basin Water Allocation Strategic Plan

[16] Water Governance Center. (2013). *Water Governance Capacity: Awash Basin, Central Ethiopia, Review on Content* . Hague: Water Governance Center, Netherlands.

2. Conceptual and Theoretical Framework

2.1. Understanding prioritization principle in the context of water governance

As Singh notes, the principles of water distribution have evolved from and contextually applied to inter-state water conflicts.[17] The principles in distributing water are related with the principles of distributive justice. As distributive justice is against compartmentalization among individuals, state and corporate bodies, the effort to find some set of standards or measures of equity among individuals can be difficult. There is also an argument that there are no basic principles of justice in the doctrines or theories of water distribution.[18] The traditional experiences have proven that the facts, values, reasons, etc. that are applied to justify the principles were based on political, geographical or sociological dimensions. The traditional views include the riparian rights or the natural flow theory, 'first come first served' or the so called prior-appropriation theory, the servitude or "whatever is mine I can treat it in any way" theory, or what has been technically called: the territorial-sovereignty theory.[19] This shows that basic principles of justice are missing in such justifications. However, there is historical evidence that shows the move from non-legal to legal principles.

In general, there are two arguments with regard to the controversies in applying the system of prioritization. Globally, the application of the system of prioritization can be taken as the most dominant paradigm across the globe which emerged from the 1827 US case law: Tyler v. Wilkinson.[20] *First*, there is an agreement that prioritization or ranking of some use rights helps to promote and fulfill the use rights for specific purposes and policies.[21] Under normal circumstances, the issue of prioritization materializes where there is an imbalance in the supply and demand side in

[17] Chhatrapati Singh (1991), *Water rights and principles of water resources management*, New Delhi: Indian Law Institute. *See* also Salman M. A. Salman, (2007). 'The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law', *Water Resources Development*, Vol. 23, No. 4, pp. 625–640.

[18] Ibid.

[19] Ibid.

[20] Anthony Scott and Georgina Coustalin, (1995), 'The Evolution of Water Rights', Natural Resources Journal, Vol 36, pp. 821-979.

[21] Gregory J. Hobbs, Jr., (2002), Priority: The Most Misunderstood Stick in the Bundle, 32 ENVTL. L. 37, 42-44. Also *see* A. Dan Tarlock, (2000) Prior Appropriation: Rule, Principle, or Rhetoric? 76 N.D. L. REV. 861.

the quantity and quality of water. The availability of scarce water resources necessitates the system of prioritization as a strategy.

Second, there is a dominant argument that the application of the prioritization system is not feasible to all contexts. This is connoted as the *'out-of-priority'* of water allocation.[22] It considers the dynamism of water allocation and water demands and it envisages the variability of contexts. The proponents of the *'out-of-priority'* emerged naturally as an antithesis to the system of prioritization.[23] The critique against the prioritization system is aligned with its rigidity to apply it in all contexts. It fails to accommodate the dynamism and variability of natural resources and potential demands.[24] This problem may emanate from the drawbacks of the bundle picture.[25] However, the challenges in the technical application of the principle should not be the sole reason to avoid its merit in water allocation systems. In general, understanding water prioritization principles demands explaining the driving forces and drawback of the priority argument with the intention to promote substantially principles of equity and efficiency in water resources usage (see figure 1 below):

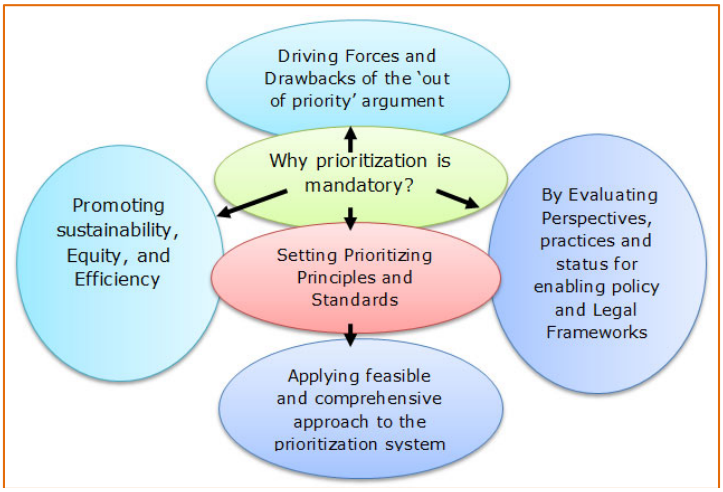

Figure 1: A conceptual framework developed based on literature review

[22] Lawrence J. MacDonnell (2004), Out-of-Priority Water Use: Adding Flexibility to the Water Appropriation System, *Nebraska Law Review*, Vol. 83:485.

[23] Ibid.

[24] Ralph A Wurbs (2001), 'Assessing Water Availability under A Water Rights Priority System', *Journal of Water Resources Management and Planning*, pp. 235 -243.

[25] Eric R. Claeys (2008), Property 101: Is Property A Thing Or A Bundle? A Book Review Essay on Thomas W, Merrill & Henry E. Smith. (2007), Property: Principles and Policies, New York: Foundation Press, 2007, pp. xiii, 1396.

The focus of the figure (above) is to explain and conceptualize prioritization principle in the context of water governance. Above all, it attempts to justify why the prioritization rule is mandatory in a given legal system. The driving forces that rationalize the importance of the prioritization cover physical, social, economic, environmental and political contexts.[26] The existence of a Federal state structure in Ethiopia has also complicated the allocation and acquisition modalities of water rights among different levels of administrative units.[27] There are questions of power allocation, trust and priorities caused by different contexts. There is an argument that prioritization is not necessary and adherence to such priority rule may cause rigidity.[28] However, there are drawbacks of the theory and there is the need for addressing the drawbacks of the out-of-priority rule is also mandatory.[29]

The reasons, justifications and factors indicating on why the prioritization of water use rights is mandatory may be multiple. *First,* the existence of scarce water resources which is negatively correlated with the existence of huge demand of water may be the cause to set prioritizations and allocate water accordingly. This is attached with physical factors and the existing inventories that show the water balance between demanded volumes of water against the supply side. The *second* reason may be to enable water allocation among users and sub-basins. The Awash strategic plan redefines water allocation as "…the mechanism for determining who, how much, from which locations, when, and for what purpose".[30] Water allocation is the process of sharing a limited water resource among different regions and competing users.[31] The operational definition of water allocation is applied among users and sub-basins. The water allocation principles with all plans and agreements have a pivotal role in resolving the intensifying conflicts at different scales.[32] Although there are several global paths and developments,

[26] Jana Klacková and Marian Sling (1978), 'The Principle of Rational Use of Natural Resources in the Theory of Optimal Planning', Eastern European Economics (Taylor & Francis, Ltd.) Vol. 16, No. 4, pp. 3-23

[27] Dudley Warren Woodbridge (1953), 'Rights of The States in Their Natural Resources Particularly As Applied To Water,' *South Carolina Law Quarterly*, 5 S. C. L. Q. 130 1952-1953.

[28] Lawrence J. MacDonnell, *supra* note 22

[29] Gregory J. Hobbs, *supra* note 21

[30] AWBA, *supra* note 15

[31] Ibid.

[32] Tom Le Quesne & Constantin Von Der Heyden, (2007), 'Allocating scarce water, A primer on water allocation, water rights and water markets', WWF water security series 1

water allocation has remained to be a contentious process of deciding who is entitled to the available water with respect to the demanded interest.

The *third* factor may be attached with economic or development priorities because an essential development objective may require huge volume of water. The economic efficiency objective in water utilization may be used as a single factor to give priorities for beneficial uses.[33] This may happen even under contexts where there is not severe scarcity of water resources.

The *fourth* driving force may be attached with the existence of environmental factors. Giving priority to preserve environmental sustainability may require water allocations[34] because the remaining volume of water in a basin may necessary for the prospective utilizations.

Fifth, the driving force may be attached with the need to maintain social objectives or the consideration of equitable allocation and utilization of water resources. In general, prioritization is an inevitable task when there is not sufficient volume of water since it can be a cause for grabbing and disputes. The overall objective of introducing prioritizations may be maintaining an equitable distribution of water resources by balancing dimensional interests.[35] This is also expected to be enforced by installing an enabling institution for participatory and inclusive water allocations.

Sixth, the existence of partial application of the prioritization rule may be a driving force to introduce comprehensive and feasible rules and their enforcements on all types of water resources. As the existing 'prioritization' rule is only enforced with regard to the surface water or the volume of water flowing from the river basin, its application does not include ground water resources. This implies that the allocation of water is only enforced to surface water resources. Thus, there is a practical paradox where ground water is excluded from the enforcement of the prioritization system.[36]

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[33] Samuel C. Wiel (1915), 'What Is Beneficial Use of Water?' *California Law Review*, Vol. 3, No. 6, pp. 460-475.

[34] Ross, *supra* note 9.

[35] Tropp, H. (2006), 'Water Governance Challenges', in World Water Assessment Programme, 2006, *The United Nations World Water Development Report 2: Water, a shared responsibility,* United Nations Educational, Scientific and Cultural Organization (UNESCO), Paris

[36] Donna M. Cosgrove, (2008), The Role of Uncertainty in the Use of Ground Water Models for Administration of Water Rights, Journal of Contemporary Water Research & Education (Universities Council on Water Resources) Moscow, Issue 140, pp. 30-36.

2.2. Upstream-downstream linkages in the water use right context

In a river basin context, understanding the upstream-downstream linkages and hydrological processes is essential for water resources planning and management. Upstream of the river basin refers to the position or the direction opposite to the flow of a stream and it usually corresponds with the upper part of the river, while downstream river basin mainly refers to the direction that the water in a river flows. The flow may be towards the sea, or nearer to the mouth of the stream where the river ends. Empirical evidence clearly shows that water use and management practices that occur in the upper part may have a direct influence on downstream from a few to many hundreds of kilometers away.[37] This again clearly implies that the scarcity or abundance water share in the downstream of a river often depends upon water use and management in the upstream part of the river.[38]

The level and trend of upstream inflows and withdrawals determines water availability or scarcity in the downstream part of the river.[39] It has already been recognized by some national and international studies that upstream water use has influence on downstream water resource. This should not, however, serve as a pretext for downstream water use monopoly because of the existing narrative that downstream part of the river is more reliant on the availability and flow of water in the upstream parts of a basin or water course.

This perception allows water users in the downstream part of the river to exploit water resources for irrigation, urban development and trade. In many cases this downstream exploitation has been and continues to be undertaken without notification of and consultation with upstream users of water resources. Downstream users might then emphasize their accomplished benefits as acquired rights and require upstream users to inform and consult them for future development that might impact on their existing and planned uses. This might then be opposed by upstream users as unreasonable, thus impeding cooperation and damaging relationships.

There is a widespread misperception that 'harm' and 'adverse effect' in the watercourse is unidirectional following the water course from upstream to downstream part of the river. However, current empirical evidence shows

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[37] S. Nepal *et al* (2014), Upstream-downstream linkages of hydrological processes in the Himalayan region. *Ecological Processes* Vol. 3:19.

[38] H. A. Munia *et al* (2017), How downstream sub-basins depend on upstream inflows to avoid scarcity: typology and global analysis of transboundary rivers *Hydrology & Earth System Sciences.*

[39] Ibid.

that harm in the water resources may not always be caused by upstream users as it can also be caused by downstream users of water.[40] For instance, construction of a dam in the downstream part of the river may lead to upstream inundation and may also lead to migration of fish resources to the downstream part of the river. But, because of the existing wrong assumption, the requirement to consult riparian States regarding planned developments on their stretch of the watercourse is one sided. However, rights and obligations of water users in upstream and downstream parts of the river should be equally treated in the watercourses of rivers and this holds true in basin level utilizations within the same state.

In reality, unilateral development of infrastructure in the downstream part of the river locks in water use and can result in water being unavailable for subsequent upstream development, foreclosing equitable and reasonable utilization. In general, upstream to downstream impacts are predominantly physical, such as altered flow volumes and patterns, sediment loads and water quality. In contrast, downstream to upstream foreclosure of future use which can have geopolitical impacts and tensions.

Though equitable and reasonable utilization is a core principle in the distribution of water resources, especially for trans-boundary rivers,[41] there seems a general misunderstanding in the interpretation of water use rights in the international water law. The practice and the laws largely favor downstream States. More importantly, the so-called "no-harm" rule is generally understood as operating to protect the interests of downstream States, while upstream States in turn tend to invoke the sovereignty principle. It is thus to be noted that there is a relatively better balance in the principle of equitable and reasonable utilization of water.[42] Thus, it is timely to consider the recent outpouring of gloomy perspectives on water use management and scarcity[43] and it is also an urgent task to develop management models that help to reconcile upstream with downstream interests and the vice versa. This is equally relevant in water basins within

[40] Owen McIntyre (2014), Reconciling the Interests of Upstream and Downstream Riparian States in Cooperation for Ecological Protection of Transboundary Basins: The Potential Role of "Benefit Sharing" in the Ecological Protection of Shared Water Resources. *School of Law, University College Cork, National University of Ireland*.

[41] The 1997 United Nations Water Course Convention (UNWC)

[42] Ibid.

[43] Yoon Taeyeon, Charles Rhodes and Farhed A. Shah (2013), Upstream water resource management to address downstream pollution concerns: A policy framework with application to the Nakdong River basin in South Korea. *Water Resources Research*.

any country's upper and lower riparian users in economic activities such as large farmlands that use the same watercourse for irrigation.

Benefit sharing arrangement between upper stream and downstream users play a significant role in reconciling the competing interests in a given river basin.[44] Benefit sharing approach is widely proposed as a key mechanism to bypass the contentious issue of property rights related to water use and access.[45] The idea is that if the focus is switched from physical volumes of water to the various values derived from water use in multiple spheres, including economic, social, political, and environmental – riparians will correctly view the problem as one of positive-sum outcomes associated with optimizing benefits rather than the zero-sum outcomes associated with dividing water.

As an obvious fact, a river basin is a common pool resource in a way that the use of it by one riparian (or indeed individual) will necessarily diminish the benefits available to others. In other words, water use in one part of the basin creates external effects in other parts. If these externalities are not 'internalized', the overall benefits will be reduced and the outcome is suboptimal. Thus, both hydrology and economics concur that a river basin should be treated as a single unit to maintain the physical integrity of the system and to internalize externalities. Moreover, applying an optimal and equitable allocation of benefits between downstream and upstream users of water necessitates proper assessment and calculation of benefits and cost. In the process of examining benefits of a river basin, emphasis should be given to calculate both benefits to the river and benefits to the society from the river.[46]

It is also important to institute an integrated land and water resources management and planning in a river basin. Integrated Water Resource Management (IWRM) is a mechanism that enables the coordinated management of water, land and related resources within the limits of a basin so as to optimize an equitable share of the water resources and promoting socioeconomic well-being of the society without compromising the long-term health of vital ecosystems.[47] It is also guided by the principle of

[44] McIntyre, *supra* note 40

[45] Halla Qaddumi (2008), Practical approaches to transboundary water benefit sharing. *World Bank Working Paper* 292.

[46] Ibid.

[47] Reta Hailu *et al* (2018), Integrated Water Resources Management as a System Approach for Water Security: Evidence from the Awash River Basin of Ethiopia. *Ethiopian Journal of the Social Sciences and Humanities (EJOSSAH),* Vol. 14, No. 1

equitable and reasonable utilization of water which is inherently flexible and quite capable of taking account of a very wide range of needs and interests of users in the river basin, including potential and future uses and the need to protect the entire watercourse ecosystem. The process of IWRM further provides an avenue for water sectors and stakeholders to interact and to create dialogues for joint action and collaboration.

3. Legal and Policy Frameworks: International and National Contexts

3.1. International context

International human rights conventions redefine the right to water substantiating the core elements as standards to test the normative compliance measures of ratifying state members. Under Article 11, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), some of the rights that are indispensable for the realization of the right to an adequate standard of living "including" the right to adequate food, clothing and housing are specifically provided. It can be contentious whether the listing is exhaustive or illustrative one. The use of the word 'including' may be standing to be indicative to some other similar rights. The list does not seem exhaustive. In spite of such arguments, the right to food is apparently inseparable from the right to water, and it is plausible to argue that the right to water is a necessity and a guarantee to secure adequate standard of living.

Moreover, the right to water is also inextricably related to the right to the highest attainable standard of health (Art. 12, paragraph 1) of General comment No. 14 (2000) and the rights to adequate housing and adequate food (Art. 11, paragraph 1 and paragraph 8 (b) of general comment No. 4 (1991). In considering the adequacy of the right to water, the General Comment No. 15 describes the right to Water (Arts. 11 and 12 of the Covenant) and it stipulates the defining elements and the indicators used to test the promotion of the human right to water.[48] *First,* the right to water can be interpreted in relation to the *availability* of water resources. The ordinary uses include using water for drinking, personal sanitation, washing of clothes, food preparation, and household hygiene. The volume of water which is a determinant quantity shall correspond to the World Health

[48] General Comment No. 15: *The Right to Water* (Arts. 11 and 12 of the Covenant) Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11).

Organization's guidelines. The extent of the availability may further include the required additional water to health, climate, and work conditions.

Second, the right to water relates to the *quality* of the water resources.[49] The comment underlines that water required for any personal or domestic use is expected to be safe and free from any hazards. It shall not cause any harm from micro-organisms, chemical substances and radiological substances as a threat to personal health. It is thus a requirement to secure the acceptability of any water resource in colour, odour, and taste for personal or domestic uses. *Third*, the comment requires the *accessibility* of water resources. Water including of water facilities and services are expected to be accessible to everyone without discrimination within the jurisdiction of the state reinforcing the right to food.[50]

Accessibility refers to four overlapping dimensions.[51]*Primarily,* it refers to the physical accessibility of the water resources. This also refers to adequate water facilities and services which need to be within safe physical reach for all sections of the population. The facilities and services must be of sufficient quality, culturally appropriate and sensitive to gender, lifecycle and privacy requirements. *Secondly,* it refers also to the economic accessibility in which all facilities and services are expected to be affordable for everyone. The direct and indirect costs and charges (or the expense) to secure water must be affordable.[52] *Thirdly,* the facilities and services must be accessible without *discrimination*. The most vulnerable and marginalized groups of the population, in law and in fact, should thus access water without discrimination. *Fourth*, it also connotes the dimension of *information accessibility*. This includes the right to seek, receive and impart any information with regard to issues of water.[53]

The covenants have emphasized on the right to water as a basic human right, with clear and implementable guidelines that are helpful to sustain the minimum core obligations.[54] However, the covenants do not directly address the issue of prioritization of water use rights in an explicit manner. There is

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[49] Ibid.

[50] Elisa Morgera et al. (2020), *The right to water for food and agriculture*, Food and Agriculture Organization of the United Nations (FAO), Legislative Study 113.

[51] Stephen C. McKaffey (1992), 'A Human Right to Water: Domestic and International Implication', 5 *Geo. Int'l Envt'l. L. Rev.*

[52] Karar, *supra* note 7.

[53] McKaffey *supra* note 51

[54] Vanessa Riegger (2014), 'Water Distribution in the Public Interest and the Human Right to Water: Swiss, South African and International Law Compared', 10/*1Law, Environment and Development Journal.*

no express statement whether personal and domestic use as a right is given a priority compared to other forms of water uses.

3.2. Policy framework in the national context

Ethiopia's Water Management Policy (2001) states that "[t]he overall goal of Water Resources Policy is to enhance and promote all national efforts towards the efficient, equitable and optimum utilization of the available Water Resources of Ethiopia for significant socioeconomic development on sustainable basis."[55] This is the main goal of the policy. The balance of promoting and mainstreaming efficiency, equity, and optimum utilization is also sought to be reflected in all the laws and standards[56] that will be implemented in line with the above main goal of the policy. Although the 1995 FDRE Constitution gives a space to regional states to issue their own social, economic and environmental objectives, most of the regional states do not have a water resources policy.

The policy explicitly addresses the prioritization principles while stating the status of the "[p]olicy on crosscutting issues". The issue of water allocation and apportionment is stated as a crosscutting issue. The first three statements indicate the prioritization principles. *First,* the basic human and livestock needs and environment reserves have the highest priority in any water allocation plan as a 'basic minimum' requirement. *Second,* it is indicated that any water allocation shall ensure and give 'highest priority' to water supply and sanitation. The policy directs that the remaining volume of water from such types of water allocation is directed to be apportioned for uses and users promoting the highest socio-economic benefits.

Third, the water allocation process is directed to promote an efficient use of water resources with the purpose of harmonizing the greater economic and social benefits. The policy does not state an explicit priority ladder. The policy states priority to basic human, livestock needs and to environment reserves. The priority among these three uses or water reserves is not explicitly and clearly stated. The third requirement –to allocate water for an efficient use enabling to promote the 'greater' and/or 'highest' social and economic benefits or economic and social benefits– narrows the space and gives an emphasis and prioritization to the most efficient use of water. In general, clear and concrete standards and priority ladders within the prioritization of water use rights are not expressly indicated.

[55] Ethiopian Water Management Policy (2001), p. 5.
[56] Ibid.

3.3 Legal framework in the national context

The 1995 FDRE Constitution is the supreme law of the land,[57] and it embodies core values aiming to promote the democratic and human rights of individuals. According to Article 9(4) of the Constitution, all international instruments adopted and ratified by the House of Peoples' Representatives are an integral part of Ethiopian law. In relation to land, the FDRE 1995 Constitution provides state and public ownership of land and other natural resources.[58] It also empowers the federal government with a mandate to administer transboundary rivers and lakes and also the rivers which link different states.[59] Moreover, it has the power to enact laws on the utilization of natural resources including water resources.[60]

The mandate of regional states is to administer natural resources in accordance with the federal utilization frameworks.[61] This is the constitutionally guaranteed right of states to administer their natural resource.[62] The Federal government or the 'supervising body' may stipulate additional power to each respective state on the power of management and administration of water resources.[63] This is in the form of delegation.[64] Therefore, the setting of prioritization of water use rights is primarily the power of the Federal government. However, the respective regional states may stipulate subsidiary rules of prioritization without deviating from the general utilization frameworks.

The FDRE Water Resources Management Proclamation 197/2000 has provided some fundamental principles on how water resources may be managed.[65] The Proclamation puts three sources of utilization frameworks and these are the policy, master plan studies and the water laws of the country.[66] These frameworks aim at ensuring that any water resource is put to the highest social and economic benefit or the people. The Supervising

[57] The 1995 FDRE Constitution Proclamation No.1/1995, *Negarit Gazetta*. Art 9 .
[58] The 1995 FDRE Constitution Proclamation No.1/1995, *NegaritGazetta*. Art 40 (2 and 3).
[59] Id., Art 51(11) and Art 55 (2)(a); and Art 52(2)(d) respectively.
[60] Id., Art 51(11).
[61] Id., Art 52(2)(d).
[62] See for example, Dudley Warren Woodbridge, *supra* note 27.
[63] FDRE, Ethiopian Water Resources' Management Proclamation, Proclamation No: 119/2000, Art 8(3).
[64] Anne M. Larson and Fernanda Soto (2008) 'Decentralization of Natural Resource Governance Regimes', *Annu. Rev. Environ. Resource*. 2008.33:213–239
[65] FDRE Water Resources Management Proclamation No. 197/2000'
[66] Id., Art. 6(1-4)'

body is required to ensure and administer the management of any water resource in a way it promotes the highest social and economic benefits of the Ethiopian people in accordance with the provisions of the three utilization frameworks. The 'management' of the water resources of the country is destined to be in accordance with the permit system.[67] The Proclamation starts with prioritizing one specific use but remains silent with regard to ranking of the orders. This Proclamation enshrines the 'preference' to domestic use.[68] The Proclamation reads "[d]omestic use shall have a priority over and above any other water uses."[69]

In principle, the law requires a permit before the acquisition and use of water resources. As exception, there are some listed 'purposes' under the law that are exempted from the requirement of a permit. The list includes use of water from hand dug water wells or digging of water wells, use of water for traditional irrigation, artisanal mining and for traditional animal rearing, as well as use of water for water mills. The list may be reduced or broadened through the issuance of a directive by the supervising body when there is "…inappropriate use or wastage of water."[70] These all manifest the priority for domestic use. However, the hierarchy of preference among the remaining types of uses other than domestic use is left unaddressed.

The previous regulation establishing the Basin Development Authority had indicated that the power and duty of the Authority was expected to act as a development and regulatory organ.[71] Based on the new structure, the BDA is changed in to Basin Management and Administration Co-ordination Office. The previous structure had incorporated different river basin authorities for each river basin. There was a separate Awash River Basin Authority. However, a central Basin Development Authority was established in 2018 in accordance with the regulations issued by the Council of Ministers based on its power to issue regulations.[72] The regulation defines basin as "…. a geographical area described by the watershed limits of water system including surface water and ground water flowing into a common

[67] Id., Art 11-12.
[68] Id., Art 7.
[69] Id., Art 7 (2).
[70] Id., Art 12(2).
[71] FDRE Basin Development Authority establishing Regulation No. 441/2018, Art 2(3) However, this regulation is repealed.
[72] FDRE Definition and Power, Duty, and of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation 1097/2018, Articles 5 and 34.

terminus."[73] The water system includes surface water and ground water types.

With regard to the prioritization of water resources, the former BDA was established to implement sustainable, integrated development, administration, and utilization of the water resources at a basin level in equitable and participatory manner.[74] In line with this objective, the Authority's mandate includes the preparation of preparing and submitting the means of 'optimal and equitable allocation and utilization" of water bodies that are lying or crossing to two or more regional states.[75]

4. The Need to Explore Actors' Perspectives and Practices of Prioritizing Water Use Rights in Awash River Basin

There are driving forces to explore the prioritization of water use rights. One of the driving forces is the existence of water crisis in the basin.[76] Awash entertains two extreme disasters. There is drought and flooding. The basin entertains water stress season starting from January to June. The water stress lasts for six to eight months. Beyond, the water stress season, there are questions of availability and accessibility even within the remaining four months[77] due to extreme flooding within the four months duration.

The *second* driving force is the existence of water grabbing among water users within the basin.[78] There are formal-informal, lawful-unlawful, rotating, location based, and other forms of grabbing problems.[79] The grabbing indicators may be measured in line with the indicators. The basic indicators are size, labor/uses, actors, purpose, and market.[80] In general, they are potential and actual risks of grabbing.

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[73] FDRE Basin Development Authority establishing Regulation No. 441/2018, Art 2(3).
[74] Id., Art 4.
[75] Id., paragraphs of the preamble.
[76] Sharad K. Jain & Vijay P. Singh, (2010) 'Water crisis', Journal of Comparative Social Welfare, 26:2-3, pp. 215-237.
[77] Committee on Economic, Social and Cultural Rights (General comment No. 15), *supra* note 48
[78] Mehta, L et al (2012), 'Introduction to the Special Issue: Water grabbing? Focus on the (re)appropriation of finite water resources', Water Alternatives 5(2): Volume 5, Issue- 2, pp. 193-207.
[79] Ibid.
[80] Jennifer Franco *et al* (2013), *The global land grab: A Primer*, Revised edition, Amsterdam: TNI Agrarian Justice, Transnational Institute, available from http://www.tni.org/primer/global-land-grab.

Third, there are factors relating to the concurring of risks of water insecurities. The academic discourse on the foundations to measure the risks of water insecurities deals with five forms of water insecurities.[81] They include the household, urban, economic and environmental forms of water insecurities. *Fourth,* there are water disputes. The disputes are water related disputes and they include disputes between water users themselves, between water institutions, and between users and institutions.

Fifth, the existence of a Federal and state structure has impact on the water governance system and prioritization of water use rights. There are clear disputes on constitutional interpretation, mandates, questions of development priorities, jurisdictional questions on the nature of water resources, planning, setting utilization frameworks and standards, issuing permits, undertaking allocations, setting water tariff regulations and collecting respective tariffs, and taking enforcement and compliance measures.

The *sixth* driving force is related with *the human right to water* as one of the critical obligations of state parties to the conventions. The human right standards to promote the availability, accessibility, and affordability of quality water are among the normative testing indicators for the promotion, fulfillment and protection of the human right to water.[82] This is clearly related with the positive obligation of states to provide water which is indispensable for the livelihood of every citizen.

5. Prioritization Standards and Principles: Interpreting and Implementing the Policy and Legal Frameworks

In the Awash River Basin, the previous practice indicates that prioritization was made in a group of water users holding homogeneity in the type of water use. However, the recent intervention on the rules of allocation and prioritization is reformed and it is believed by the actors that prioritizations are made at individual level. This is done by carrying out an 'integrated water allocation system' covering a wider scale.[83] The decision for any allocation is supported by undertaking a study on the three interfaces of simulation, operation and monitoring. In 2016, according to AWBA, the water demand of the basin was estimated at 6.56 billion cubic meters with a

[81] Global Water Partnership. (2014), *Coordinating Land and Water Governance: An Essential Part of Achieving Food Security,* Stockholm, Global Water Partnership.

[82] Committee on Economic, Social and Cultural Rights (General comment No. 15), *supra* note 48

[83] Quesne & Heyden, *supra* note 32, p. 4

potential increase in the past five years.[84] The water allocation principles and the prioritization of water use rights need to accommodate the practical contexts.

As a broad and preliminary document, the strategic plan mentions and lists the categories of water uses.[85] In the basin, there are major types of water uses, according to the strategic plan. They include irrigation, agriculture, domestic use, livestock and industrial uses of water.[86] Amidst such uses of water, there is a growing demand for water and this necessitates due consideration of the future human and livestock population growth, future irrigation needs and industrial expansion.

An aggregate allocation plan is prepared annually between in November or December that stays in force for a duration of eight months. Participants and beneficiaries of the water allocation in the Awash River basin express different interpretations of the prioritizations (among uses) in the policy. One of the top officials of the former BDA states his perception on the policy's status in accommodating the priority ladder and the interaction of the bundled rights.[87] He recognizes the incorporation of the priority rule under the water management policy and the water resource management proclamations.

The first priority is given 'over and above other uses' (*ke minim belay*) to domestic (human) and animal use of water manifesting the 'reasonable use' standard. Second, water is allocated for environmental flow. This requires preserving water in the basin and it should not be totally abstracted and the ecosystem has to be safe.[88] The minimum volume of water shall be left into the natural flow to keep the water flowing. Third, the economic feasibility of the water use is the requirement for allocation where there are competing uses of water. If it is economically feasible, priority is given to hydro-power generation. If water use for irrigation is found to be economically feasible, the priority among other uses is given to irrigation.[89] In practical terms, water use for hydropower does not consume water rather it is discharged into the natural flow. This is problematic to practice in large hectares of land

[84] AWBA, *supra* note 15.
[85] Ibid.
[86] AWBA, *supra* note15.
[87] A narrative taken from an interview held with a top management of the former Ethiopian Basin Development Authority on Nov, 15/2019, Addis Ababa.
[88] Ralph W. Johnson, (1989), Water Pollution and the Public Trust Doctrine . *Environmental Law, Vol.19,* , pp,485-491.
[89] Samuel C. Wiel *supra* note 33.

which is being used to develop irrigation. However, water allocation in most dams of the country, water use for hydro-power generation takes the priority. According to the respondent indicated in the preceding paragraph, the human right to water, environmental sustainability and economic feasibility are taken as prioritization standards.

One of the respondents from the top management of the Environment, Forest and Climate Change Commission perceives and responds to the contrary. Ethiopia does not have a comprehensive and special water law and it is considered as part of the existing environmental laws. This may be attributed to the doctrinal foundation. Even the environmental organs are not actively involved in determining allocations and in regulating such interventions, and this manifests fragmented governance.[90] There is a similar challenge among upstream and downstream water users and there is lack of clear framework to regulate allocations even if some of the foundational principles such as fairness and equitability are stated under the Policy. Even if these principles could have been put into effect along with due attention to the sustainability of the environment, there is no regulation on the permit and the utilization of such water resources. The existing Proclamation is not also comprehensive and detailed thereby causing failure to manage the resource.

Unlike the above statements, one of the key informants from the previous Water Development Commission believes that the policy is clear with regard to allocation of water. First, the priority is given to domestic water use. Then, it is given for irrigation, fishery, recreation, environment etc. respectively.

According to the director of the water administration department, the policy is not clear with regard to the issue of prioritization. The first priorities are clear and it gives priority to domestic, livestock and environmental use of water. According to his experience, 10 to 20% of the volume of water from the available volume is given to the environmental use of water as a priority. However, it is unclear among the remaining ones. The policy and the laws have indicated that priority may be given to the specific use which has highest social and economic values that keeps the balance of both.[91] But, the interpretation of this standard is problematic to prioritize

[90] Jae Hong Kim *et al.* (2015), Fragmented Local Governance and water resource management Outcomes, Journal of Environmental Management 150 pp., 378-380.

[91] Douglas W. MacDougal (1996) Private Hopes and Public Values in the "Reasonable Beneficial Use" of Hawai'i's Water: Is Balance Possible? University of Hawai'i Law Review / Vol. 18:1.

among the uses for irrigation, industry and hydro-power generation. The priority is given to the more efficient and that is for irrigation. However, this aspect of water use can change over time, and the application of the policy in the context of the dynamism is unregulated.[92]

In addition to the above statements of the respondents, a senior water administration expert from the BDA has described the status and specificity of the policy.[93] He stated that the priority ladder is not clear especially in the latter ranks. The first two priorities are clear ones but the third one is full of ambiguity. Domestic purpose is clear and it is specified and quantified for both urban and rural contexts. The environmental use or flow is also operationalized. It includes the natural flow of the basin, keeping the safety and life of the aquatic animals, and the conservation of the natural ecosystem and watershed of the river basin are some of the indicators used to preserve the environmental flow. The minimum flow of the river basin is also expected to be kept flowing with the purpose to preserve the natural ecosystem.

According to the expert, unlike the first two priorities, the third priority is stated in a broader fashion because it states that a 'use that gives highest socio-economic value' has a priority thereby creating ambiguity in the interpretation of 'highest socio-economic value'. The respondent believes that exemption from a water use permit implies prioritization. The FDRE water laws have already exempted for some types of water uses. These include traditional forms of use that are developed for a size of land which is less than 0.25 hectare, traditionally drilled water wells, livestock and domestic water uses.[94]

6. Practical Experience in Prioritization Standards and Principles

There have been three water allocation practices in the Awash Basin since 2015. The water allocation applies in a dry season and it is based on the available volume of water in each of the three dams in the basin. Even if there are domestic, livestock, environmental and industrial water users, more

[92] Jeremy Bird et al. (2009), Water Rights and Water Allocation Issues and Challenges for Asia, Asian Development Bank.

[93] A narrative taken from an interview held with an expert on Water Administration, Use permit and Allocation under the Water Resource Administration Directorate of the formerAwash Basin Authority Upper Branch Office, on Nov, 13/2019, Adama.

[94] FDRE Water Resources Management Proclamation Number 197/2000, Art 12(2), see also Oromia Land Use Regulation No. 151/2005.

than 86% of the users are irrigation water users. The Water Administration, Use Permit, and Allocation Directorate also focuses on the allocation of water for irrigation without the specific application of prioritizing rules for the different types of irrigation water uses.

As stated by a senior hydrologist, the water allocation process is carried out by the use of water measurement tools even if there are challenges in quantifying the available volume of water and allocated volume of water.[95] Water allocation for domestic use has the first priority. For instance, *Adama* city's domestic water supply is allocated from *Awash* Basin. After allocating the required volume of water for domestic water supply for *Adama* city, the remaining volume of water is allocated to the other types of uses. The diversion point is installed three kilometers away from *Koka* dam. There are some other cities like *Metahara* and *Awash Sebat Kilo* and they get a supply of water for domestic use from the main course of the basin. However, *Metehara* and *Awash Sebat Kilo* are located downstream to the irrigation and other uses that are undertaken upstream.

The most important issue to be considered during allocation is the dynamics in demand and supply.[96] As stated by the senior hydrologist cited above, depending upon the supply in the dams of the basin, the demanded water may be minimized especially for the third and the latter ranked types of uses. If for example, there is demand for water resource that can irrigate 50 hectares, the supply of water is minimized to 30-hectare size of land. This means water use rights or the volume of water may decrease depending upon decline in the volume of water from time to time.[97] If there is sufficient volume of water, the allocation is applied to all ranked categories of uses in the ladder of priority. Accordingly, each user acquires water subject to priority in favour of the preceding prioritized user.

While the prioritization in the allocation plan is prepared for surface water in the basin, significant volume of water is also allocated from ground water resources. In relation to the practice in *Oromia* National Regional State, the top management noted that it is working to provide sufficient water to domestic use. Domestic use is defined and understood to include human and livestock needs. Then, the water resource is also allocated to the

[95] Interview held with the senior hydrologist in the former Awash Basin Authority Upper Branch Office, Nov, 10/2019, Adama.

[96] Wurbs, *supra* note 24.

[97] Singh, (ed.) (1992), *Water Rights in India, A book chapter of Water Law in India, Chhatrapati, Singh (ed.) New Delhi, Indian Law Institute (ILI) Publications.* Citing Schlager and Ostrom (1992).

categories of uses including irrigation and hydro-electric power generation respectively. But, there are challenges in allocating ground water and, in most cases; the applicants acquire the volume of water they demand from ground water resources.[98] This creates a challenge or a conflict of interest among users including the local domestic users.

Water is allocated based on the demanded volume of water. There is no volume quantification since the Bureau does not have instruments to measure the volume of water. Thus, there can be a possibility of variation between the figures that the registered and the actual volume of water that is extracted. This can also be variation in opportunity to the investors by taking a permit from central of local levels[99] and depending upon the level of efforts that are conducted by regulatory offices to properly implement allocations.

According to an interview held with the top management of the former Water Development Commission, Ethiopia's ground water resource covers 90% of the water supply and utilizations across the nation.[100] However, there can be challenges due to the increase in demand commensurate with rapid urbanization. The need for enforcing environmentally resilient water allocation system is mandatory. The available ground water resource is not identified and it is not exactly quantified in the course of undertaking prioritization on the allocation of water for each water use. The available volume of water from both ground and surface water resources has to be quantified and allocated to each water use.

It is to be noted that the implementation of the policy in relation to domestic water supply is full of constraints. According to the respondent in an interview, the demand and tension on water from the basin is continuing.[101] In the future, it will continue as a source of tension among regions, *Weredas*, and *Kebelles*. There is thus the need for enhanced awareness and a clear guideline to quantify the volume of water and undertake allocations accordingly.

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[98] Wurbs*, supra* note 24.

[99] See for example, Sane Pashane Zuka (2016), Contesting Institutional Engineering for Decentralized Natural Resource Governance in Malawi, SAGE Open, DOI: 10.1177/2158244016659527

[100] Interview held with the top management of the former Water Development Commission on Oct 30/2019, Addis Ababa.

[101] Interview held with the top management of theformer Water Development Commission on Oct 30/2019, Addis Ababa.

With regard to small and medium scale water users, water is allocated based on *location***.** A respondent among water users states the practice in the prioritization of water use rights.[102] According to the respondent, some downstream users (farmers and investors) in *Merti* Wereda around *Wesrodino* utilize the water flow starting from 4:00 PM (late in the afternoon) till the night time; and it stays flowing until the morning. The Authority has discussed and communicated with the upper stream users and the restriction on access within that time and the duty to keep the river basin flowing is justified.

There is no ranking in the order of water use rights. Nor is there specific allocation of water based on each type of water use and water users do not acquire water based on this type of allocation. Moreover, a specific water charge is not applied based on such type of allocation.[103] Most of the water users in the upper part of the basin are irrigation water users.

7. Challenges and Standards

7.1 Challenges in the prioritization of water use rights

The main challenge in the effective prioritization of water use rights is lack of clarity in the laws and policies. *Second,* the basin development offices are working to promote an integrated water management without putting in place effective instruments. For instance, there are 17 diversion points but each diversion point needs water volume measuring instruments that monitor the water allocation process. However, there is no water measuring technology at every diversion point.

Third, the available volume of water in each dam or reservoir is not exactly known due to sedimentation problems. For instance, Koka dam was constructed 50 years ago, and the problem of sedimentation is apparent. Moreover, as the allocation process is done for eight months, the estimated volume of water which is used for the allocation decision during the first month of the dry season may not be accurate. It is to be noted that the allocation process is made based on the old design of the dam. After some months of utilization, there are water scarcity related impediments since the

[102] An interview held with the Chairman of one *Water Users Association*, on Dec 20/2019, *Wenji.*

[103] FDRE Water Resources Management Proclamation 197/2000, Art 20-22 and FDRE Water Resources Management Regulation 115/2005, Art 30-34 The charges covering the water tariff system include: charges for use of water, charges for the discharge of treated wastes into water resources, charges for the use of water from government projects,

allocations are made without accurate data on the volume of available water. The allocation process may face impediments and it may stop at some point. This also violates the water rights of the users and causes risks and damages.[104]

Fourth, there is a difference in the degree of enforcement of the prioritization of water use rights as a system among the Federal, regional and city administrations. With regard to the prioritization of water use rights, the BDA and its branch offices are in a better position to apply some of the general rules for prioritizing water use rights and undertaking allocation of water (specifically surface water) accordingly. However, the regional administrations encounter difficulties in promoting the prioritization of water use rights while undertaking water allocation and their decisions relate to undemarcated and contested water resources. The difficulty of making prioritization among uses also becomes difficult with regard to ground water resources. Due to the lack of capacity and water technologies, ground water allocations are made without any restriction based on the requested volume. The enforcement of the policy's prioritization objective (particularly with regard to irrigation) is clearly difficult.

Fifth, there was a question of impartiality on the mandate of the previous Ministry of Irrigation and Electricity. The respondent among the top management of the former Environment, Forest and Climate Change Commission (which is currently changed into Environmental Protection Authority) also questions on "who manages the priority stated under the policy?[105] The policy gives priority to domestic water use, and other social and economic vitality are also considered. However, according to the respondent, there is a practical challenge of impartiality within the Ministry.

7.2 Perceived and recommended standards

There are different views on the necessity of raking the priority ladder. Some of the respondents give their immediate views on the order while others suggest applying the policy on a case by case basis or through the consideration of contexts, especially in relation to the third or fourth priorities, by deconstructing the standard of 'socio-economic value' into its contexts. Others also suggest the need for conducting further research to add specificity in the priority ladder.

[104] Quesne & Heyden, *supra* note 32.

[105] Taken from an interview held with a member of the top management of the former Environment, Forest Climate Change Commission, on Nov 05/2019, Addis Ababa.

Senior experts from the water administration department state their recommended order of the priority ladder.[106] The policy is not clear as to what is 'socio-economic value' and it has to be specific. The socio-economic standard is put as hybrid phrase and the analyst or decision maker need to consider the balance of both values. Having this as a general standard, it is better to implement it on a case by case basis or based on contexts of the water basin under consideration. This has to be determined in a temporal and spatial basis on the types of uses that are competitive. The value of the irrigated crop or fruit has to be compared with corresponding demanded water.

According to a respondent from the former Environment, Forest and Climate Change Commission, an exceptional priority should be given to environmental flow which deserves the first rank. Unless the environmental flow is maintained, the other prioritization will not be feasible. The prioritization can then be made on the water resources in a manner that does not affect the environmental flow. Any allocation that affects the environmental flow will result in some other crises, and prioritization can work only by securing environmental flow. Then, first, domestic water (drinking, cooking, and bathing) are the basic water uses and these shall get the first priority. This is also rightly stated in the policy. Then, irrigation can be excluded from the priority ladder since it can be supplied from some other sources. However, irrigation may be aligned with food security.

Industrial needs can follow in the prioritization list. Meanwhile, the industries may be classified as basic and non-basic. Even within domestic use, important public and non-public services, such as hospitals, may be categorized within the category of domestic use. In some other legal systems (UK, for example) some types of water uses (e.g., washing vehicles) are not classified within the category of domestic use.

There are differing opinions and suggestions on the ranking of the priorities. The water users suggest prioritization based on *efficiency* and minimal wastage of water. A key informant from the water users' side underlines the existence of wastage of water which violates efficient utilization of water.[107] For example, water is wasted by some negligent irrigation water users while downstream domestic water users, domestic and wild animals do not get the required volume of water for drinking.

[106] Taken from an interview held with an expert on Water Administration, Use permit and Allocation under the Water Resource Administration Directorate of the former Awash Basin Authority Upper Branch Office, on Nov, 13/2019, Adama.

[107] Samuel C. Wiel, *supra* note 33.

One of the water users also recommends prioritizing for users on the manner of utilization or users who make withdrawal of water by using diesel and/or water pumping technology.[108] Some respondent users who use water by diesel or electrical pump shall also be treated separately. It has to be considered that such type of users will make use of the water resource efficiently since there are costs or economic burdens in the course of water extraction. Moreover, they also think that the other types of users or who use water through furrow (ቦይ) usually waste water since they do not incur costs in the course of utilization.

The other recommended criterion is to prioritize water users based on *proximity* or *convenience* of water users to the water course of the river basin.[109] The prioritization based on this criterion may be easily enforced. The *schedule* (confused with prioritization) is very important since there is a difference in water requirement level of each plant cultivated by each user. The schedule is designed in a manner that can assure the water requirement for each plant.[110] In the upper Awash, some crops or plants may be watered within 15 (e.g., perennial crops), 10, 7, 4, or 2 days. The schedule which is confused with the prioritization system is designed in a way it reinforces these periods.[111]

8. Approaches of Prioritization Maintaining Multiple Interests within the Same River Basin

8.1 Ordinary ranking of categorized uses as priorities:

The allocation and prioritization of water may be on the basis of categorical classification of water use type. This form of prioritization adds specificity in addition to the general adhered principles or standards. The prioritization is made by defining, listing and putting specific ranks or categories of water use types. In this form of prioritization, the prioritization is made by ordering the ranking of water use types in the form of priority ladder. The listing based on types of water use may be stated as environmental, domestic, irrigation, industrial, commercial, municipal, hydro-electric power, construction, etc.

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[108] Taken from an interview held with the member of one *Water Users Association*, on Dec 20/2019, Wenji.

[109] Frank E. Marony (1953), The Balance of Convenience Doctrine in the Southeastern States, Particularly as Applied to Water, South Carolina Law Quarterly, 5 S. C. L. Q. 159.

[110] Awash River Basin, Dry Season Water Allocation Plan for 2017/18.

[111] Ibid.

However, the specific ranking of the water use rights may be difficult since there can be specific types of water use that require equal or equivalent weight thereby seeking 'relational management strategies' among users.[112] It can also be difficult to give first priority by singling out one of the water use types among those that hold equivalent significance. The other challenge may also relate to the hairsplitting attempt to define and differentiate specific forms of water uses within the same category or use of water, such as industrial uses of water. One of the reasons for undertaking situation analysis is to change the priority from agricultural use to industrial use[113] (as quoted below) where it becomes more efficient and economical to give preference to industrial use thereby reviewing the prioritization between the two types of water uses:

> This situation analysis identifies three major things as emerging issues that may have influences on the implementation of this strategic plan. The first one is the change of the priority from agricultural uses to other uses particularly industrial uses. This strategy assumes irrigation water use as a priority for economical use. But if this priority is changed to industrial system, the allocation system will alter and need reviewing.

The quoted text shows the rationale or driving force for reviewing the strategic plan on issues of allocation. *First,* there should be a clear question and scrutiny between the policy document and the document that embodies the water allocation strategy.[114] *Second,* the policy indicates when and why review may be required, and this needs to be seen with due attention to the broader economic, agricultural, and industrial policies of the country.[115]

The prioritization of water use rights within the same category of use is left unaddressed. According to empirical evidence, prioritization of water use rights is implemented based on the categories of water uses. However, the prioritization of water use rights among individual users within similar category of use is left unaddressed.

8.2 Prioritization by clustering the categorized water use types

Clustering of water use types can avail an equivalent significance or weight within the same category of water use types. This can be the best option to

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[112] StijnBrouwer (2015), *Policy Entrepreneurs in Water Governance: Strategies for Change*, Springer, Switzerland.

[113] AWBA (2017), Executive Summary of the Strategic Awash River Basin Plan, unpublished.

[114] Ibid.

[115] AWBA, *supra* note 15.

prioritize clusters instead of specific and water use types. The priority ladder may also be labeled as cluster one, two, three etc. This may have its own advantages. *First,* this approach is the most manageable and feasible option. It avoids the difficulties in defining and characterizing water use types. *Second,* it may also be the most effective approach since it accommodates the differences of contexts but governed with similar rules in legal frameworks. *Third,* it can accommodate dynamism of water use types that may fall within the same cluster.[116] The commercialization and water tariffs including water pricing systems may be designed with a view to promoting these interests.[117]

8.3 Prioritization by clustering the bundle of rights

Prioritization of water use rights may be accompanied by clustering the bundle of rights. The bundle of rights can be classified into two or three clusters. The first cluster may hold the right to access and withdrawal of water resources. The second cluster may include the right to management and exclusion. The third cluster may be the right to alienation as a standalone right since it can cause a significant legal impact or effect on the remaining bundles of water use rights.

8.4 Prioritization by integrating the clustering of the bundle of rights into the clustered categories of water use types

This form of prioritization gives the opportunity to integrate the prioritization of the bundle of rights into the clustered water use types.[118] For instance, the three clusters of the bundled rights may be enjoyed through the first cluster while the rights may be reduced and transferred to the latter forms of clusters. The integration of the clustered bundle into the clustered types of water use types may help to introduce a separate treatment on the nature of water resources.

It is highly recommended to incorporate exhaustive ranking of water uses.[119] The allocation system must pass three or more steps. *First,* there can be a clear direction in the upcoming policy by clustering the water use rights into three clusters. *Second,* the first basic cluster shall hold the basic water uses such as domestic use, livestock use, environmental or the

[116] Lawrence J. MacDonnell, *supra* note 22.

[117] *See* for example, Ezekiel Nyangeri Nyanchaga (2016), *History of Water Supply and Governance In Kenya (1895–2005): Lessons and Futures*, Tampere University Press

[118] Singh *C, supra* note 97, citing Schlager and Ostrom (1992).

[119] Global Water Partnership. (2014). *Coordinating Land and Water Governance: An Essential Part of Achieving Food Security,* Stockholm, Global Water Partnership.

environmental flow requirement and rural and city water supply use as basic water uses. All the bundle of rights shall be enjoyed by the respective water users. The first three bundled rights (access, withdrawal, and management) shall be given a first priority and the right to exclusion and alienation shall be an equivalent second priority. Each respective city administration shall segregate the types of water users. The use of water for industrial use and purpose shall be excluded from this arrangement. The cross subsidizing system can be installed even for industries that are using water for industrial services under urban settings.[120] These types of uses shall be considered as minimum requirements and non-derogable types of water use during the allocation and apportionment process thereby manifesting the reasonable use of water as minimum standard test.[121] The government organs shall fulfill, protect and promote the human right to water.

Third, the second cluster shall include the use of water for irrigation (traditional, outgrowing/contract farming, small, medium and large scale irrigations), hydroelectric power generation, tourism and resorts. The right to access and withdrawal shall get an equivalent first priority but the right to management shall get a second priority. The right to exclusion and alienation shall be enjoyed and exercised equivalently in an exceptional ground if there is not a negative impact in balancing the dimensional interests.[122]

Fourth, the use of water for 'water based industries' and 'non-water based industries', construction works and commercial use of water shall be under the fourth cluster. If there is a remaining volume of water after an apportionment is made for the above priorities, all the bundled rights shall be exercised. *Fifth,* each lower administration shall ensure that any new coming demand of water is accommodated but it does not affect the attributes of each bundled right under each cluster.

Certain measures have to be taken to improve the water governance.[123] The existing standard of the 'highest social and economic benefits' may be used as a comprehensive standard but its implementation needs to be in

[120] *See* for example, Laura Echternacht (2014), Pricing Urban Water: Evaluation of Economics in the Water Sector of Hyderabad and Varanasi (India), Springer, Germany.

[121] Anthony Scott and Georgina Coustalin, *supra* note 20, p, 871.

[122] UNESCO Education Sector. (2012). *Learning about Water- Multiple- Perspective Approaches.* UNESCO- Education for Sustainable Development in Action Learning and Training Tools No. 5.

[123] Viktor A. Dukhovny and Dinara Ziganshina (2011), *Ways to Improve Water Governance*, Irrig. and Drain. 60: 569–578.

tandem with specific contexts. There is the need for a joint river basin organization as an actor in the governance of Awash River Basin and the concerned regional and city administrations should have the duty to cooperate and enforce the duty of protecting the natural flow of the river basin with the required volume of water.[124] They have to avoid the problems of grabbing because of location and by taking undue advantage of other facilitating factors.

5. Concluding Remarks and the Way Forward

The prioritization of water use rights is interpreted in different ways. The most general interpretations include the prioritization of domestic water use as a basic human right to water. The conservation of an environmental flow with the purpose to sustain environmental sustainability is also applied as a factor to interpret the policy and legal frameworks. Moreover, there is a key consideration to economic feasibility or value as a prioritizing standard. Some approaches in interpretation also consider exemption (by the law) from the requirement of permit as a form of prioritization

The data from practice indicate that efficiency or economic feasibility is applied as the most important criteria to prioritize water use rights. The lion's share in the water of the Awash River Basin is utilized for irrigation and the actual water allocation is also carried out based on the size of land. There is an effort to prioritize domestic use but it is disputed with other types of users. The actual and immediate allocation from ground water to industrial water users is given without the application of the prioritization rule.

The key informant water users also believe that they do not have awareness on the prioritization of water uses. There is no water charge based on such type of prioritization and allocation although the water pricing system may deviate from concerns on sustainability[125] unless they are accompanied by caution, equity and good governance. Allocation to small and medium scale water users is made based on location at the river basin. The convenience to utilize water from the basin especially by the upper water users also gives them an opportunity to get first priority to it. There is

[124] *See* for example, Nowlan, L and K. Bakker. (2007), Delegating Water Governance: Issues and Challenges in the BC Context, *Program on Water Governance*, University of British Columbia.

[125] Worldwatch Institute (2013), *State of the World 2013: Is Sustainability Still Possible?* Island Press, Washington.

also a practice of water allocation by rotation by classifying those who can utilize water at night and day time.

The key informants and respondents have expressed their suggestions on standards of prioritization. Most of them support the ranking of the orders without any pre-condition. Some of them suggested that prioritization should be enforced on a case by case basis with regard to irrigation and industrial uses of water by assessing in the context of socio-economic value. The remaining respondents stated the need for enriching the existing general statements through research thereby enhancing specificity of the ranking by meanwhile ensuring that there shall be workable, manageable, and feasible ranking or ordering of the priorities.

Prioritization to domestic, irrigation and industrial water uses is supported by most respondents, while some respondents believe that environmental flow should get the first priority, other respondents also rank it either in the middle or at a lower tier. However, it is to be noted that environmental flow is a *sine qua non* condition for the very existence and sustainability of the river basin. Equally important is domestic water which requires clarity in its definition including the classification of basic and non-basic, and public and non-public services.

Water use for irrigation and industrial purpose have also been discussed. The latter needs distinction between basic vs. non-basic types of industries as criteria in the process of prioritization. The requirement and regulation on efficiency, manner of utilization, proximity or convenience, rotating schedules have to be used as additional criteria among the types of water uses in the Awash River Basin.

The discussion and analysis in the preceding sections suggest *four* approaches of prioritization that address multiple interests within the same river basin. *First,* the categorization of water uses or the categorical classification of water use types can be considered as a preliminary design. *Second,* the categorization may be supported by clustering the categorized water use types, and prioritization is expected to be made among clusters. *Third,* the clustering of bundle of rights must be designed depending upon the categorization or the clusters. *Fourth,* it shall be mandatory to undertake prioritization by integrating the clustering of the bundle of rights into the clustered categories of water use types.

Finally, clarity, specificity and comprehensiveness are mandatory. There is thus the need for policy, legal and organizational reforms to address and implement the prioritization of water use rights. ■

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The Regulation and Supervision of Micro Finance Institutions in Ethiopia:

The Need to Balance Social Objectives with Financial Sustainability

Gebreysus Abegaz Yimer ♣

Abstract

Microfinance Institutions (MFIs) play an important role in providing access to finance in developing countries. However, how to effectively regulate MFIs remains one of the challenges that needs attention. The need for legal and financial innovation to enable MFIs to continue to provide the much-needed financial service to society is apparent. One of the proposals is to use regulatory frameworks that are closely related or similar to those we use in banks. Ethiopia is currently using laws that are in many ways similar to its banking laws to regulate Microfinance Institutions. However, this approach is not without its limitations. Complex and burdensome regulations greatly affect the efficiency of Microfinance Institutions. We need MFIs not to be just commercial banks. We need them to fill the gap that is created by the existing banking system. We need them to be more open to small-scale borrowers, to use flexible credit packages and to give priority to women and vulnerable groups in society. Therefore, we need a legal regime that considers these special traits of MFIs and provides the required support to these institutions to be sustainable and viable in the market. This article examines the legal regime in Ethiopia, outlines its limitations and provides suggestions to make it more efficient.

Key terms:

Access to finance · Social objective · Financial sustainability · Mission drift · Financial regulation

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NB-
This article was written before two of the most dominant government-affiliated MFIs were converted into Siinqee Bank and Tsedey Bank.

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Contents

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1. Introduction

The relevance of law and its effective implementation for the development of the financial industry is a well-established theory.[1] Quality of laws and their effective implementation helps to improve financial inclusion and reduces the probability of exclusion from the formal credit market, particularly for small and micro enterprises.[2] Effective and efficient laws that can be enforced without a prolonged procedure and with minimum cost also reduce cost of credit and increase the probability of repayment.[3] Furthermore, Hanedar's empirical analyses revealed that lack of an effective and efficient legal procedure is one of the reasons for small and medium

[1] K Pistor, M Raiser, & S Gelfer (2003), Law and finance in transition economies. *Economics of Transition*, *8*(2), 326-368.

[2] C Grant, & M Padula (2006), Informal credit markets, judicial costs and consumer credit: Evidence from firm level data. Working Paper. Centre for Studies in Economics and Finance.

[3] D Fabbri, & M Padula (2004), Does poor legal enforcement make household credit constrained. *Journal of Banking and Finance*, *28*(10).

enterprises (SME's) dependence on informal credit markets.[4] An empirical research study that relies on a rich database collected from more than 30 countries has shown that there is a significant positive relation between the poor quality of legal systems and increased dependence on informal credit markets.[5] When the legal system of a country lacks predictable, stable and efficient laws, and enforcement of contracts requires prolonged litigations, and the result is a high rate of financial exclusion of small-scale borrowers. Staschen *et al.* outline how laws hinder the attempts of formal financial institutions to provide financial services to the poor, thereby aggravating financial exclusion.[6]

Micro finance Institutions (MFIs) play an essential role in providing access to finance in developing countries. However, the need for legal and financial innovation to enable MFIs to continue to provide the much-needed financial service to society is apparent. One of the proposals that are made, among others, is to use regulatory frameworks that are closely related or similar to those we use in banks and other corporations. The other option that those activists of MFIs often advocate is to use the non-for-profit structure and to avoid any temptation for profit in the sector. Profiting from the poor is considered both unwanted and immoral by some.

The two approaches have their own advantages and limitations. It is apparent that we need MFIs not to be just commercial banks. Applying the banking system to MFIs erodes the very purpose they are established for. We need MFIs to fill the gap that is created by the existing banking system. Therefore, we should be careful not to convert them just into a commercial bank. We need them to be more open to small-scale borrowers, use flexible credit packages, and prioritize women and vulnerable groups in society.

On the other hand, MFIs need to be self-reliant and sustainable, at least in the long run; therefore, remaining a not-for-profit organization limits their potential and the possibility of staying a reliable development and business partner to customers. Therefore, we need a legal, financial and governance

[4] E Yaldiz Hanedar (2013), *Essays on loan markets in less-developed economies*. PhD dissertation. University of Toronto.

[5] E Hanedar, Y Altunbas & F Bazzana (2014). Why do SMEs use informal credit? A comparison between countries. *Journal of Financial Management and Markets and Institutions*, *2*(1), 65-86.

[6] S Staschen, & C Nelson (2013), The role of government and industry in financial inclusion. In J Ledgerwood, J Earne, & C Leson (2013), *The new microfinance handbook a financial market system perspective*. (pp. 71-96). The World Bank. Elibrary, https://elibrary.worldbank.org/doi/full/10.1596/978-0-8213-8927-0_ch3.

structure that considers these particular traits of MFIs. This article examines the arguments on both sides based on literature review in the field and some comparative legal analyses with particular focus on the financial structure of MFIs.

This article mainly examines the possibilities and challenges of using equity finance in Microfinance Institutions. The questions that are addressed include: the most appropriate financial structure of Microfinance Institutions, the balance between financial motives and social objectives, and whether we can rely on shareholders with a pure profit motive in MFIs, and if so, the manner in which this may affect the social mission of MFIs. With regard to sequence, Section 2, provides a historical background of MFIs, and the third section briefly deals with the financial structure of MFIs. Sections 4 and 5 respectively discuss MFIs and the legal regime of MFIs in Ethiopia followed by conclusion.

2. Historical Background

Microfinance can be defined as a system that provides access to finance for individuals or small-scale businesses that do not have access to financial services.[7] It is an innovative economic, financial and social response to rectify market failures that exclude the poor from accessing the most important resource to fight poverty.[8]

2.1 Generous lending as the origin of micro credit programs

The innovative and generous lending program in Bangladesh by Muhammud Yunus is considered as the origin of the modern microcredit program. Muhammad Yunus, an economist by profession, lent small amounts of money to poor women from his own pocket.[9] The little money he provided helped the women to improve their income and most importantly he observed that they were honest and prepared to repay him. From his experiment, he concluded that access to credit improves the lives of the less fortunate significantly and it also contributes a great deal to fight poverty in the community. He successfully persuaded the Central Bank of Bangladesh to allow him to establish a special bank branch dedicated to serving the poor

[7] A Vanroose & B D'Espallier (2013), Do microfinance institutions accomplish their mission? Evidence from the relationship between traditional financial sector development and microfinance institutions' outreach and performance. *Applied Economics*, 45(15), 1965-1982.

[8] Id., p. 3

[9] B Armenda'riz & J Morduch (2010), *The Economics of microfinance*, (2nd edn.). MIT Press, p. 10.

and as a result, the Grameen Bank was established in 1976.[10] The Grameen Bank introduced group lending as its main lending strategy.[11] Group lending with joint liability enabled the Grameen Bank to operate without a need for collateral. Group lending enabled the Grameen Bank to use soft information, social pressure, and social capital to minimize the effects of loans being issued to unreliable or amoral debtors.

The success of Grameen Bank has been considered as a breakthrough in fighting poverty. Microfinance presents itself as the latest solution to the age-old challenge of finding a way to combine the bank resources with local information and cost advantages.[12] Development agents in many developing countries have introduced microfinance as a main strategy to reduce poverty. MFIs commonly use group lending to assure repayment and to avoid requiring high value property as collateral.[13] This has opened up opportunities for those who have the good will to work hard to escape from poverty.

The group lending system requires no real security and it is based on the personal security system that all group members act as unconditional guarantors for each other. Individuals form groups voluntarily, select their team members, and take the responsibility of screening who joins their group. However, some MFIs also randomly form groups among those who are willing to participate in a group system. Empirical researchers claim that there is no significant difference between the two approaches in terms of repayment rates.[14]

In many countries, MFIs have been introduced by national and international development agents. Initially, MFIs were launched as NGOs with the objective of providing access to finance for those who are excluded by the formal banking system as "credit unworthy;" these have been mainly subsidized by international development actors.[15] Although microfinance initially used group lending as its main strategy, it later embraced different

[10] Ibid.
[11] Ibid.
[12] Id., p. 9.
[13] K Tsai (2004), Imperfect substitutes: The local political economy of informal finance and microfinance in rural China and India. *World Development 32*, 1487-1507. https://www.sciencedirect.com/science/article/pii/S0305750X04000956.
[14] *Supra* note 9, Armenda'riz. & Morduch (2010).
[15] B D'espallier, J Goedecke, M Hudon, & R Mersland (2017), From NGOs to banks: Does institutional transformation alter the business model of microfinance institutions? *World Development,* 89, 19-33.

strategies and techniques and also broadened its services to the poor segment of society by including saving and insurance services among its products. MFIs also take part in providing trainings and other activities that empower the poor, especially women. In addition to group lending, MFIs now use other security systems depending on the nature of the credits and the social and economic circumstances of their clients.[16]

2.2 Three periods in the history of microfinance

Haldar and Stiglitz divide the history of microfinance into three periods.[17] The period from the mid-1970s to the late 1980s is considered as the *first phase* in the evolution of microfinance. During this era, microfinance was mostly informal, unregulated, and operating mainly at a local level. Group lending was the main strategy. Groups were obliged to attend mandatory trainings and ritual ceremonies before they gained access to credit. Creating strong social connections among the group was considered an important element to strengthen repayment.[18]

During this phase, the focus was mainly to provide very small loans to women. The credit providers were described as "bicycle bankers" in Bangladesh and the loan providers established a very strong connection with the local community; they focused on empowering debtors. Honest defaulters who failed to repay because of natural disaster, illness, or business failure were released from their debts.[19] During this phase, microfinance was operating mainly based on the practices among family members and friends who lend money out of altruism rather than for financial gain. Family and friends commonly exonerate debtors from their obligation whenever it is expected by norms and customs of society, and microfinance officers were doing the same. The main motive behind microfinance during this phase was to protect the poor from heavy usury in informal loans; such loans were considered to be impeding the development of local communities by imposing high interest rates and keeping the poor trapped in poverty. As Haldar& Stiglitz noted, "[t]he initial impetus for microfinance was to provide respite from the oppressive regime of traditional moneylenders."[20]

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[16] N Hermes, R Lensink & AMeesters (2011), Outreach and efficiency of microfinance institutions. *World Development* 39(6), 938-948.

[17] A Haldar & J Stiglitz (2016), Group lending, joint liability, and social capital: insights from the Indian microfinance crisis. *Politics and Society*, *44*(4), 459-497.

[18] Ibid.

[19] Id., p. 466.

[20] *Supra* note 17, Haldar & Stiglitz (2016).

The *second phase* was from the late 1980s up until 2006 and was considered the golden age of microfinance. During this period, the microfinance movement emerged as a global phenomenon and was crowned as the best strategy to put "poverty into museum."[21] The microfinance movement is considered by international development actors as an intrinsic element of the global effort for development and empowerment of people who are living in poverty. Access to finance is considered a key element for social and economic development of societies. Some go to the extent of arguing that access to finance is a human rights issue and that governments and the international community should maximize efforts to provide affordable credit to everyone who is qualified.[22] Access to finance implies a possibility to receive a financial service at a reasonable distance and affordable price.[23] However, the majority of the population in the developing world have no access to affordable finance. MFIs therefore fill the objective of providing access to finance for those who have no access to adequate financial services.[24]

The idea that the poor cannot save has been challenged; and the microfinance movement started based on the idea that the poor shall and should save for sustainable development to be achieved.[25] The microfinance movement has also challenged the hidden assumption that the poor would not repay debts. The system has proved that with an appropriate approach and with systematic support, the poor can repay debts and become free from dependency on aid.[26] The microfinance system also emphasizes how a credit security system that relies on collateral is against the interests of the poor; an alternative security system should be used by finance institutions to increase access to credit for the poor. The requirement for collateral as a security for credits favors those who have already created wealth and it discriminates against those who are not in a position to own a property which would be accepted by banks as collateral.

[21] Id., p. 464.
[22] O Bayulgen (2013), Giving credit where credit is due: Can access to credit be justified as a new economic right? *Journal of Human Rights*, 12(4), 491-510.
[23] M Hudon (2009), Should access to credit be a right*? Journal of Business Ethics, 84,* 17-28.
[24] *Supra* note 9, Armenda'riz & Morduch (2010).
[25] Ibid.
[26] Ibid.

Microfinance during this phase was considered as both a social innovation and a successful business model which could be reproduced throughout the world. Providing access to credit in a sustainable way needs to attract funding from investors who prioritize financial over social interests. The question is, therefore, how microfinance can both sustain affordable credit for the poor and attract private investors for funding.

The *third phase* started in 2006 when repayment rates by debtors started to decline. The reported increase in defaults in repayment challenged expectations based on the high repayment rates recorded ubiquitously during the first phase of the evolution of microfinance.

The third period is referred to as "the age of crisis." Following this crisis, many countries introduced laws to regulate microfinance institutions, to ensure sustainability of the institutions and to provide protection to debtors. The commercialization of MFIs and the introduction of individual loan systems with strong enforcement mechanisms have negatively affected the goodwill of MFIs. Moreover, interventions by governments have become fashionable thereby removing the freedom that MFIs enjoyed previously. Haldar *et al.* argue:[27]

> The challenge for microfinance, then, is fundamentally to regain what it once built itself on trust. It is unlikely that this can be achieved without a reversion to the not-for-profit model and the careful cultivation of social capital, which in turn will place inherent limits on the speed at which microfinance can be scaled up. If these brakes fail to be put on the evolution of the industry, the noble vision with which microfinance started runs the risk of being reduced to mere moneylending.

3. Financial Structure of MFIs

Like most financial institutions, MFIs have multiple sources of finance that can be divided into debt and equity. MFIs collect voluntary deposits or tied-up or mandatory deposits that they request as a condition to provide loans. They also get a debt from development and commercial banks, sometimes in a favorable situation and sometimes based on the market value. Most MFIs also receive essential support from international development actors in the form of interest-free debts. International development actors commonly provide funds without interest and sometimes with low interest. Some

[27] *Supra* note 17, A Haldar, A. & J Stiglitz, 2016), p. 481.

findings have indicated that MFIs are not financially sustainable without global and local development agents' robust support.[28]

MFIs also receive funding in the form of equity, and some MFIs issue shares to be offered to the general public. Equity is an essential source of funding in MFIs. Investors with pure financial interest and impact investors, who are interested in supporting the social objective of MFIs, invest in MFIs. Investments with MFIs can be considered pioneers when it comes to social impact investments.[29] Access to finance is included in the Sustainable Development Goals (SDGs).[30] So, access to finance is an essential target that attracts the attention of social investors. Hereunder, we will succinctly discuss the different sources of finance. For clarity purposes, we divide the sources of finance into two groups: Equity and debt.

3.1 Equity in MFIs

Equity is an essential source of finance in MFIs that are established as business enterprises.[31] Some researchers also indicated that equity is the best means to finance MFIs as it enhances the financial performance of the institutions.[32] According to Chikalipah, findings of a study 'demonstrate that the optimal source of finance for MFIs …is equity.'

The equity investors in MFIs may have different interests and backgrounds. In MFIs that have been converted from NGOs into companies, the founders of the original MFIs remain dominant shareholders, at least at the initial stage of the company. The founders of the converted MFIs continue to be dominant shareholders at an early stage of the MFIs, and most of them also remain on the board of directors.[33] This has allowed them to

[28] I Bayai & S Ikhide (2018), Financing structure and financial sustainability of selected SADC microfinance institutions (MFIs). *Annals of Public and Cooperative Economics*, *89*(4), 665-696.

[29] H Hummels & M de Leede (2014), The emergence of impact investments: The case of microfinance. In *Socially Responsible Investment in the 21st Century: Does it Make a Difference for Society?* Emerald Group Publishing Limited.

[30] Goal 8. Promote sustained, inclusive, and sustainable economic growth, full and productive employment, and decent work for all.

[31] V Bogan (2012), Capital structure and sustainability: An empirical study of microfinance institutions. *Review of Economics and Statistics*, *94*(4), 1045-1058.

[32] S Chikalipah (2019), Optimal sources of financing for microfinance institutions in sub-Saharan Africa. *Development in Practice*, *29*(3), 395-405.

[33] U Varottil (2012), Microfinance and the Corporate Governance Conundrum. *Berkeley Business Law Journal*, 9(2), 242-292.

influence the decision-making of the MFI, including in the election of the board and the executive.[34]

The founders have tried to put the social objective on the far front in all decisions that the MFIs have made[35]. However, once this dominance of the founders was minimized by the growth of the shareholders who joined the company exclusively for-profit motive or with limited interest in the social objectivities of the MFIs, it becomes apparent that the MFI faces a firm pressure from shareholders to shift attention from social objectives to financial interests of the shareholders.[36] Krauss and Walter[37] argued that some investors have joined the microfinance business because of the very attractive return on investment around 1990.[38]

Most investors have profit as their objective. This somehow pressurized MFIs to focus more on the financial performance and sustainability of the business as otherwise, investors will move away from the sector. Employees and directors are also pushed to demonstrate a solid balance sheet to keep investors and attract new investors.[39] This is particularly important in listed companies where most investors have only a financial interest and a possibility to sell their shares so quickly.[40] This is a serious challenge to the development of MFIs. The new directors and investors who focus on maximizing shareholders' interest and disregarding the interest of other stakeholders disregard the social objectives of MFIs and some refer to this scenario as mission drift. However, it must be noted here that some investors are supporters of the social objective of the MFIs. Therefore, they are willing to receive a little lower than the profit they might have obtained from alternative investments.

International development actors and NGOs also buy shares in MFIs.[41] They commonly buy the shares to support the organizations' missions. The NGOs appoint nominal shareholders who receive no profits. However, in countries like Ethiopia, where there is no clear law that regulates the position of nominal shareholders, it has created uncertainties about the rights and

[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] N Krauss & I Walter (2009), Can microfinance reduce portfolio volatility? *Economic Development and Cultural Change*, *58*(1), 85-110.
[39] Ibid.
[40] Ibid.
[41] S Ghosh & E Van Tassel (2011), Microfinance and competition for external funding. *Economics Letters*, 112(2), 168-170.

duties of the nominal shareholders and how to replace them when they leave. Generally, attracting private investors without eroding the novel social objectives is essential.[42]

3.2 Debt as source of financing in MFIs: Long term debts

Debt is another critical source of financing in MFIs. Empirical research indicates that most MFIs use debt more often than equity as a source of funding.[43] Private investors, governments, development agents, and commercial and development banks provide loans to MFIs.[44] Mersland & Urgeghe indicated that 'access to commercial debt is related to strong financial performance and a high level of professionalization'.[45] There is also evidence that indicates in well-developed financial markets 'debt is the primary funding instrument which Microfinance Investment Vehicles (MIVs) invest in Microfinance.'[46]

Private institutions may be motivated to participate in the MFIs purely for financial gains or dual objectives. They may provide loans to MFIs because they share the values and goals of MFIs.[47] When they give the debt intending to support the purposes of the MFI, they provide a favorable term to the MFIs. They may provide the debt interest-free, or a meager interest rate may be charged. Commonly, national development banks and commercial banks offer such support to MFIs. Banks may be required by law to offer loans to small and medium enterprises that normally use MFIs. That is, the banks grant funds at good terms to MFIs, and MFIs, in turn, provide small-scale loans to end-users of the fund at a reasonable cost. MFIs have more expertise and experience to deal with small-scale loans; therefore,

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[42] O Adejumo, U Efobi, & S Asongu (2021), Financing Sustainable Development in Africa: Taking Stock and Looking Forward. In *Handbook of Research on Institution Development for Sustainable and Inclusive Economic Growth in Africa* (pp. 140-152).

[43] J Lislevand (2012), *The effect of capital structure on microfinance institutions' performance* (Master's thesis, Universitetet I Agder; University of Agder.

[44] G Dorfleitner, MRöhe & N Renier. (2017), The access of microfinance institutions to debt capital: An empirical investigation of microfinance investment vehicles. *The Quarterly Review of Economics and Finance*, *65*, 1-15.

[45] R Mersland & L Urgeghe (2013), International debt financing and performance of microfinance institutions. *Strategic Change*, *22*(1□2), 17-29.

[46] H Tchuigoua (2014), Institutional framework and capital structure of microfinance institutions. *Journal of Business Research*, *67*(10), 2185-2197. (2196).

[47] G Dorfleitner, et al *supra* note 44.

banks offer loans to MFIs as part of their social contribution to be further distributed to SMEs.

Development agents provide loans to MFIs to support the social objectives of MFIs. However, they do not commonly give the fund without attaching some conditions and terms that explain how the fund has to be used to benefit end-users or the target beneficiaries. The conditions can be specific, for example, requiring a certain percentage of the loan to be allocated to women or other interest groups.

Debt financing provides some benefits to firms –tax advantage due to the deductibility of the interest rate as taxable income. Most MFIs pay taxes, and it is obvious that they will consider the tax advantages of the debt in their decisions. The reduction of agency costs is another advantage of debt financing.[48] Directors and employees will give proper attention to the performance of the MFIs because failure to pay timely interest or principals will invite a risk of insolvency.[49] It is obvious that the bankruptcy of the institution directly or indirectly affects the directors and employees of the institution.

In MFIs, founders with social objectives may prefer to maintain their power as dominant decision-makers in the MFI. Founders may continue to prioritize their social goals as far as they can pay their debts. Furthermore, founders may prefer to remain as the only residual owners of the MFI, if they expect to obtain a significant amount in a grant. Getting a significant amount in grants will help the MFI to become profitable; therefore, they may not want financially oriented shareholders to make a fortune from grants and donations that are meant to support the social objectives of the MFI.

On the other hand, debt financing may encourage the practices of earning management by directors.[50] Therefore, it may affect the quality of information that they send to grant providers and donors. There is also evidence which shows that a high level of leverage affects outreach and service to the poorest of the poor because of the increased cost of capital.[51]

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[48] I Bayai & S Ikhide (2016), Financing and financial sustainability of microfinance institutions (MFIs): a conceptual view. *Banks and Bank Systems*, *11*(2), 21-32.

[49] Ibid.

[50] N Lassoued (2021), Capital structure and earnings quality in microfinance institutions. *International Journal of Managerial Finance*.

[51] M Hoque, M Chishty, & R Halloway (2011), 'Commercialization and changes in capital structure in microfinance institutions: An innovation or wrong turn?' *Managerial finance*.

3.3 Deposits (as short term debts)

Not all MFIs are allowed by law to collect deposits. Some countries restrict the scope of business activities that MFIs can undertake. Countries may prohibit MFIs from collecting deposit –from the public. However, in most countries, MFIs are allowed to collect deposits. MFIs often require a certain amount of mandatory savings to provide credits to their customers. Sometimes they need debtors to deposit a certain amount periodically. The primary purpose of the forced saving mechanism is to minimize risk and see if the client is creditworthy. They also consider saving as an essential means to alleviate poverty; hence, they motivate savings to improve the saving culture.

Tang *et al*, state various uses of deposits.[52] They noted that deposits of MFIs have some advantages over other funding sources and allow the poor to accumulate liquid assets and develop fiscal discipline. Specifically, deposits add to MFIs' available funds, enhance MFIs' monitoring incentives, reduce the information asymmetry between lenders and borrowers, and allow MFIs to diversify their loans. However, managing deposits also entails costs, such as interest payment, operating expenses, and regulatory costs.

As Tang *et la* observed, deposits are also essential sources of funding for microfinance institutions, and deposit mobilization has the following advantages: (1) It is less expensive, (2) it helps to change the overall social welfare of the community, and (3) the fact that the community knows the money they take as debt is money that is deposited by themselves or by a neighbor reduces defaults.[53] Evidence has shown that when debtors know they are borrowing money deposited by their neighbors, not money from the government or donors, they incline to pay more frequently than to default.[54]

[52] JJ Tang, S Quayes, & G Joseph (2020), Microfinance institutions, financial intermediation, and the role of deposits. *Accounting & Finance*, *60*(2), 1635-1672. (1671).
[53] Ibid.
[54] Ibid.

4. MFIs in Ethiopia

In 2021 there were 42 MFIs in Ethiopia, they mobilized 52.4 billion Birr in saving deposits, and their total assets reached 85.7 billion Birr.[55] However, the microfinance sector in Ethiopia is dominated by government affiliated microfinance institutions.[56]

MFIs in Ethiopia provide both saving and credit services. In relation to savings, they use both voluntary saving and compulsory saving. Compulsory saving is commonly a condition for releasing credits.[57] MFIs in Ethiopia use group lending with joint liability.[58] Groups are formed based on self-interest with no intervention of microfinance institutions. Under Ethiopian laws, debtors are assumed to be jointly and severally liable unless it is expressly provided otherwise by contract.[59]

In joint and several liability, any one of the debtors is responsible for the whole debt and can be sued in a court of law for the total amount of the loan the group has borrowed. The microfinance institution, therefore, can bring a legal action against one of the debtors for the payment of the whole unpaid loan and the member's properties can be used to satisfy the loan. Generally, the group lending system is a good screening mechanism to select potential beneficiaries, who are considered to have high moral value, to be free from other debts, and ready to use the money for productive engagements.

The group loan system is also closely related to Ethiopian values, norms, and traditions of sharing risks. In the tradition of Afar, for example, a tribe shares responsibilities for damages incurred by a member of the specific tribe. The tribe also has a right to claim for damages upon its members.[60] Wrongs done to individuals are considered an attack on the whole tribe. Another example relates to Iddirs and Eqqubs whereby social capital including reciprocity and altruism are well entrenched values in traditional

[55] National Bank of Ethiopia, *Quarterly Bulletin*, 36, 2 Second Quarter 20120/21 Fiscal Year Series, p. 20.

[56] Ibid.

[57] B Kereta (2007), *Outreach and financial performance analysis of microfinance institutions in Ethiopia*. Conference Paper at African Economic Conference, United Nations Conference Center (UNCC), Addis Ababa, Ethiopia 15-17 November.

[58] Ibid.

[59] The Civil Code of Ethiopia. Article 1896.

[60] Y Kebede, I Ayele, M Gebregziabher & G Gebrewahid (2013), Case Study on seven customary laws in Ethiopia. In E. Stebek & Muradu A. (2013). *Law and development and legal pluralism in Ethiopia.* Justice and Legal System Research Institute, Addis Ababa.

financial institutions in Ethiopia. The bedrock thus already exists for MFIs to use group lending (social collateral) effectively to serve those who were unbanked.

MFIs have recently included individual loans as one of their services. They provide individual loans with a personal guarantee or by using vehicles or houses as collateral. Individual loans are allowed for those who can find a personal guarantor, who have a permanent job in government offices or in government affiliated enterprises, and those who can adduce a collateral such as buildings, vehicles, or machines. MFIs are also allowed to engage in leasing finance.[61] Accordingly, they provide financial leasing services for those who take part commonly in government backed project works. For example, recently, MFIs have provided credits using the leasing finance system to business entities that are taking part in the universal road access project initiated and financed by the federal government.

MFIs commonly provide loans for agriculture (mainly to support the production of domestic animals), for SMEs, civil servants and employees in government owned or government affiliated enterprises or agencies, and for housing projects both in collaboration with government or independently. The vision statements of Most MFIs in Ethiopia expressly state that poverty reduction is their priority and they also work very closely with local and regional governments.[62] They usually take part in financing projects that are initiated by government to create employment, to build infrastructure for the people, or to build affordable houses. MFIs also receive political and administrative support in their effort to enforce contracts and to pressure debtors to repay their debts.[63]

Enforcement of contracts using the formal legal system is both expensive and lengthy in Ethiopia. The long time that is needed to obtain and execute judgments makes formal court litigation processes unaffordable for microfinance institutions, given the small size of the loans they provide for a large number of customers. Lack of a proper property registration system and sometimes the fact that a property can be owned by family members jointly further complicates the already slow and complex legal procedures,

[61] Micro Financing Business Proclamation No. 626/ 2009. *Negarit Gazette*, No. 33. 4703. Article 3 (k).

[62] G Ageba (1997), Microfinance institutions in Ethiopia: Issues of portfolio risk, institutional arrangements and governance. *Ethiopian Journal of Economics, 7*(2), 25-45.

[63] Ibid.

particularly in rural areas. The support of local administration is therefore critical for MFIs to increase repayment rates. Sometimes, the local administrators may be too zealous in collecting payments and use inappropriate means, including detention, taking domestic animals by force from the defaulter without a court order, or excluding the defaulter from receiving services and donations from the government.[64]

5. The Legal Regime for MFIs in Ethiopia

Microfinance was officially recognized in 1996 as a business organization by Proclamation No. 40/1996. Currently, Proclamation No. 626/2009 regulates microfinance businesses. This Proclamation has made it mandatory that MFIs should be organized as share companies in Ethiopia. NGOs or institutions other than banks are not allowed to provide microfinance services in Ethiopia.[65] It is therefore very important to provide some leeway to NGOs that seek to provide access to finance for the poor and thus help overcome the lack of access to credit in the country.

The rigid one-fits-all approach that is currently applied by the National Bank of Ethiopia greatly compromises the role of NGOs that are more interested in the social aspect of microfinance than profit-making. W Amha & T Alemu recommend that Ethiopia should provide different legal frameworks for MFIs that operate at different levels and scale. Some of the MFIs in Ethiopia are very large and they are even larger than some of the banks. The MFIs that are controlled by regional governments have already finished their preparation to be registered as banks. Therefore the one size fits all approach may not work given the diversified objectives and sizes of MFIs in Ethiopia.[66]

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[64] G Yimer (2011), *Civil detention as a means to execute civil judgments: Is the wrong practice superseding the law? A case study in Tigray Regional State social courts.* Research Paper presented at Mekelle University College of Law and Governance Research Review Day. https://www.academia.edu/10695189/

[65] *See*, Microfinancing Business Proclamation No. 626/2009, Article 4.

[66] W Amha & T Alemu, (2014), *Household saving behavior and saving mobilization in Ethiopia*. Ethiopian Inclusive Finance Training and Research Institute (EIFTRI), Addis Ababa.

Hailu argues that commercial microfinance in Ethiopia faces multifaceted challenges to be successful.[67] The perception that MFIs should give priority to social objectives and not focus on profit is a very dominant view in Ethiopia and may make the journey of commercial MFIs uncertain.[68] Interest rates are commonly higher in MFIs than in banks due to a higher cost of transaction in microfinance institutions. International and national donors provide support to MFIs to keep interest rates low so that the poor can benefit from affordable credits.[69] However, it is now becoming more common for microfinance to depend on credits from banks to provide credits to their clients. [70]

As MFIs are becoming more dependent on commercial banks and other sources that operate with the sole purpose of making profit, they have to remain profitable to survive. The small loans that MFIs provide for poor people to increase outreach is another reason for higher interest rates; the unit cost of loans are inversely related to the amount of loans.[71]

As indicated above, MFIs are required to be organized as share companies, and MFIs in Ethiopia are therefore considered as business enterprises and should be organized, registered, and regulated as business entities.[72] They are also subject to a prudent financial regulation. Organizing MFIs as business entities is becoming very common in other countries too, and most MFIs that were originally organized as NGOs are transforming into business entities.[73] The transformation of MFIs from NGOs to for profit commercial entities is a common phenomenon throughout the world.[74] MFIs are therefore expected to blend together commercial with social objectives. Maintaining the objective of serving the poor with affordable credit and the need for self-reliance and sustainability demand a very innovative approach

[67] L Hailu (2014), Commercial microfinance in Ethiopia and challenges and prospects: A case of Aggar microfinance. In S. L. Narayana (Ed.) (2014), *Evolution of inclusive finance in Ethiopia*. Papers and Proceedings of the 8th biennial conference of AEMFI, Ethiopian Inclusive Finance Training and Research Institute (EIFTRI), Addis Ababa.
[68] Ibid.
[69] N Hermes et al, *supra* note 16.
[70] *Supra* note 9, Armenda'riz & Morduch, (2010).
[71] N Hermes et al, *supra* note 16.
[72] Requirements for Licensing and Renewal of Microfinancing Business Directive MFI/ 123/2003/. National Bank of Ethiopia.
[73] *Supra* note 15, B D'espallier *et al* (2017).
[74] Ibid.

both by the MFIs and by the regulators.[75] Microfinance will have to be treated as a social enterprise that is judged by different standards, a field that is to be occupied by capital providers with a long-term focus and lesser expectations on commercial returns, and one where social goals are not forsaken.[76]

As share companies, MFIs are governed by boards of directors. The law provides that the board may constitute between five and 13 members. Although the board members are to be selected by shareholders, the National Bank of Ethiopia has the mandate to review the profile of board members and can reject any member it finds unfit for the job. The challenge encountered by the board in microfinance governance is to meet two expectations: the social expectation to reduce poverty and the expectation of shareholders to gain profit from their investment.

Varottil argues that the governance of microfinance should be different from traditional corporate governance in many ways. He argues that the boards of MFIs should be measured using parameters of the social impact of the company.[77] According to Varottil,[78] the corporate governance framework must transcend beyond a "shareholder primacy" or "agency cost" approach into a "customer primacy" approach that maintains focus on the customers and the communities that [microfinance institutions] MFIs serve. MFIs will have to be treated as social enterprises that are subject to different standards, where emphasis is placed on attracting investors with long-term goals and lesser expectations on commercial returns, and with a continued focus on social goals.

Organizing MFIs as business organizations has the advantage of promoting sustainability of the institutions and improving their efficiency.[79] MFIs are under pressure from growing competition among themselves and also from banks that are now interested in providing microfinance services directly or via other microfinance institutions.[80] Most prominent MFIs are therefore restructuring themselves to become business entities that provide financial services, thus departing from their previous not-for-profit organizational objectives.

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[75] *Supra* note 9, Armenda'riz, & Morduch (2010).
[76] U Varottil (2012), Microfinance and the corporate governance conundrum. *Berkeley Business Law Journal*, 9(2), 242-292 (p. 288).
[77] Id., pp. 242-292.
[78] Id., p. 246.
[79] A Vanroose & B D'Espallier, *supra* note 7.
[80] *Supra* note 15, D'espallier *et al* (2017).

The transfer of MFIs to business entities, however, is not welcomed by all stakeholders because there is a fear that structural changes will compromise their mission, commonly referred to as a mission drift by researchers.[81] It is argued that the transformation of MFIs into business entities controlled by investors, who are motivated by personal gain, minimizes the social objectives and results in declining financial outreach and depth.[82] Some argue that earning large profits by serving the poor is inherently immoral and illogical.[83]

Researchers have also discovered that subjecting MFIs to banking laws and regulations positively affect their financial sustainability. However, their effect on the social objective of the MFIs is negative. MFIs that are subjected to banking laws and subjected to supervision in the same manner as banks focus on financial sustainability and they minimize their effort to reduce poverty in the society.[84]

Empirical research also proves that MFIs organized as business entities are focusing on the less poor rather than on the poorest of the poor and they are also providing larger loans to individuals with good financial circumstances. MFIs that follow the business model also provide fewer loans for women.[85] The preference to adopt the business model approach with strict regulation by the National Bank of Ethiopia seems to have favored efficiency and sustainability of MFIs –rather than the social objectives. Haldar & Stiglitz underline the impact of shifting to more formal systems with strict regulation on microfinance:[86]

> Although legal enforcement of the credit contract may, at least in theory, be the most normatively desirable and procedurally

[81] J Copestake (2007), Mainstreaming microfinance: Social performance management or mission drift? *World Development,* 35, 1721-1738.

[82] E Assefa, N Hermes & A Meesters (2013), Competition and the performance of microfinance institutions, *Applied Financial Economics, 23* (9), 767-782.

[83] G. Bethlehem (2014), Commercialization and *Regulation of Microfinance*. In S. L. Narayana (Ed.) (2014), *Evolution of inclusive finance in Ethiopia*. Papers and Proceedings of the 8th biennial conference of AEMFI, Ethiopian Inclusive Finance Training and Research Institute (EIFTRI), Addis Ababa.

[84] N Zainal, AM Nassir, F Kamarudin & SH Law (2020), Does bank regulation and supervision impedes the efficiency of microfinance institutions to eradicate poverty? Evidence from ASEAN-5 countries. *Studies in Economics and Finance*.

[85] R Cull, A Demirgüç–Kunt & J Morduch, (2009), *Microfinance tradeoffs: regulation, competition, and financing*. World Bank Policy Research Working Paper No. 5086. http://agris.fao.org/agris-search/search.do?recordID=US2012416757.

[86] *Supra* note 17, Haldar & Stiglitz, (2016), p. 483.

> just enforcement mechanism ([and even if] formal regulation is an increasingly important part of the microfinance industry) –at least in the context of the developing world– the shift from informal to formal lending will come with significant increases in cost and a concomitant adverse impact on inclusivity. That leaves social enforcement as the most likely choice, at least in the case of rural credit markets of the developing world. [This may relate] to either a reversion to the … mode of enforcement of traditional moneylenders, namely, brute force and coercion (of which there are increasing reports in the microfinance industry), or a return to the more innocent, if less ambitious, version of microfinance based on social capital, norm creation, and preference shifting. In resorting to coercion, microfinance sacrifices its normative value, and in lapsing to formal regulation –while preferable– it risks losing its novelty.

Microfinance is highly regulated in Ethiopia and operates under strict supervision of the National Bank. Regional states are totally stripped of any control in relation to MFIs in Ethiopia. Solomon Yimer suggests that regional powers should be given more regulatory power in relation to MFIs to avoid unnecessary costs and to provide effective support to help them achieve their social and business objectives efficiently.[87] The National Bank could delegate some of its powers to regional offices, which could regulate and support institutions operating in their respective regions. However, giving regional governments the mandate to provide prudent supervision and support to MFIs requires considering the nature and purpose of microfinance institutions.

The procedural requirements and the paperwork required to establish MFIs in Ethiopia is *mutatis mutandis* similar to the procedures that are required for banks.[88] The law expressly provides that banking laws including directives are applicable to MFIs unless their application is expressly limited or they contradict with laws specifically enacted for the regulation of microfinance institutions.[89] This is in stark contradiction to the principle that

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[87] S Yimer (2011), *Financial market development, policy and regulation: the international experience and Ethiopia's need for further reform*. PhD thesis. University of Amsterdam, Digital Academy Repository. p. 11.

[88] Requirements for Licensing and Renewal of Microfinance Business Directives No. MFI/23/2013.

[89] Micro Financing Business Proclamation No. 626/ 2009. *Negarit Gazette*, No. 33. 4703. Article 3 (k).

MFIs should be provided more flexible regulations to enable them play their irreplaceable role in poverty alleviation efforts.[90]

The National Bank has the mandate to provide onsite or offsite supervision and there are obligations to submit various reports to the National Bank. These requirements may also affect the depth and outreach of MFIs in Ethiopia as they may lead to concentration of head office staff on the duty to provide the required reports to the National Bank.[91] Furthermore, researchers also suggest that strict supervision may encourage MFIs to avoid small-scale loans.[92]

Given the fact that Ethiopia prefers the business model approach in relation to microfinance institutions, it is expected that they may have limited outreach and limited incentive to provide credits to the poorest of the poor. This may explain why informal financial institutions are still prevalent alongside microfinance institutions, as preferred saving tools as well as an important source of credit in Ethiopia. Researchers have also noted that the poor's preference for informal credit markets rather than MFIs is because of the lack of flexibility in repayment schedules. This may also be influenced by the strict legal requirements that MFIs need to follow and the complex governance structure they need to maintain.[93]

The effect of the rigid loan contracts used by MFIs have been investigated by Pearlman, who concludes that lack of flexibility in loan contracts is inhibiting MFIs from providing the required service to the poor. This in turn affects the role of MFIs in poverty alleviation.[94] Pearlman argues that inflexibility is a major variable that prevents many of the poor from borrowing from microfinance institutions.[95] Studies also suggest that social norms and values play a large role in people's decisions on how and

[90] *Supra* note 85, Cull *et al* (2009).

[91] C Chiumya (2006), *The regulation of microfinance institutions: a Zambian case study.* PhD Dissertation, University of Manchester. https://www.microfinancegateway.org/sites/default/files/mfg-en-case-study-the-regulation-of-microfinance-institutions-a-zambian-case-study-2006.pdf. The research indicated that regulations can affect the development of microfinance institutions if the regulation is strict and inflexible.

[92] *Supra* note 85, Cull *et al* (2009).

[93] *Supra* note 62, Ageba, (1997), pp. 25-45.

[94] S Pearlman (2010). *Flexibility matters: Do more rigid loan contracts reduce demand for microfinance?* CAF Working paper No. 2010/10.

[95] Ibid

when to save.[96] In Ethiopia, therefore, it may be concluded that most people's preference for traditional financial institutions for serving their financial needs is partly influenced by social values and traditional norms.

It is also important to note that the microfinance business in Ethiopia is dominated by government affiliated microfinance share companies. Dedebit Credit and Saving Institute (DECSI) in Tigray regional state, Amhara Credit and Saving Institute (ACSI) in Amhara regional state and Oromia Credit and Saving Share Company (OCSSCO) in Oromia regional state together dominate the microfinance markets in Ethiopia.[97] The fact that the dominant MFIs are affiliated with regional governments may have two important implications for the direction in which MFIs evolve in Ethiopia. First, the regional governments may somehow help to minimize the possible effects of the business model that the MFIs follow on outreach and financial depth. Regional governments may provide direct and indirect support to MFIs to enable them to serve the most excluded part of society.

This may be one reason why Kereta's research found no trade-off between suitability and outreach in Ethiopia.[98] Second, MFIs being highly related and having political support may shield them from penalties and measures imposed by the National Bank for violating regulatory requirements. This unequal treatment of government affiliated and nongovernment affiliated MFIs may distort the market, making it difficult for autonomous commercial MFIs to remain in the sector as viable businesses.

Generally, the regulatory approach to MFIs in Ethiopia is burdensome. The establishment requirements, operational laws, reporting requirements, and auditing requirements that are *mutatis mutandis* similar to the banking laws are costly that may create a stress on MFIs. Article 28 of the Micro Financing Business Proclamation No. 626/ 2009 provides that 'Banking business laws shall, mutatis mutandis, apply to micro-financing business concerning matters not covered by this Proclamation.' This provision makes it clear that MFIs in Ethiopia are in most part required to pass through the burdensome financial regulation process.

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[96] J Goedecke, I Guérin, B D'Espallier and G Venkatasubramanian (2018), Why do financial inclusion policies fail in mobilizing savings from the poor? Lessons from rural south India. *Development Policy Review,* 36, 201–219.

[97] E Deribie, G Nigussie, & F Mitiku, (2013), Filling the breach: Microfinance. *Journal of Business and Economic Management* 1(1).

[98] *Supra* note 57, Kereta, (2007).

It may be helpful to briefly provide the comparative experience of two countries –India and Indonesia– even if it cannot be considered as a comprehensive comparative analyses. In India the financial industry is divided into two. Banks and Non-Banking Financial Company (NBFC). Most MFIs in India operate as a Non-Banking Financial Company (NBFC), and they have been officially recognized as NBFC-MFIs.[99] However, it is essential to note that under Indian law, MFIs can be organized as civil societies, trusts, or other not-for-profit organizations.[100] Most of these MFIs –organized as not-for-profit organizations– are not subjected to prudential regulation and they are registered at the regional level.[101]

On the other hand, MFIs organized as business entities or as a company can provide almost all banking services and obtain financing from domestic and foreign investors. Some of them are listed public companies participating in the international stock markets. NBFC-MFIs in India are qualified as beneficial of the priority sector lending by banks. Banks in India are required by law to allocate fund for sectors identified by the government as priority areas. Providing access to finance is considered as one of the identified priority areas of interest that banks must prioritize.

Indonesia provides two options under its regulatory frameworks to MFIs. MFIs can be organized as cooperatives or as private limited companies.[102] MFIs can also apply Islamic banking principles.[103] The kind of regulation that applies to MFIs is to be determined by the size of the institution and whether the MFIs collect deposits.[104] In Indonesia, foreigners are not allowed to own shares in MFIs. The Law under section 5 also

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[99] K Gupta (2017), Funding Gap Analysis of Microfinance Institutions (MFIs) Converted into Small Finance Banks in India. *International Journal of Business Insights & Transformation*, 10(2).

[100] The Micro Finance Institutions (Development and Regulation) Act, Bill No. 62 of 2012.

[101] K Kline, & S Sadhu (2011), Microfinance in India: A new regulatory structure. *IFMR Centre for Microfinance Working Paper*.

[102] E Mulyati & N Harieti (2018), Model of business activities of microfinance institutions in Indonesia. In *IOP Conference Series: Earth and Environmental Science* (Vol. 175, No. 1, p. 012194). IOP Publishing.

[103] P Prananingtyas & H Disemadi (2020), Legal consequences of dualism regulations on micro waqf banks as sharia microfinance institutions in Indonesia. *Varia Justicia*, *16*(1), 1-14.

[104] Law Number 1 of 2013 on microfinance institutions (MFI Law). See for more explanation on the laws https://www.ojk.go.id/en/kanal/iknb/Pages/Microfinance-Institutions.aspx. Law Number 1 of 2013 on microfinance institutions (MFI Law).

provides that local governments should control 60% of the share in MFIs. This requirement aims to avoid mission drift and ensure that MFIs remain focused on their primary objective of reducing poverty.

6. Conclusion

The microfinance sector in Ethiopia has played an irreplaceable role in providing access to credit for those who have no access to banks' services. MFIs use group lending as their main lending strategy and they provide small loans in both urban and rural areas. The microfinance sector so far performs well. However, the need for financial services is so high that it is not possible to satisfy the demand for credit with the existing capacity of the microfinance institutions. The demand for consumption loans and the demand by SMEs in Ethiopia is beyond the capacity of the MFIs that operate in the country.

As a result, the informal credit markets still operate alongside microfinance institutions. Although there are few data, some researchers indicate that clients of MFIs use the informal credit markets both to meet repayment obligations to MFIs and as matching funds, because MFIs commonly only provide part of the capital required to start or expand businesses.[105] The relation between MFIs and the informal credit markets in Ethiopia therefore seems complementary rather than competitive.

A microfinance institution in Ethiopia is required by law to be organized as a business entity in the form of a share company. Thus NGOs or other institutions –except banks– are prohibited by law from providing microfinance service. The National Bank regulates and supervises microfinance institutions. There are multiple directives that are issued by the National Bank that MFIs need to follow strictly.

In Ethiopia, the microfinance sector is dominated by government affiliated MFIs that enjoy a great deal of support from local, regional, and federal governments. The National Bank may not use its full power over the government affiliated microfinance institutions. However, it can impose cumbersome administrative and legal requirements on small microfinance institutions, disadvantaging them in the market. The burden of conforming to costly legal and administrative requirements and the fact that the regulator

[105] K Segers, S Dessein, P Develtere, S Hagberg, G Haylemariam, M Haile & J Deckers (2010), The role of farmers and informal institutions in microcredit programs in Tigray, Northern Ethiopia. *Perspectives on Global Development and Technology,* 9 (3-4), 520-544.

has no branch or other offices in regional states (to avoid transport and other communication costs) may increase the administration costs of smaller microfinance institutions, thereby raising the interest rates they charge. This presents a challenge because it may force them to set aside the social objectives (that microfinance promises) and focus on financial sustainability.

MFIs may be more effective if they rely on local knowledge, concepts, and practices that are used by Eqqubs (as rotating savings and credit associations) and Iddirs to provide vital financial services to the community. The legal and administrative requirements that the National Bank imposes on MFIs need to be lightened. With the current regulatory requirements in place, in the near future, MFIs in Ethiopia will be smaller banks serving only those who have a certain amount of wealth, rather than serving the poorest. The government affiliated They may also incline to operate just like commercial banks focusing more on financial interests by compromising the social objectives for which they were initially established. ■

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The Synergies and Tension between International Trade Law and Environmental Law in Ethiopia

Tesfaye Abate Abebe ♣

Abstract

The relationship between international trade law and environmental law is susceptible to divergent views. Trade liberalization and global competition among producers may result in efficient use of natural resources, or it may on the contrary impede regulatory interventions by the government to protect the environment that may lead to wider circulation of polluting substances. This article examines the linkages (synergies) and tension between international trade law and environmental law in Ethiopia. Relevant international, regional as well as domestic legal instruments have been investigated. Relevant literature has also been analysed. The research identifies that both the linkages (synergies) and contradictions have been incorporated in the international and domestic laws of Ethiopia. Thus, Ethiopia needs to work more on the balance between the promotion of trade and environmental protection in the context of sustainable development.

Key terms:

International trade law · Environment · Free trade · Environmental protection law · Ethiopia

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Frequently used acronyms:

MEAs	Multilateral environmental agreements
WTO	World Trade Organization

Contents

1. Introduction

Trade is an economic activity that is, *inter alia*, based on natural resources, which are part of the environment.[1] The impact of trade liberalization on environmental protection is ambiguous[2] because it may lead to a pollution of the environment, or (in the context of sound social and environmental compliance standards) may result in efficient use of natural resources. Trade liberalisation may also lead to a wider circulation of environment-friendly goods and technologies.[3] Trade may contribute positively for the environmental protection by providing opportunity for the global spread of environmental services and technologies to address particular environmental problems. In addition, where trade is promoted, it may bring about economic efficiency and growth, which in turn may raise income and provide more

[1] Mitsuo Matsushita *et al*, (2015), *The World Trade Organization Law, Practice, and Policy* (3rd Edition, The Oxford International Law Library: Oxford), at 719.

[2] Julia Grubler, Roman Stollinger and Gabriele Tondl, (2021), *Wanted! Free Trade Agreements in the Service of Environmental and Climate Protection* (Research Report 451, The Vienna Institute for International Economic Studies), at 9.

[3] Pierre-Marie Dupuy and Joerge E. Vinuales (2018), *International Environmental Law* (Second Edition, Cambridge University Press), at 472.

money for environmental protection.[4] Trade may improve resource allocation, increase more environment-friendly products, and defuse higher environmental standards as well as green technologies especially to developing countries.[5]

Environmental protection and trade are two separate activities governed by separate laws. Various multilateral environmental agreements (MEAs), regional, national and sub-national regulations constitute environmental law that regulate the environment.[6] On the other hand, international trade law embraces multilateral agreements under the World Trade Organization (WTO), and the regional as well as bilateral trade agreements.[7]

The legal literature as well as data indicate tension and harmony between these two areas of laws. This article investigates the issue of the linkages and tensions between international trade law and environmental law in Ethiopia. The next section deals with the tension between environmental law and trade law. Section 3 discusses the linkage and synergy between trade law and environmental law of Ethiopia taking into account the international treaties. The practice of environmental protection in Ethiopia from trade point of view is examined in the fourth section, followed by concluding remarks.

2. The Tension between Trade Law and Environmental Laws

Conflicts may be normative and/or they may be attributable to legitimacy. The tension between multilateral environmental treaties and trade regulations are discussed respectively under this section.

2.1 Arguments regarding the tension between trade law and environmental law

Some argue that liberalization of trade, meaning, the removal of trade barriers on exchange of goods and services between nations, negatively affects the environment. According to this argument, developing countries may adopt less stringent environmental standards to attract trade to their

[4] Matsushita *et al*, supra note 1, at 722. Trade law has both negative and positive impacts on environment. Diana Tussie, "The Environment and International Trade negotiations: Open Loops in the Developing World" in Diana Tussie (Editor), (2000), *The Environment and International Trade Negotiations Developing Country Stakes*, (National Political Economy Series, Great Britain), 225-236, at 225.

[5] Grubler, Stollinger and Tondl, *supra* note 2, at 9.

[6] In Ethiopia, the FDRE Constitution, international agreements to which Ethiopia is a party, relevant proclamations, regulations, directives regulate the environment.

[7] International Institute for Sustainable Development (2014), *Trade and Green Economy* A Handbook (3rd Edition, Geneva), at 3.

jurisdictions from more stringent environmental standards.[8] Researches show that free trade negatively affects the environment.[9]

There is a theory which promotes the idea that environmental regulation would affect trade by shifting production from more regulated countries to less regulated ones. It is argued that countries, endowed with capital that is the main factor to produce pollution intensive industries, while the Global South has loose environmental regulations and low labour compliance standards. The pollution haven hypothesis explains that the stringency of environmental regulation in the industrialized countries results in the transfer of polluting industries to the South.[10]

On the contrary, it is argued that trade places constraints on legitimate environmental restrictions or contributes to the wider circulation of polluting substances.[11] Trade may have a negative impact where hazardous waste or harmful chemicals are involved or where sale relates to products from endangered species.[12] Trade in products derived from endangered species causes direct harm on the environment.

Production of any goods requires natural resources such as metals, minerals, soil, forests, and fisheries as inputs. The energy to process the production is also based on natural resources. The production activity may also have a by-product or involve waste disposal that would pollute the environment.[13] Trade activities including transportation produce carbon dioxide (CO_2).[14] Thus, trade may have a negative impact on the environment.

On the other hand, the quality, safety and availability of natural resources affect trade.[15] Environmentalists assert that free trade is one of the main causes of the global environmental crisis, and environmental law should limit free trade where it harms environmental quality.[16] It is argued (and

[8] Richard K. Lattanzio and Christopher A. Casey, (2022), *Environmental Provisions in Free Trade Agreements (FTAs),* Congressional Research Service, at 1.

[9] Mounir Belloumi and Atef Alshehry (2020), "The Impact of International Trade on Sustainable Development in Saudi Arabia", *Sustainability*, at 5.

[10] Zhe Dai, Yunzhi Zhang and Rui Zhang, "The Impact of Environmental Regulations on Trade Flows: A Focus on Environmental goods Listed in APEC and OECD" *Front.Psychol.* 12, dol:10.3389/fpsyg.2021.773749; at 2.

[11] Dupuy and Vinuales, *supra* note 3, at 472.

[12] Matsushita, and Et al, *supra* note 1, at 722.

[13] Id, at 719.

[14] Grubler, Stollinger and Tondl, *supra* note 2, at 451.

[15] International Institute for Sustainable Development, *supra* note 7, at 3.

[16] Robert Falkner and Nico Jaspers, (2012), "Environmental Protection, International Trade and the WTO: in Ken Heydon and Steven Woolcock (Eds.), *The Ashgate*

revealed based on data) that free trade has deleterious effects on the environment through the release of emissions that pollute the environment and causes depletion of natural resources.[17]

Critics argue that trade may cause environmental harm by promoting economic growth that results in the unsustainable consumption of natural resources and waste production where there is no (or weak) environmental safeguard. Unless appropriate environmental protection mechanisms are built into the structure of the trade system, trade rules and trade liberalization often override environmental regulations. Thus critics suggest trade restrictions.

It is contended that countries having lax environmental standards have a comparative advantage in global market over countries having rigorous environmental standards.[18] This indicates that trade may have a negative impact on the environment by attracting non-environmental friendly investment. On the other hand, Matushita *et al* argued that the empirical evidence proves that it is only few companies which actually moved to countries with lower environmental standards to take advantage of lower costs of production.[19]

Recent researches also confirm that strict environmental law limits trade. However, it is found that strict environmental regulation impede environmental goods. On the other hand, researches revealed that strict environmental regulation reduces trade volume, but promote environmental friendly goods.[20] There is a friction between international environmental law and international trade law[21] because as economic globalization proceeds,

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Research Companion on International Trade Policy (Ashgate, Chapter 13), at 2. Some environmentalists oppose trade for it harms the environment. Matsushita *et al*, supra note 1 at 719. For the debate *see* Domminic Gentile, "International Trade and the Environment: What is the Role of the WTO? *Fordham Environmental law Review*, Vol. 19 No. 1, 2009, at 196-99.

[17] J. Bernard and S. K. Mandal (2016), "The Impact of trade openness on environmental quality: an empirical analysis of emerging and developing economies" *WIT Transactions on Ecology and The Environment*, Vo. 203, , at 197. For detailed treatment of the issue, *see* Jeffrey Frankel *et al*, (2009), Environmental Effects of International Trade, Expert Report No. 31. To Sweden's Globalization Council, Stockholm.

[18] Matsushita and *et al*, *supra* note 1, at 719.

[19] Ibid.

[20] Dai, Zhang and Zhang, *supra* note 10, at 9.

[21] Edith Brown Weiss and John H. Jackson, (2008), "The Framework for Environment and Trade Disputes" in Edith Brown Weiss, John H. Jackson, and Nathalie

the global nature of many environmental problems becomes more evident.[22] In some cases, environmental regulations limit trade and this creates conflicts between the two regimes.[23] For instance, the regimes that protect the environment would result in lower consumption.[24]

Environmental law and trade law seem to work in opposite ways. Environmental regulation is a public/governmental intervention in various avenues including the private market place so as to correct perceived market failures to ensure environmental protection.[25] For instance, environmental law imposes standards on automobile emission, content and disposal of packaging, standards on chemical handling, processing and labelling food, and standards to protect natural resources and wildlife which affects trade.[26]

International trade law, on the other hand, "limits the government intervention and allow the unimpeded flow of goods and services".[27] According to environmentalists, environmental law limits trade rules so as to protect the environment. Trade experts, on the contrary, start from the premise that States should not intervene in trade promotion.[28] Environmental law could increase cost in production by requiring using more environmental friendly technologies.[29] In Ethiopia, the trade regime contains crucial provisions that support economic development. International treaties to which Ethiopia is a party, regional trade instruments, bilateral trade agreements also regulate international trade in Ethiopia.[30]

Bernasconi-Osterwalder, (editors,) *Reconciling Environment and Trade*, (2nd Edition), 1-38, at 2.

[22] Ibid; Daniel Bodansky and Jessica C. Lawrence, "Trade and Environment", in Daniel Bethlehem Etal (editors) *The Oxford Handbook of International Trade Law*, available at: www.oxfordhandbooks.com; accessed on: 23 June 2020, at 512.

[23] Bodansky and Lawrence, id, at 508.

[24] Richard Baron and Justine Garret, *Trade and Environment Interactions: Governance issues*, (Background paper for the 35th Round Table on Sustainable Development 28-29 June 2017), at 8.

[25] Bodansky and Lawrence, *supra* note 22, at 512.

[26] David Voget, (2000), "The Environment and International trade" *Journal of Policy History*, at 1.

[27] Bodansky and Lawrence, *supra* note 22, at 512.

[28] Ibid.

[29] Baron and Garret, *supra* note 24, at 8.

[30] Much of the supporting legal institutions to promote trade remain underdeveloped. Nita K. Solanki and Jignesh N.Vidani, (2016), "The Study Legal Aspects of Trade in Ethiopia", *ZENITH International Journal of Multidisciplinary Research*, Vol. 6(1), pp. 266-284, at 271. Despite the reforms made in the 1990s, and 2000s, more reforms

Ethiopia is a beneficiary of UNCTAD's General Systems of Preferences (GSP) which is trade program. Ethiopian Exporters to Australia, Belarus, Bulgaria, Canada, Estonia, the European Union, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey and United States of America are given GSP.[31] Under GSP rules, *Everything but Arms* (EBA) guaranty duty free access to all products originated from Ethiopia, except arms and ammunitions.[32] However, unless due attention is given to environmental compliance standards in the process of production, mere focus on Ethiopia's trade promotion could use the natural resource unsustainably; and waste disposal can adversely affect the environment and local livelihoods. Thus, this could promote trade and 'economic growth' at the expense of sustainable development including the environment.

Ethiopia was also a beneficiary from the US African Growth and Opportunity Act (AGOA) [33] that is an extended duty free market access by United States of America (USA) to Sub Saharan African Countries.[34] The Act encourages increased trade and investment in both United States of America and sub-Saharan Africa.[35] The Act reduces tariff and non-tariff barriers as well as other trade obstacles.[36] In general, the Act promotes free trade economy.[37] Yet, according to environmentalists, free trade promotes trade that would adversely affect the quality of environment unless corresponding caution is made in relation to compliance standards.

Furthermore, India has provided the Duty Free Tariff Preference (DFTP) Scheme for least developed countries (LDCs) since 2008; and according to the 2012 Scheme, 85% of India's total tariff lines were made duty free. Ethiopia is one of the LDCs which are the beneficiaries of the Tariff Scheme.[38]

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are needed to ensure the trade laws are consistent to the international standards of "good governance". Solanki and Vidani, ibid.

[31] Addis Ababa Chamber of Commerce and Sectorial Associations, (2016), *How to Start Export in Ethiopia* at 22.

[32] Ibid.

[33] *African Growth and Opportunity Act* (AGOA), (One Hundred Sixth Congress of the United States of America, Washington, the twenty-fourth day of January, two thousand), Sec. 107.

[34] *See* Addis Ababa Chamber of Commerce and Sectorial Associations, *supra* note 31, at 23.

[35] *Id*, Sec. 103(1).

[36] *Id*, Sec. 103(2).

[37] *Id*, Sec. 104 (2)(1)(A).

[38] United Nations Conference on Trade and Development (UNCTAD), (2017), *Handbook on Duty-Free and Quota-Free market Access and Rules of Origin for*

China has granted DFQF market access to LDCs on 97% of its tariff lines. Ethiopia is one of the beneficiaries of China's preferential rules of origin for Least Developed Countries.[39] Furthermore, the Republic of Korea Government has enacted a law that lifts tariffs on items that originate from the LDCs. The Republic of Korea granted preferential duty-free access to products for LDCs, including Ethiopia.[40]

African Countries have established an "African Economic Community" among themselves.[41] One of the principles of the African Economic Community is the "promotion of harmonious development of economic activities among member States".[42] This principle promotes economic development. However, it does not incorporate the principle of sustainable economic development. Therefore, the Treaty does not promote, as a principle, the principle of sustainable development.

One of the objectives of the Community is to promote development and economic integration of the Continent.[43] It is aimed at liberalizing trade through the abolition of custom duties, and non-Tariff barriers.[44] Ethiopia, as Member State to the Community, is obliged to abolish non-tariff barriers. Such restrictions should have allowed rooms regarding compliance standards that protect the environment and ensure that environmental polluting goods and services could not be allowed to enter into Ethiopia.

African Countries have established the African Continental Free Trade Area (ACFTA)[45] with the objective to, *inter alia*, deepen economic integration,[46] liberalize market,[47] and promote investments.[48] This again may contradict with the protection of environment if it solely pursues free trade.

A common market to East and South African countries (COMESA) is established to promote trade in the sub region. Ethiopia, as member to

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Least Developed Countries Part II: Other Developed Countries and Developed Countries (UNCTAD/ALDC/2017/4), at 57.

[39] Id, at 51.

[40] Id, at 62.

[41] Treaty Establishing the African Economic Community, (June 3rd 1991, Abuja, Nigeria), Art. 2.

[42] Id, Art. 3 (d).

[43] Id, Art. 4(1)(c).

[44] Id, Art. 4(2)(d).

[45] Agreement establishing the African Continental Free Trade Area (Kigali, 2018), Art. 2.

[46] Id, Art. (a).

[47] Id, Art. 2(b).

[48] Id, Art. 2(c).

COMESA, must comply with the rules and principles stipulated under COMESA Treaty. The aims and objectives of the Common Market are meant to promoting trade and to foster economic development. For instance, it is aims at cooperating in the "…creation of an environment for foreign cross border and domestic investment including the joint promotion of research and adaptation of science and technology for development".[49] This provision could have taken into account the protection of the environment in the course of trade promotion.

In general, Ethiopian trade law is intended to promoting economic development and to improve foreign exchange earnings.[50] Ethiopia is on the verge of accession to WTO. It is argued that Ethiopia will be obligated to perform the WTO Agreements and this would have a negative impact upon the environment[51] unless Ethiopia takes legal measures to protect the environment commensurate with the level of production and waste disposal that can unfold in the course of trade promotion which increases emissions that pollute the environment and cause depletion of resources.

2.2 Normative conflicts *vs*. legitimacy conflicts and the practice

There are normative and legitimacy conflicts between the environment and trade law.[52] Normative conflicts are conflicts involving two or more norms of international law[53] or it may also occur in domestic laws. A normative conflict in international law (which is the thematic focus of this article) is a contradiction of obligation arising from international trade law and international environmental law.[54] Thus, a conflict between obligation

[49] Id, Art. 3(c).

[50] Trade Duty Incentive Schemes Proclamation No. 768/2012, 1st paragraph of the preamble.

[51] Sirak Akalu, (2012), "The legal Framework on international Trade Institutions and their Impact on Environment in Ethiopia" (Proceeding, Faculty of Law SMUC), at 215.

[52] Dupuy and Vinuales, *supra* note 3, at 478-79. For the treatment of trade environment debate, *see* Simeneh Kiros Assefa, (2008), "The Trade and Environmental Debate: The Normative and Institutional Incongruity", *Mizan Law Review*, Vol. 2, No. 2, 311-338.

[53] Ibid. For detailed treatment of the definition of conflicts of norms, see Erich Vranes, (2009), *Trade and the Environment* Fundamental issues In International Law and WTO Law (Oxford University Press), at 10-38.

[54] *See* Tesfaye Abate Abebe, (2018), *Laws of Investment and environmental protection: The case of Ethiopian large-scale agriculture,* (A Thesis submitted in accordance with the requirements for the degree of Doctor of laws at the University of South Africa), at 57. For the detailed treatment of conflict of norms see Joost Pauwelyn,

arising from international trade law and an obligation from international environmental law is a normative conflict. Such conflict of norms also constitutes a conflict within Ethiopia's legal system because international instruments ratified by Ethiopia constitute an integral part its law in accordance with Article 9(4) of the FDRE Constitution.

There is a potential conflict between environmental law and international law. A number of MEAs provide for trade restrictions and this has the potential clash with WTO standards. For instance, the Basel Convention, the CITES Agreement (i.e., the Convention on International Trade in Endangered Species), the Biosafety Protocol, Rotterdam Convention and Stockholm Convention may potentially conflict with WTO law.[55] In such a case, conflict may arise where a country (Ethiopia) does not meet its commitments in the context of an MEA.[56]

Legitimacy conflicts involve an international obligation and a domestic measure.[57] Legitimacy conflict is one arising between international trade law and a domestic measure based on environmental consideration.[58] It can involve contradiction between domestic environmental measures and an international trade law norm.[59] For example, the competing interest between environmental and trade law can be seen from the General Agreement on Tariffs and Trade (GATT) Article XX exceptions and an implicit balancing test between the sovereign right of governments to avoid protectionist policies hindering trade.[60]

Over time, trade panels have paid increasing attention to environmental protection. There is a move from a "traditional" approach sometimes called "inward looking" which saw environmental measures as protectionist and

(2003), *Conflict of Norms in Public International Law* How WTO Law Relates to Other Rules of International Law (Cambridge University Press).

[55] Tilman Santaruis *et al*, (2004), *Balancing Trade and Environment An Ecological Reform of the WTO as a Challenge in Sustainable Global governance What kind of globalization is sustainable?* (Wuppertal Papers, No. 133e-), at 23.

[56] Id, at 24.

[57] Dupuy and Vinuales, *supra* note 3, at 478-79.

[58] See Jeorge E. Vinuales and Manus Jesko Langer, Managing conflicts between environmental and investment norms in international Law, Electronic copy available at: http://ssrn.com/abstract=1683465 visited on: 4 June 2020, *See* also Abebe , *supra* note 54, at 56-7.

[59] Abebe, *supra* note 54, at 57.

[60] Mark Wu and James Salzman, (2014), "The Next Generation of Trade and Environment Conflict: The Rise of Green Industry Policy" *North-western University Law Review*, Vol. 108, 401-474, at 405.

subordinated to trade disciplines, to an "upgraded" one sometimes called "outward looking", a sort of view by which environmental considerations and international environmental law are taken into account to interpret trade law.[61] Many States are pursuing "green industrial policies" namely policies that aspire to develop strong competitive industries in environment-related sectors, for instance, renewable energies. In such a case, they may be hindered by international trade and investment disciplines unless trade law evolves[62] towards the outward looking conception that is based on the *complementarity* of trade and the environment rather than the inward looking *trade-off* between the two pursuits.

In Ethiopia, the objective of trade law, *inter alia*, is "… to accelerate economic development".[63] To this end, exporters are given duty free incentives[64] which would promote trade. The Export Duty Incentive Schemes Proclamation has the rationale "…to ensure economic development by accelerating industrial growth of the country and to improve the foreign exchange needed for development and investment."[65] On the other hand, Ethiopia's environmental law requires any person not to pollute the environment.[66] There is thus the need to balance the objectives of both categories on laws, i.e. trade laws and environmental laws. In the absence of such harmony mere focus on the 'acceleration of economic development' contradicts with the right to sustainable development enshrined under the FDRE Constitution, since accelerating economic development may be made at the expense of the environment.

Examining the new Commercial Code reveals similar gaps. Its preface expresses its aim to "… strike the balance between the interests of investors, traders and other stakeholders that are directly affected" and it states that "… it has been necessary in order to bolster commerce and improve the standard of living of citizens; …".[67] It also aspires to enhance Ethiopia's global competitiveness in trade.[68] Although the new Commercial Code expresses the need for striking a balance between the interests of traders, investors and the like who do have similar interest of development, the interest of environmental protection is not clearly expressed. Nor does it express the

[61] Dupuy and Vinuales, *supra* note 3, at 479
[62] Id, at 479-80.
[63] Trade Competition and Consumers Protection Proclamation No. 813/2013, Art. 3(3).
[64] Export Trade Duty Incentive Schemes Proclamation No. 768/2012, Art. 3.
[65] Id, Preamble, 1st paragraph.
[66] Environmental Pollution Control Proclamation No. 300/2002, Art. 3(1).
[67] Commercial Code of Ethiopia Proclamation No. 1243/2021, Preface, 3rd paragraph.
[68] Ibid.

need for the promotion of social rights and cultural rights of citizens (which are among the pillars of sustainable development). Such gaps are, *inter alia*, inconsistent with the multinational environmental agreements (MEAs) highlighted below that are ratified by Ethiopia.

2.3 Multilateral Environmental Treaties and Trade Regulation

The normative conflicts between trade and environmental treaties have been mostly analysed in connection with "trade-related environmental measures" (TREMs). Several environmental treaties impose trade restrictions or even ban trade in certain substances.[69] These treaties may be categorized into two as discussed below.

2.3.1 Imposition of trade control systems against environmental hazards

This article uses the word '*trade control*' rather 'trade restriction' in the context of the treaties that are discussed below because they do not restrict legitimate trade. Treaties that impose trade control systems embody the principle of prior informed consent (PIC) such as the Basel Convention, the PIC Convention or the Cartagena Protocol on Biosafety.[70] Control systems on trade are at the heart of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. The main objective of the Convention is to "ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with the protection of human health and the environment whatever the place of disposal."[71]

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[69] Dupuy and Vinuales, *supra* note 3, at 480. Ethiopia is a party to the following international treaties: International Plant Protection Convention IPPC 1979; Convention on International Trade in Endangered Species of Wild Fauna and flora-CITES; The Vienna Convention, especially its Montreal Protocol on Substance that Deplete the Ozone Layer; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; Convention on Biological Diversity; Cartagena Protocol on Bio-safety; United Nations Framework Convention on Climate Change; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; Stockholm Convention on Persistent Organic Pollutants. See, Ministry of Trade and Industry, *Memorandum of the Foreign Trade Regime,* at 65.

[70] Dupuy and Vinuales, Ibid.

[71] Basel Convention, preamble. Ethiopia has ratified Basel Convention. See Basel Convention on the Control of the Transboundary Movements of hazardous Wastes and Their Disposal Ratification Proclamation No. 192/2000.

Trade in hazardous waste is subjected to a comprehensive control system, which is based on the principle of prior informed consent.[72] Where a country has gained the prior written consent from the importing country and all transit countries, a country can export these materials to such other country.[73] In principle, trade in these materials with non-parties is prohibited.[74] However, it is possible to trade with non-party countries where there is an agreement with them. The agreement should "not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention".[75] As provided under Article 4(1), a party has the right to ban the entry or disposal of foreign hazardous waste in its territory.

The Convention does not incorporate any substantive provisions for financial assistance to developing countries to assist them in implementing their obligations. This is accepted as one of the reasons for poor implementation of the Convention.[76]

The Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) was adopted in 1998.[77] It has the objective "to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use".[78]

Chemicals which are subject to the prior informed Consent (PIC) procedure are specified under Annex III of the Convention. This makes clear that a country can only export these chemicals after having consent from the importing country.[79] The exporting country has also the responsibility to provide for "labelling requirements that ensure adequate availability of

[72] Eric Neumayer, (2000), "Trade Measures in Multilateral Environmental Agreements and WTO Rules: Potential or Conflict, Scope for Reconciliation" Published in: Aussenwirtschaft, 55 (3), pp. 1-24, available at: http://ssrn.com/abstract=248528, visited on: 6 June, 2020, at 7.
[73] Basel Convention, *supra* note 71, Art. 6.
[74] Id, Art. 4 (5).
[75] Id, Art 11(1)
[76] Neumayer, *supra* note 72, at 8.
[77] Id, at 9.
[78] The Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention), Art.1.
[79] Neumayer, *supra* note 72, at 9.

information with regard to risks and/or hazards to human health or the environment, taking into account relevant international standards".[80]

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, regarding the objective provides:

> In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.[81]

The protocol has the objective to protect human health and conserve the environment. It, thus, prohibits the movement of living modified organisms. Article 7(1) of the protocol stipulates that:

> Subject to Articles 5 and 6, the advance informed agreement procedure in Articles 8 to 10 and 12 shall apply prior to the first intentional transboundary movement of living modified organisms for intentional introduction into the environment of the Party of import.[82]

The basic purpose of the protocol, here again, is to restrict trade in living modified organisms. In addition, there are treaties which seek to protect endangered species (mostly located in developing countries) through the control of demand (from developed countries). The Convention on International Trade in Endangered Species (CITES) is an excellent example.[83]

CITES restricts international trade in endangered species.[84] Appendix I specifies around 600 animals and 300 plant species that are threatened with extinction and whose trade for commercial purpose is generally prohibited

[80] Rotterdam Convention, *supra* note 78, Art 13(2).

[81] The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, (2000) Montreal, Article 1.

[82] Id, Art. 7(1). Ethiopia has ratified the Cartagena Protocol. *See* Cartagena Protocol on Biodiversity Ratification Proclamation No. 362/2003.

[83] Dupuy and Vinuales, *supra* note 3, at 480.

[84] Neumayer, *supra* note 72, at 5

with few exceptions.[85] Furthermore, Appendix II provides 4000 animals and 25,000 plants species that might become threatened with extinction where their trade is not regulated. It is possible to import them if the exporter gets permit from the exporting state, testifying that the export will not be detrimental to the survival of that species. The export should be made in a manner where risk of injury, damage to health or cruel treatment is minimized.[86] As one can discern from the discussion, the Convention controls trade with a view to harmonizing it with health and environment compliance standards.

2.3.2 Trade bans as implementation tool for environmental protection

The second category on environmental treaties includes treaties such as the Montreal Protocol[87] or the Persistent Organic Pollutants (POP) Convention.[88] The Vienna Convention for the Protection of the Ozone Layer[89] and its Montreal Protocol aim to phase out ozone depleting substances (ODS). These substances are responsible for the thinning of the ozone layer in the stratosphere, which filters out ultraviolet radiation. Chlorofluorocarbons (CFC) and Halons are the major ODS regulated by the Protocol.[90]

The Protocol bans imports[91] and exports[92] of controlled substances between parties as well as non-parties of the Protocol. It is possible to trade with those substances with non-parties where the latter comply with its obligations.[93] It also bans the import of products containing controlled substances from non-parties.[94]

Coming to the Persistent Organic Pollutants (POP) Convention, its objective is to eliminate ten POPs- aldrin, cholordane, DDT, dieldrin, endrin, heptachlor, hexacholorobenzene, mirex, polychlorinated biphenyls (PCBs), and toxaphene. In an exception, DDT could be used against malaria and for

[85] The Convention on International Trade in Endangered Species of World Fauna and Flora (CITES), Art. III.
[86] Id, Art. IV.
[87] The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, *supra* note 81, Art. 4 and 4A.
[88] Stockholm Convention on Persistent Organic Pollutants (POPs), as amended in 2009, Arts. 3(1)(a)(ii) and 3(2).
[89] The Vienna Convention for the Protection of the ozone layer, Vienna, 22 March 1985, entered into force: September 1988, preamble, 6th Paragraph.
[90] Neumayer, *supra* note 72, at 4
[91] Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, Art. 4(1).
[92] *Id*, Art. 4(2).
[93] *Id*, Art. 4(8).
[94] *Id*, Art. 4(3).

existing uses of (polychlorinated biphenyls) PCBs is possible. POPs are considered as special danger to human health and the environment as they persist and can accumulate in the environment and therefore passed on from one generation to the next.[95] According to these treaties, trade measures (typically a ban of transfers to non-parties) are useful to avoid shifting the production and/or the consumption of regulated substances to States that are not parties to the treaty.[96] It is to be noted that such trade bans are also found in treaties of the first category, for instance, the Basel Convention which bans trade with non-parties unless they have a similarly protective system regulating hazardous waste.[97]

TREMs ("trade-related environmental measures") are not the only measures required or authorized by environmental treaties that may conflict with trade pursuits. A treaty that does not explicitly require the adoption of TREM, for instance, the UNFCCC, may be interpreted as authorizing the adoption of TREMs or other (non-TREM) trade relevant measures. Ethiopia is a party to the above international instruments which control trade in such a manner that the environmental objectives enshrined under Article 92 of the FDRE Constitution are respected in the pursuance of trade enhancement and economic growth.

3. Arguments in Support of Free Trade as a Positive Factor for the Environment

Free trade supporters argue that liberalizing trade has mostly a positive effect on the environment. They contend that, some environmental measures pose a protectionist threat to the free trade order.[98] They consider trade law and environmental protection law as mutually supportive. According to this perspective, trade will affect the environment at its initial development, and can provide resources to mitigate environmental pollution as trade develops. They believe that trade liberalization can support environmental goals through the elimination of tariffs on environmental goods, and can, *inter alia*, reduce trade distorting subsidies.[99]

It is argued that free trade attracts more advanced technology and this in turn helps to promote sustainable development.[100] According to the

[95] Neumayer, *supra* note 72, at 10-11.
[96] Dupuy and Vinuales, *supra* note 3, at 481.
[97] Basel Convention, *supra* note 71, Arts 4(5) and 11(1).
[98] Falkner and Jaspers, *supra* note 16, at 1-2.
[99] Lattanzio and Casey, *supra* note 8, at 1.
[100] Dai, Zhang and Zhang, *supra* note 10, at 3.

arguments in favour of free trade, there are three features in the link or the synergy between environment and trade. *First*, promoting the efficiency in trade would promote the protection of environment. If international trade promotes efficiency it allows enhanced production from lesser inputs and minimizes our impact on the natural environment.[101] Using renewable energy, for example, could promote trade without polluting the environment.[102] It is argued that international trade promotes efficiency and this promotes sustainable development as a result of efficiency and reduces our use of resources.[103] Trade can help to end poverty, which is the one of the core Sustainable Development Goals (SDDs), to promote sustainable economic growth[104] and promote sustainable industry.[105]

Second, empirical evidence shows that the increase of wealth by trade promotes environmental protection. This is explained by the Kuznet curve which shows that where members of the society intensify their economic demands, they demand for more healthy and sustainable environment.[106] Thus, they demand their government to regulate the environmental protection by using law.[107] *Third*, there is a positive relationship between trade and sustainable development. As trade liberalizes, economic development increases which is one of the pillars of sustainable development.[108]

3.1 Mutual supportiveness

There is mutual supportiveness between environmental and trade regimes. The Rio Declaration states:

> States should cooperate to promote a supportive and open international economic system that would lead to economic

[101] Chandaengerwa Yeukai, (May 2005), *Trade Promotion vs The Environment: Inevitable Conflict?* (A mini thesis submitted in partial fulfilment of the requirements for the degree of Masters in Law, International Trade and Investment Law in Africa, Faculty of Law, University of the Western Cape), at 8.

[102] See OECD, (June 2021), *OECD Work on Trade and the Environment:* A retrospective, 20008-2020, at 56.

[103] Yeukai, *supra* note 101.

[104] United Nations, Transforming our World: The 2030 Agenda for Sustainable Development, A/RES/70/1, 8th goal;

[105] Sustainable industry is the ninth Sustainable Development Goal. Ibid.

[106] Yeukai, *supra* note 101, at 9. Kuznet curve is challenged in practice.

[107] *See* Id, at 10.

[108] Ibid. Economic pillar, social pillar, cultural pillar and environmental pillar are the four pillars of sustainable development. For the discussion of the four pillars of sustainable development, see Abebe, *supra* note 54, at 72-75.

> system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade …[109]

The Declaration promotes *mutual supportiveness* between trade and environmental protection. In addition, Agenda 21 stresses that "the international economy should provide a supportive international climate for achieving environment and development goals by … making trade and environment mutually supportive".[110] States are called upon to "promote and support policies, domestic and international, that make economic growth and environmental protection mutually supportive".[111]

Then, the WTO Committee on Trade and Environment (CTE) was instructed to pursue its activities "with the aim of making international trade and environment policies mutually supportive".[112] The Committee reported that the environmental protection and the WTO system are both "two areas of policy-making that are both important and … should be mutually supportive in order to promote sustainable development"[113] It is emphasised that in both environmental treaties and international trade treaties, the parties are representatives of the international community, and they should pursue both the protection of the environment as well as the promotion of trade.[114] This requires making both laws mutually supportive.

In 1996, the WTO Committee on Trade and Environment (CTE) Report turned this principle to a legal standard internal to the WTO. The Doha Ministerial Conference gives emphasis to the Mutual Supportiveness principle. The Doha Ministerial Declaration indicated the WTO members' conviction "that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of

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[109] Rio Declaration on Environment and Development, 12 August 1992, Principle 12.
[110] Agenda 21, (Rio de Janerio, 1992), para. 2.3(b), emphasis added.
[111] Id, para. 2.9(d). See also paras. 2.19-2.22. The emphasis is mine.
[112] Acceptance of and Accession to the Agreement Establishing the World Trade Organization, Decision of 14 April 1994, MTN/TNC/45(MIN). Emphasis supplied.
[113] Riccardo Pavoni, (2010), "Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO- and-Competing-Regimes' Debate?" *The European Journal of International* Law Vol. 21 N0. 3, 649-679 (EJIL), at 652.
[114] Id.

the environment and the promotion of sustainable development can and must be mutually supportive".[115]

Likewise, in relation to trade and health, it is stated that the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) should be interpreted in a supportive context relating to WTO Members' right to protect public health and in particular to promote access to medicines for all.[116] In this regard, the (2004) trade agreement between Ethiopia and Libya provides that the parties to the Agreement can restrict trade to protect the public health.[117] This illustrates the potential for trade law, health and the environment to be *mutually supportive*.

3.2 Integration (synergy) of ecological principles with trade

It is argued that ecological aspects must be firmly integrated into all international negotiations. It is necessary to integrate environmental aspects into WTO agreements to ameliorate the negative effects of international trade.[118] Law is an important tool to integrate environmental protection into trade law.[119] The protection of environment requires supportive trade laws that would promote using technologies to reduce or control pollution.[120]

In this regard, a number of international instruments articulate the connection between environmental treaties and trade disciplines from a synergetic point of view.[121] For instance, the preamble of the 1998 PIC Convention[122] reads:

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[115] World Trade Organization, Ministerial Declaration, WT/MIN(01)/DEC/W/1 (14 Nov. 2001), at Para. 6. Emphasis added.

[116] Pavoni, *supra* note 113, at 652.

[117] *Trade Agreement between The Government of The Federal Democratic Republic of Ethiopia and The Great Socialist People's Libyan Arab Jamahiriya*, (2004), Art. 9 (a).

[118] Engobo Emeneh, (2006), *"The Limits of Law in promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria", Journal of Energy and Natural Resources Law*, 24 574-606, at 578.

[119] Id, at 576-77.

[120] OECD, *supra* note 102, at 12.

[121] Dupuy and Vinuales, *supra* note 3, at 475.

[122] The 1998 Rotterdam Convention on the Prior Informed Consent Procedures for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention), Revised in 2011, preamble, paras. 8-10. The 2000 Biodiversity Protocol embodies a relatively similar content. (The 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Preamble, Paras, 9-11.)

> *Recognizing* that trade and environmental policies should be mutually supportive with a view to achieving sustainable development,
>
> *Emphasizing* that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection,
>
> *Understanding* that the above recital is not intended to create a hierarchy between this Convention and other international agreements.

This Convention shows the mutual supportiveness between international trade and environmental laws. In short, the 1998 PIC Convention and the 2000 Biodiversity Protocol provide for the synergy between environmental and trade regimes through the principle of mutual supportiveness. In this respect, it is essential to consider the 2005 UNESCO Convention on Cultural Diversity[123] and the 2010 Nagoya Protocol. The protocol makes clear that the principle of mutual supportiveness be applied so as to implement the Protocol in relation to other international agreements and instruments. [124]

Mutual supportiveness between environmental protection and promotion of trade is also given attention in Africa. African countries negotiate regional trade agreements in the context of their other international commitments.[125] Africa's aspiration stated in Agenda 2063 includes "a prosperous Africa based on inclusive growth and sustainable development", [126] among others. Agenda 2063 was used as a basis for African countries to contribute to the 2030 sustainable development goals (SDGs). Both Agenda 2063 and the

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[123] Art. 20 titled "Relationship to other treaties: mutual supportiveness, complementarity and non-subordination" requires parties to "foster mutual supportiveness between [the] Convention and the other treaties to which they are parties" … and to "take into account the relevant provisions of [the] Convention "when interpreting and applying the other treaties to which they are parties or when entering into other international obligations".

[124] Art. 4(3) of the 2010 Nagoya Protocol reads:
"This Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to this Protocol. Due regard should be paid to useful and relevant on-going work or practices under such international instruments and relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.",.

[125] United Nations Economic Commission for Africa, *(*July 2017) *The Continental Free Trade Area (CFTA) in Africa - A human Rights Perspectives* (Report), at 27.

[126] Agenda 2063: *The Africa We Want*, Art. 8. There are seven aspirations in general.

SDGs stipulate the key role that trade can play in alleviating poverty, achieving sustainable development, and fulfilling human rights. It is to be noted that trade policy and trade related measures are stated in Goals 2, 8, 9, 10, 14, and 17.[127]

Ministry of Trade and Regional Integration is responsible to formulate policies to ensure sustained development and competitiveness in trade, and implement same upon approval by the pertinent body.[128] Ethiopia has a vision to make the economic development green and sustainable.[129] This envisages that trade contributes to green economic development. For instance, the Industrial Parks Proclamation aspires "to enhance export promotion, protection of environment and human wellbeing…"[130] To this end, the Industrial Parks Council of Ministers Regulations requires environmental impact assessment to designate industrial park,[131] and an industrial park enterprise should submit environmental impact assessment to obtain permit.[132]

3.3 The implication of "mutual supportiveness"

The principle of mutual supportiveness has the following implications:

a) It may be a mere policy statement;
b) It can be used as interpretative guideline (and some commentators consider this as a 'principle);
c) It may be used as a conflict clause allocating hierarchy; and
d) It could even be a 'law-making' principle.

3.3.1 Mutual supportiveness as principle of interpretation and balancing technique

In case law, there is some authority for the proposition that mutual supportiveness may at least play an interpretative role in trade disputes.[133] The 1998 report of the WTO Appellate Body (AB) in the *Shrimp-Turtle* Case is a good example. The case involved a domestic environmental measure adopted by the United States which affected the imports of shrimp harvested in a way that did not afford sufficient protection to sea turtles. As

[127] United Nations Economic Commission for Africa, *supra note* 125, at 28.
[128] Definitions of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 1263/2021, Art. 22 (1) (a).
[129] Federal Democratic Republic of Ethiopia, (2011), *Ethiopia's Climate –Resilient Green Economy Green economy strategy,* (Addis Ababa), at 5.
[130] Industrial Parks Proclamation No. 886/2015, Preamble Second paragraph.
[131] Industrial Parks Council of Ministers Regulations No. 417/2017, Art. 5(8)(C).
[132] Id, Art. 9(2) (d).
[133] Dupuy and Vinuales, *supra* note 3, at 475.

part of its defence, the United States invoked the general exception in Article XX(g) of the GATT regarding the protection of exhaustible natural resources.[134]

Although the Appellate Body eventually concluded that the measure was not justified under Article XX (as it violated its chapeau), it invoked both to the preamble of WTO Agreement and two environmental treaties, i.e.- the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to interpret Article XX (g).[135]

The Appellate Body stated that the terms "exhaustible natural resources" in Art. XX (g) had to be interpreted "in the light of contemporary concerns of the community of nations about the protection and conservation of the environment".[136] This approach can be seen as a general application of the customary rule of systematic integration codified in Article 31(3)(C) of the Vienna Convention on the Law of Treaties. However, it has not been consistently followed by the WTO Dispute Settlement Body.[137]

The principle of mutual supportiveness (MS) is considered as essential means for achieving sustainable development. This envisages integration between competing regimes in the case of MS, and the integration of all the environmental, social, economic and cultural human rights factors involved in the case of sustainable development.[138]

The *SD Myers* case –submitted to an Arbitral Tribunal established under the North American Free Trade Agreement (NAFTA) investment chapter– involved a Canadian ban on the export of polychlorinated biphenyl (PCB) wastes allegedly issued pursuant to various international environmental standards and rules. The case evoked competing economic, environmental and health concerns. The Tribunal extensively reviewed the pertinent environmental regimes and found that mutual supportiveness was the main principle governing the interface of trade, investment and environmental

[134] *See* Unites States *vs* India and others, United States-Import Prohibition of Certain Shrimp and Shrimp Products, World Trade Organization Appellate Body, AB-1998-4.
[135] Ibid.
[136] Ibid.
[137] Dupuy and Vinuales, *supra* note 3, at 476.
[138] Pavoni, *supra* note 113, at 661.

obligations. It reasoned that "environmental protection and economic development can and should be mutually supportive".[139]

It is to be noted that the conciliatory rationale in the principle of mutual supportiveness operates at both the interpretative and law-making levels. Thus, States are required to give due attention to thorough and careful negotiations in order to seek normative solutions to trade and environmental issues capable of accommodating competing interests.[140]

3.3.2 Mutual supportiveness as a law-making principle

This element consists of a state's responsibility to facilitate the law-making process, including amendment procedures so as to resolve the conflicts between environmental issues and trade issues. This law-making process should constitute a measure of last resort where the interpretative element cannot achieve the conciliation due to irreconcilable norms and principles.[141]

According to Riccardo Pavoni, the mutual supportiveness principle in law-making, is a "real added value that MS has to offer to the international law system".[142] It is noted that mutual supportiveness would be used on the assumption "that conflicts may and should be resolved between the treaty partners as they arise and within a view to mutual accommodation".[143]

3.4 Environmental goods and services

Facilitating trade on Environmental Goods and Services (EGS) could serve a number of purposes, including incentivising green industries worldwide, creating "green jobs" and increasing the diffusion of green products. It is intended to achieve "triple win" outcomes –i.e. good for trade, the environmental protection and development.[144] Under this context, liberalizing international trade law can play a positive role in building

[139] SD Myers, Inc v. Canada, Parital Award, 13 Nov. 2000, 40 ILM (2001) 1408, para 220 and 247.
[140] Pavoni, *supra* note 113, at P.663.
[141] Id, at 666.
[142] Id, at 667. See generally Committee on Trade and Development Aid for Trade, Sustainable Trade, Circular Economy and Aid for Trade An Issue, Joint Paper for the 2020-2022 Monitoring and Evaluation Exercise, Joint Communication by the WTO and OECD Secretariats, World Trade Organization, 2 August 2021.
[143] Pavoni, *supra* note 113, at 667.
[144] Dupuy and Vinuales, *supra* note 3, at 477. Institute of International Sustainable Development, *supra note* 10, at 110.

international markets for environmental goods and services.[145] Steenblink *et al* define *environmental goods and services* as:

> … capable of measuring, preventing, limiting or correcting environmental damage such as the pollution of water, air, soil, as well as waste and noise-related problems. They include clean technologies where pollution and raw material use is being minimized.[146]

This definition comprises goods and services that can be used for prevention, monitoring, and remediation of environmental impacts. Environmental goods are also defined in two ways: through environmental services, or as an "environmental service". The first category includes goods that are integral or incidental to the delivery of environmental services, such as waste water treatment or waste management. The second category comprises goods that are environmentally preferable products. However, these two categories are not mutually exclusive.[147]

There are trends towards product development and market creation in ecosystem goods and services, as in the case of bio-trade, or Kyoto Protocol markets. Services that have emerged from the Kyoto Protocol consist of emissions trading and emissions offset services.[148] The trend shows that trade in environmental goods has been increasing.

4. Environmental Protection in Practice

The practice of environmental protection may be explained by exploring the process and production methods, the use of general exceptions, and specific agreements including agreement on Sanitary and Phytosanitary (SPS) and agreement on Technical Barriers to Trade (TBT).

4.1 Process and production methods (PPMs)

Process and production methods (PPMs) deal with the way in which a product is made.[149] Trade law addresses how a product is made.[150]

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[145] Ronald Steenblink, Dominique Drouet, and George Subbs,(2005), *Synergies between Trade in Environmental Services and trade in Environmental Goods,* (OECD Trade and Environment Working Papers 2005/01, OECD 2005), at 5.

[146] Dupuy and Vinuales, *supra* note 3, at 477.

[147] Alexey Vikhlyaev, (2003), "Environmental Goods and Services: Defining Negotiations or Negotiating Definitions?" 33-60, *United Nations Conference on Trade and Development, Trade and Environment Review*, (United Nations, New York), 35.

[148] *Id*, at 36.

[149] Institute of International Sustainable Development, *supra* note 7, at 67.

Environmental trade measures on products, and import regulatory standards regulate how a product is produced, manufactured or obtained. This is known as process and production methods (PPMs).[151]

Many products go through a number of stages before they are made ready for market. Thus, we find a number of PPMs. For instance, the production of a traditional paper requires trees to be harvested. Then, wood should be processed, and the pulp is often bleached. In the production process, there are choices about how the product is made that have environmental impacts. For instance, in paper production, we may use post-consumer waste which is recycling, rather than trees, or may be bleached without chlorine. In general, the different processes may have various environmental impact. Accordingly, the impact of different products on the health, water, air etc. will depend on the type of chemicals used in the production or energy use.[152]

As Sifonios notes, legal regimes "may seek to adopt product standards or disposal requirements to reduce environmental effects" and they "also need to regulate the production methods of the goods" that will be produced domestically as well as imported ones. [153] This is because some methods may result in extensive environmental harm. For instance, exploitation of natural resources may cause environmental damage, such as "incidental catch of non-target species in fish trawling, destruction of primary forests to harvest tropical timber or the use of certain farming methods such as slash and burn", and extensive use of chemicals.[154] Greenhouse gas emission is the other significant impact of production regardless of the location of emission sources. Thus, the production method of one country may have a negative impact upon the environment of another. Therefore, a process and production method of goods can be regulated to render the production and environmental protection mutually supportive.[155]

However, there are fears that environmental standards to regulate PPMs might produce environmental improvement only in certain industries. For instance, a country where water is scarce may regulate the product by discriminating the products which use more water than the products that use

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[150] Howard Mann and Stephen Porter*, (*2003), *The State of Trade and Environmental Law 2003 Implications for Doha and Beyond* (Institute for Sustainable Development and the Center for International Environmental Law), at 7.

[151] Matsushita etal, *supra* note 1, at 746.

[152] Institute of International Sustainable Development, *supra* note 7, at 67.

[153] David Sifonios, (2018), *Environmental Process and Production Methods (PPMs) in WTO Law*, (Springer International Publishing AG,) at1.

[154] Ibid.

[155] Ibid.

of less water or recycle water. The same measure can be inappropriate in a country where water is not a problem.

Moreover, there are arguments that interrogate the application of a similar standard to all countries on the ground that this may violate the principle of common but differentiated responsibility.[156] Based on this conception, some developing countries argue that their priority primarily relates to social issues such as clean infrastructure, education, water, and health. Thus, the argument goes that the discrimination of the developed countries against the exporters of developing countries based on environmental issues that are high on these country's agendas is not appropriate.[157] They also argue that the now-rich countries have used various natural resources to develop and, on the contrary, forbid developing countries to use these natural resources.[158]

Sovereignty is among the arguments that can arise. If the environmental damage in issue is local, it is the jurisdiction of the government to manage it. However, the problem arises in case of some resources that are transboundary such as shared waters or airstreams. In such a case international cooperation is needed. Therefore, multilateral environmental agreements (MEAs) are used as a form of cooperation to prevent PPMs-based environmental and trade conflicts.[159]

Recently, several countries have introduced measures that do distinguish products based on their PPMs, such as "biofuel suitability standards" or fuel-quality standards. For instance, the European Union's Fuel-Quality Directive introduces "a mandatory reduction target of 6% by 2020 for the life cycle greenhouse gas emissions of fuels used in the EU by road vehicles and non-road mobile machinery".[160] As stipulated under the Trade Agreement Ethiopia made with the Republic of Korea, goods and services imported from Korea should be sold in Ethiopia after the approval by appropriate authority.[161] This gives the appropriate authority to check whether the goods

[156] Institute of International Sustainable Development, *supra* note 7, at 70.
[157] Ibid.
[158] Id, at 71.
[159] Ibid.
[160] Baron and Garrett, *supra* note 24, at 20.
[161] Trade Agreement between the Government of the Federal Democratic of Ethiopia and the Government of the Republic of Korea, (Addis Ababa, 3rd of June 2002), Art. 5(2).

and services meet the Standards[162] that are aimed at protecting the environment. Member States agree to implement common policy on standardization of goods and services among themselves.[163] In the case of trade between Ethiopia and Sudan, competent authorities must approve the goods and services prior to sale.[164] This means that appropriate authority has to check that goods and services confirm to the national standards of Ethiopia.

With regard to Ethiopia's institutional framework, the Council for the Quality and Standards Authority must determine "standards of products, process and systems" that are subject to mandatory certification.[165] The Ministry of Trade and Regional Integration has the responsibility to control the export or import of goods so that they are in conformity with the required standards.[166] It also has the power to ensure that goods comply with the mandatory Ethiopian standards.[167]

For example, any infant formula and follow up formula must have the components free from genetically modified organisms (GMOs) and should not be exposed to any radiation during manufacturing. Its package should also be made from a non-plastic material, and contain a label bearing the source of its protein.[168] This shows the Process and Production Methods (PPMs) that are adopted in Ethiopian laws to protect health and the environment, while promoting trade.

4.2 The use of general exceptions

The use of exceptions is the main avenue through which environmental protection is being brought under trade law.[169] Thus, a member State may invoke justifications under the general exceptions provided under Article XX of the GATT.[170] Article XX, sub paragraphs (a), (b), (d), (g), and (j) of

[162] Ministry of Trade and Regional Integration is responsible to control the compliance of goods with the mandatory standards of Ethiopia. Proc. No. 1263/2021, Art. 22 (1) (L).

[163] Treaty Establishing the African Economic Community, (June 3rd 1991, Abuja, Nigeria), Art. 67(1) (a).

[164] Trade Agreement between the Government of the Republic of Sudan and the Federal Democratic Republic of Ethiopia, Art. 10.

[165] Proclamation to Amend the Quality and Standards Authority of Ethiopia Establishment Proclamation No. 413/2004, Art. 9(3).

[166] Proc. No. 1263/2021, Art. 22 (1), (f).

[167] Id., Art. 22 (1) (l).

[168] Food and Medicine Administration Proclamation No. 1112/2019, Art. 12.

[169] Dupuy and Vinuales, *supra* note 3, at 485.

[170] Institute of International Sustainable Development, *supra* note 7, at 43.

the GATT have been invoked to justify measures such as import bans of re-treaded tires, or seal products, or export restrictions of certain materials, or still, preferential treatment of domestic producers of solar panels for environmental reasons.[171]

Subject to the prohibition of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" Article XX of GATT allows contracting parties to take measures that are:

(a) "necessary to protect human, animal or plant life or health"…[172] [and]
(b) "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption" …

The country that wants to use these exceptions must, first show the justification that the exception is applicable to the case at hand. Moreover, it must indicate that the application of the exception does not contravene the lead paragraph, called the chapeau of Article XX.[173]

Under sub (b) of Article XX, the party is required to show that the measure is "necessary" to protect the environment. Thus, the party should prove that the restriction of trade was the least restrictive measure necessary to protect the environment.[174] As coined by the panel in *Korea-Various Measures on Beef and Brazil-Retreated Tyres* case, the factors to balance include: "(1) the relative importance of the objective of the measure, (2) the contribution of the measure to the objective pursued, and (3) reasonably available less trade-restrictive alternatives."[175] The reasonableness should be determined taking into account the cost and the administrative capacity to implement it. Moreover, the alternative measures should be equally effective in achieving the objectives of the members.[176]

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[171] Dupuy and Vinuales, *supra* note 3, at 485.

[172] The Ethiopian Criminal Code punishes a person who disseminates human diseases. Civ. C., Art. 514. It is also punishable to disseminate animal diseases. Civ. C., Art. 515.

[173] Institute of International Sustainable Development, *supra* note 10, at 44.

[174] Ibid; Thomas J. Schoenbaum, (1992), "Free International Trade and Protection of the Environment: Irreconcilable Conflict?" *The American Journal of International Law*, vol. 86, No. 4, pp. 700-727, at 711.

[175] *Korea-Various Measures on Beef and Brazil-Retreated Tires* case; Institute of International Sustainable Development, *supra* note 7, at 44.

[176] Ibid; Steve Charnoviitz, (2007), *Trade and the Environment in the WTO* (GW Law Faculty Publications,), *10 J. of Int'l econ. L.1*, at 24.

The exception under sub (a) of Article XX is seldom used to protect the environment, particularly the animals on the bases of public morality. This exception was invoked in an EU ban on seal products, implemented in response to concerns about animal cruelty in hunting. However, the scope of the exception is to be determined yet.[177]

Cases, like *Shrimp-Turtle case*, have greatly contributed to the understanding of Article XX and its potential for environmental protection. In the *US-Shrimp and China-Raw Materials* cases, the Appellate Body confirmed that the term "natural resources" is not static and may cover both mineral and living resources and that the term "conservation" means "the preservation of the environment, particularly natural resources".[178] This would help the protection of the environment.

In *EC-Seal Products* case, a ban on the import of seal products was considered "necessary to protect public morals" under Article XX(a). However, the challenged measures failed to meet the requirements of the chapeau. This is the first case where an environmental concern such as animal welfare was brought under the protection of public morals in Article XX (a).[179] One can indeed appreciate these encouraging developments. However, it is argued that the protection of environment should not only rely on the exceptions: the interpretation of trade law should help more developments.[180]

4.3 Specific trade agreements: SPS and TBT

After the North American Free Trade Agreement (NAFTA) and Uruguay Round multilateral trade negotiations, a trend has been developed to include environmental provisions in trade agreements. However, this incorporation of environmental provisions in trade agreements is subject to debate. Those who criticize the incorporation argue that Environmental regulations inhibit trade; and without incorporating environmental provisions in trade agreements, trade promotes economic development which raises incomes and this is essential for the implementation of environmental protection. On the other hand, those who support the incorporation assert that trade and

[177] Institute of International Sustainable Development, *supra* note 7, at 46-7.
[178] China- Measures Related to the Expropriation of Rare Earths, Tungsten, and Molybdenum, 7 August 2014, WT/DS431/AB/R WT/DS432/AB/R WT/DS433/AB/R, Reports of the Appellate Body, World Trade Organization, para. 5.89.
[179] Dupuy and Vinuales, *supra* note 3, at 487.
[180] Ibid.

environment are interrelated; and in the absence of such incorporation many MEAs are weak and unenforceable to protect the environment.[181]

The Agreement on Sanitary and Phytosanitary (SPS) Measures and Agreement on Technical Barriers to Trade (TBT) are the two standards related to WTO Agreements on environmental measures.[182] An exception to Article XX incorporates the right of States to adopt measures necessary to protect human, animal and plant health. In addition, this is also regulated at the level of trade disciplines. The SPS Agreement allows the adoption of specific measures to ensure transparency –through a notification requirement, administrative due process (through expediency and reasonableness requirements in inspection procedures), for harmonization (through references to equivalent and to international standards). The relevant measures should be based on scientific evidence and risk assessment.[183]

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)

This agreement refers to the process and production methods.[184] Sanitary and phytosanitary (SPS) measures are applied to both domestically produced and imported goods so as to protect human or animal life or health from food borne risks. It is intended to protect human from animal and plant carried diseases, and the territory of a country from the spread of pest or disease. To achieve these goals, SPS measures may address the characteristics of final products and how goods are produced, processed, stored and transported. Conformity assessment certificates, inspections, quarantine requirements, import bans, and so on would be used. Some of the SPS measures may result in trade restrictions. However, governments generally recognize that some restrictions are necessary and appropriate to protect human, animal and plant life and health.[185] The Agreement is an

[181] Dale Colyer, *Environmental Provisions in Trade Agreements*, Paper presented at the short course "Trade and the Environment: Dealing with Pollution and natural Resource management in a Globalizing World", World Bank, Washington, DC, December 8, 2004, at 2.

[182] Fahmida Khatun, (2009), *Environment Related Trade Barriers and the WTO*, (Centre for Policy Dialogue), at 7.

[183] Dupuy and Vinuales, *supra* note 3, at 488. Khatun, id, at 7.

[184] Sifonios, *supra* note 153, at 5.

[185] Simonetta Zarrilli, (1999), *WTO Agreement on Sanitary and Phytosanitary Measures:* Issues for Developing Countries, (Working Paper, South Centre).

attempt to promote efficient international trade and the sovereign duty to protect health.[186]

The legal base for SPS is risk assessment.[187] The SPS Agreement incorporates measures necessary to protect humans, animals and plants from certain hazards associated with the movement of animals, plants and foodstuffs in international trade.[188] The main goal of the SPS Agreement is to prevent domestic SPS measures having unnecessary negative effect on international trade and their being misused for protectionist purposes. The Agreement fully recognizes the legitimate interest of countries in setting up rules to protect food safety and animal and plant health.[189]

The Agreement provides national authorities with a framework within which countries can develop their domestic policies. It encourages countries to base their SPS measures on international standards, guidelines, or recommendations. It also requires states to play their role in the harmonization of SPS regulation worldwide.[190]

It may be argued that SPS gives a room for the adoption of environmental measures based on the *precautionary principle*. This was widely discussed in cases- *EC-Hormones* and *EC-Biotech*. In both cases, the EC sought to reason out trade restriction measures on the basis of the precautionary principle. However, the argument was not accepted by the tribunals. The Appellate Body declined to take the argument. In *EC-Biotech* case, "the panel reasoned that the legal status of the precautionary principle was still unsettled in general international law and therefore, the principle was not relevant for the interpretation of the SPS Agreement".[191]

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[186] Christopher Bisgaard, (2008), "Assessing the Standard of Review for Trade-Restrictive Measures in the Sanitary and Phytosanitary Agreement" in Edith Brown Weiss, John H. Jackson, and Nathalie Bernasconi-Osterwalder (eds.), Reconciling *Environment and Trade,* (Second Edition), 357-376, at 357.

[187] Michael Burkard, (2018), *Conflicting Philosophies and International Trade Law*, World views and the WTO, (Malgrave Macmilalan), at 2.

[188] Institute for Sustainable Development, *supra* note 7, at 51.

[189] Ibid. Public morality is used as a rationale to protect the health of animals. See generally, Chad J MCyiure (2015), Environmental Law and International Trade: Public Morality as a Tool for Advancing Animal Rights" in Ronald Abate (Editor) *What Can Animal Law Learn from Environmental Law*, 287-304 (McGuire, Washington DC).

[190] Khatun, *supra* note 182, at 7; Institute for Sustainable Development, *supra* note 7, at 52.

[191] *EC-Biotech* case

Regulatory measures and bilateral trade agreements

On the basis of bilateral trade agreements, Ethiopia has the right to impose restrictions or apply prohibitions to

- Protect public health;[192]
- Prevent disease and pests in animals or plants;[193] and
- To protect cultural values of the country.[194]

Importation of plant or animal originated food items to Ethiopia must be accompanied by a health certificate issued only by authorised government body from the exporting country.[195] Wildlife and wildlife products can be imported to Ethiopia upon presentation of health certificate.[196] Live animals should be exported only upon fulfilling the Ethiopian standards or in the absence of such standards, the standards of the buyer.[197] Live animals could be exported based on animal health certificate from the Ministry of Agriculture.[198] The Ministry of Agriculture and/or the regional concerned body is responsible to prohibit and control the importation of animals, animal products and by-products to Ethiopia so as to prevent and control the spread of animal disease.[199] Restricted plants could be imported to Ethiopia based on permit issued by the Ministry of Agriculture.[200] Moreover, there are plants that are prohibited to be imported.[201]

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[192] Trade Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Korea, Art. 9(b).

[193] Ibid.

[194] *Id*, Art. 9(c).

[195] Public Health Proclamation No. 200/2000, Art. 8(1). Import permit is also essential. See Frank Joosten, (2007), *Phytosanitary services in the Ethiopian export-oriented horticulture; An assessment of needs and potentials for further development*, (Mission Report, Wageningen University & Research, the Netherlands), at 12.

[196] Council of Ministers Regulations to provide for Wild life Development, Conservation and Utilization, Regulations No. 163/2008, Art. 28(1).

[197] Live Animals Marketing Council of Ministers Regulations No. 34/2015, Art. 14(2).

[198] Live Animals Marketing Proclamation No. 819/2014, Art. 11(5).

[199] Animal Diseases Prevention and Control Proclamation No. 267/2002, Art. 7(1). See also the Draft Proclamation on Animal Health and Welfare, 2012, Art. 27.

[200] Plant Quarantine Regulation, Council of Ministers Regulations No. 4/1992, Art. 4(1). For the list of restricted plants, see Schedule I of the Regulation.

[201] Id, Art. 5 and Schedule II. Ethiopia has signed a memorandum of understanding with Somalia so as to control animal disease, Art. 3(a) and to facilitate livestock trade through quality control and certification, among others (Art. 3(c)). Memorandum of Understanding between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Federal Republic of Somalia on Cross border Cooperation and Coordination on Animal Health and Sanitation measures, 2019.

Consignments of plants or agricultural commodity by a trader require certificate issued by the Ministry of Agriculture. The certificate must indicate that the consignment is substantially free from diseases and pests, and conforms with the current phytosanitary regulations of the importing country.[202] In Ethiopia, goods must carry the labels affixed on them indicating particulars including country of manufacturing or export of the goods, quality of the goods, materials used to manufacture the goods and the indication that the goods have fulfilled the requirements set in Ethiopian standardization.[203] The rationale of the law is to prevent and control public heath from hazards caused by unsafe food.[204]

The executive organ is empowered to initiate and implement food standards.[205] Therefore, food and packing materials must comply with the standards issued by the appropriate organ.[206] In the absence of such standards, standards adopted by international organizations may be used to regulate the safety of food.[207] It is stipulated that "every food prepared for the purpose of exporting shall be safe …".[208]

Food manufacturing for sale must install the required quality control system so as to ensure the safety of foods it produces.[209] Food must be produced from safe raw materials.[210] It is stipulated that : "Any food product may not have chemical residue including pesticide, fertilizer, animal medicine, food additive chemical, cleaning chemical, a radioactive substance, and other contaminants above the maximum level issued or adopted by the appropriate organ".[211]

Food that complies with safety standards can be imported with permission granted by the executive organ.[212] Likewise, an exporter may be given health certificate to export food.[213] Ministry of Health must "ensure

[202] Addis Ababa Chamber of Commerce and Sectorial Associations, *supra* note 31, at 18.
[203] Food and Medicine Administration Proclamation No. 1112/2019, Art. 24(2)
[204] Id, 1st Paragraph of Preamble.
[205] Id, Art. 4(1).
[206] Id, Art. 5(3). The Quality and Standards Authority has the power to approve standards. Regulations No. 4/1992, Art. 9(2).
[207] Id, Art. 5(4).
[208] Id, Art. 5(6).
[209] Id, Art. 9(1)
[210] Id, Art. 9(2).
[211] Id, Art. 7(5)
[212] Id, Art. 10 (1)
[213] Id, Art. 10 (5).

the proper execution of food, medicine and health care administration and regulatory functions".[214] Ministry of Agriculture is also responsible to create a system to prevent plant and animal diseases.[215] As one can discern from the above discussion, Ethiopia is employing SPS to protect public health and to ensure plants and animals are protected from pests and diseases. In addition, Ethiopia has adopted law so as to protect its cultural values, which are part of the environment.

The Agreement on Technical Barriers to Trade (TBT)

Technical Barriers to Trade refers to process and production methods (PPMs) "since it applies to technical regulations, which are defined as a document that lays down product characteristics 'or their related process and production methods'." [216] TBT Agreement does not apply to PPM measures that do not have any impact on the physical characteristics of the product-this is called non-product related (npr-PPMs, or unincorporated PPMs) which are only coved by the GATT.[217]

TBT covers non-tariff barriers to trade, which are technical regulations, standards and conformity assessment procedures. Specifications of product characteristics that goods (to be traded) must fulfil are called technical regulations. For instance, energy efficiency (in case of washing machine), and labelling requirements (for nutritional products) are technical regulations. On the other hand, there are label differentiation standards that can be non-binding product specifications which may include environmental, health, labour or other specifications that a product must meet to get a label. It is to be noted that forest products, for instance, must originate from sustainably managed forests.[218]

The TBT Agreement aims at promoting the objectives of the GATT by balancing between the benefits and risks of international trade and drawing a borderline between protectionism as legitimate protection that would include environmental protection.[219] As Khatun observes, the "Agreement on TBT relates to trade restrictive effect arising from the application of technical

[214] Proclamation to the definition of a Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 1263/2021, Art. 35 (1)(L).
[215] Id, Art. 20 (1)(f).
[216] Sifonios, *supra* note 153, at 4.
[217] Id, at 4-5.
[218] Institute of International Sustainable Development, *supra* note 7, at 49-50.
[219] Erich Vranes, (2009), *Trade and the Environment* Fundamental Issues in International and WTO Law (Oxford University Press), at 286.

regulations or standards such as testing requirements, labelling requirements, packing requirements, and safety and health regulations."[220] According to TBT Agreement, each individual government has the right to set appropriate environmental standards.[221] However, the Agreement must meet the conditions such as notification, non-discrimination, proportionality, and transparency in developing the rules.[222]

Specific marking and labelling is essential among others, to ensure compliance with environmental and safety standards.[223] In this regard, Environmental protection may require voluntary or mandatory energy efficient standards and labelling.[224] This is important to make sure that trade does not contradict environmental protection. This would strengthen the mutual supportiveness of trade law and environmental law in Ethiopia.

5. Conclusion

As discussed in the preceding sections, trade law may have negative impact on the environment where it promotes free trade irrespective of its adverse effect on the environment such as trading in chemicals. On the other hand, trade law may provide the opportunity for supportive settings in the avenues of environmental sustainability.

Indeed, there is a potential for conflicts between environmental law and trade law (such as the potential conflict between trade and environmental treaties). Such conflict is normative where there is a contradiction between international environmental law and international trade law. There can also be a legitimacy conflict where the conflict arises between international trade law and domestic environmental law. Such conflicts can be solved through various methods of interpretation. Ethiopia should thus give due attention to environmental issues and the application of relevant laws so as to ensure environmental sustainability in the course of economic activities.

The pragmatic approach, as discussed above, is to pursue the path of synergy between trade and the environment. This approach can enable trade

[220] Khatun, *supra* note 182, at 8.
[221] Ibid.
[222] Institute of International Sustainable Development, *supra* note 10, at 50.
[223] Addis Ababa Chamber of Commerce and Sectorial Associations, *supra note* 18, at 16.
[224] Shunata Yamaguchi and Rob Dillink, *Regional Trade Agreements (RTAs) on Non-Tariff Measures (NTMS) through Technical Barriers to trade (TBT), and Regulatory Co-operation*, 25 December 2020 Joint Working Party on Trade and Environment, at 9.

law to enhance genuine and sustainable economic development which in turn would help the society to protect the environment. In short, there is the need to establish harmony and linkage between environmental law and trade law.

The effectiveness of this harmony and synergy is dependent upon the level of *mutual supportiveness* and *integration* between environmental law and trade law. The principle of *integration* is used as important tool to integrate environmental protection into trade law. And, the principle of *mutual supportiveness* can be used as principle of interpretation and balancing techniques among the elements of *sustainable development* which include economic, social, environmental and cultural objectives in the context of good governance.

Mutual supportiveness can also be used as a law-making principle thereby informing the laws on environment and trade. The synergies between environmental law and trade law can indeed be promoted by international trade law in building markets for environmental goods and services to solve environmental problems. Moreover, as discussed above, both trade and environmental protection can be promoted by using trade measures on products, import restrictions upon violation of standards, and regulation of process and production methods (PPMs), i.e., how a product is manufactured, produced or obtained. Efforts towards the balance (between trade and the environment) can further make use of the general exceptions enshrined under Article XX of the GATT.

The measures that have been highlighted relating to specific trade agreements, i.e, Agreement on Sanitary and Phytosanitary (SPS) Measures and Agreement on Technical Barriers to Trade (TBT) also reveal the trend of incorporation of environmental provisions in trade treaties. These agreements can indeed promote international trade in the context of the sovereign right to protect (human, animal and plant) health, and can meanwhile address trade objectives by balancing the risks and benefits of trade with environmental protection. ■

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COMMENT

Court's Reluctance to Safeguard Rights of the Accused in the Ethiopian Counter-terrorism Prosecutions and its Broader Implication

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Abstract

Ethiopia's former and current anti-terrorism laws recognize information obtained through court authorized interception as evidence in counterterrorism prosecutions. This comment briefly examines Federal High Court rulings in two counterterrorism prosecutions where the accused challenged the admissibility of intercepted materials into evidence for not being obtained with court warrant. Though the objections in both cases could have been easily addressed by verifying whether a court warrant was in fact issued prior to intercepting the material in question, the court did not take this course of action. In one of the cases, the court *presumed* that a court warrant was issued; in the other it ignored the objection altogether and admitted the contested material into evidence. The comment can serve as a basis to undertake further research on whether the courts are doing justice in enforcing rights of the accused the safeguarding of which do not require constitutional interpretation. It might also invite investigation into its broader implication on whether the courts have the readiness to meet public and legal professionals' expectation in safeguarding human rights were they empowered in the realm of constitutional interpretation.

Key terms

Counter terrorism · Intercepted evidence · Right to privacy · Court's reluctance to listen to the accused. Constitutional interpretation

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Contents

1. Introduction

Ethiopia's first anti-terrorism law (Anti-Terrorism Proclamation No. 652/2009, commonly referred to as the ATP) was repealed and replaced by the Prevention and Suppression of Terrorism Crimes Proclamation No. 1176/2020. Both laws recognize information obtained through court authorized interception as evidence in counterterrorism prosecutions.[1]

This Comment mainly draws on Federal High Court rulings in two counterterrorism prosecutions where the accused challenged the admissibility of intercepted materials into evidence for not being obtained with court warrant.[2] In *Federal Public Prosecutor v. Getachew Shiferaw Andarge*, the court '*presumed*' that a court warrant was issued based on problematic reasoning; in *FPP v Mohamed Sulieman*, it simply ignored the objection and admitted the challenged material into evidence.

Frequently used acronyms:
ATP Anti-Terrorism Proclamation
NISS National Intelligence and Security Agency

[1] Article 14 (1) (a) of the ATP authorizes "the National Intelligence and Security Service, *up on getting court warrant*, [to] intercept or conduct surveillance on the telephone, fax, radio, internet, electronic, postal and similar communications of a person suspected of terrorism" (emphasis added. Article 23 of the ATP gives evidentiary value to "intelligence report prepared in relation to terrorism." Article 42 (1) (a) of the Terrorism Prevention and Control Proclamation No. 1176/2020 authorizes the police to intercept or conduct surveillance on postal, letter, telephone, fax, radio, internet and other electronic devices exchange or communications of a person suspected of terrorism. Article 42 (2) provides for the requirement of court warrant to undertake the interception.

[2] In the cases, information said to have been obtained through interception were presented to the court as intelligence report. As the repealed law explicitly authorizes the prosecution to use intelligence report the defence simply based their objection on the non-fulfilment of the law that regulates interception.

This comment also makes reference to three cases where the court subjected the prosecution's evidence to different levels of scrutiny. In *Federal Attorney General v. Ato Dejene Serbesa Terfusa and Ato Lelesa Gadisa Regassa,* where the court displayed its proper judicial role, the prosecution's evidence was dismissed on the ground that it was not obtained through court warrant as required by law. In *FPP v. Deputy Inspector Abebe Yehuala et al* and *FPP V Ato Wagari Bedassa Shiro et al,* the court, without confirming issuance of warrant prior to interception, used its own method[3] to check if what was obtained through interception was related to the accused at all. By applying this method, the court learned that in 7 of the 9 defendants the material presented as having been obtained through interception was not related to them making it disregard the material and acquit the accused. These three cases are presented for comparison purposes. These are meant to demonstrate the practical difference the court's approach –in dealing with objections of the accused– would make in the outcome of the prosecution's case and its vital importance to the fate of the accused.

2. The Court's Approach to Dealing with Objection of the Defence

This Section is presented in two sub-sections. The first relates to two prosecutions where the court unreasonably disregarded the objection of the defence. The second discusses other three cases where prosecution's evidence were scrutinized.

2.1 Cases where the court ignored the law requiring court warrant

Federal Public Prosecutor v. Getachew Shiferaw Andarge [4]

Getachew Shiferaw was charged under Article 7(1) of the ATP for having a connection with and providing information to *Ginbot 7*.[5] The charge indicated

[3] This method cannot be seen as a proper alternative to verifying whether interception was conducted with prior court warrant. Such verification is to be done prior to considering the relevance of the information seized through the interception. To see the weakness of the method the court employed, see *FPP v. Deputy Inspector Abebe Yehuala et al* where one of the accused was convicted simply because the court found the evidence obtained through interception relevant without ascertaining that the interception was conducted with court warrant.

[4] *Federal Public Prosecutor v Getachew Shiferaw Andarge*, Federal High Court, File No. 178771.

[5] Ginbot 7 was one of the political organizations which were proscribed as terrorist organization under the repealed ATP. Parliament voted to lift that label following the 2018 change of government in Ethiopia. The Party dissolved itself to form a new

that he contacted members, leaders, and supporters of Ginbot 7 through telephone and Facebook. Prosecution's evidence to prove these details constituted letters from the National Intelligence and Security Agency (NISS). The letters were prepared based on information said to have been obtained through interception.

Getachew's defence lawyer raised several objections against this evidence.[6] One relates to the procedure through which NISS conducted the interception. According to the defence, there is no evidence to show that the interception was conducted with court warrant as required under Article 14 of the ATP. Collecting evidence through interception without a court warrant, the defence asserted, would amount to violation of right to privacy recognized under Article 26 of the FDRE Constitution. The defence argued that this would make the interception unconstitutional and the intercepted communication void, not admissible into evidence.

The court agreed that Article 14 of the ATP requires the information to be used for the intelligence report to be gathered with court warrant.[7] However, instead of verifying whether or not court warrant was issued, the court reasoned "because the security agency sent the intelligence report to the police citing Article 14 of the ATP [which requires court warrant], the court

political party — the *Ethiopian Citizens for Social Justice* —together with other political parties. Abdur Rahman Alfa Shaban, 'Ethiopia's Ginbot 7 dissolves, transforms into new 'united' party' *Africanews* 10 April 2019, available at: https://www.africanews.com/2019/05/10/ethiopia-s-ginbot-7-dissolves-transforms-into-new-united-party//

[6] One of the objections relates to what should be the content of the report. The defense argued that though the evidence obtained through interception under Article 14 of the ATP should have been directly reduced into writing, the NISS has interpreted what it has intercepted. To the extent the NISS engages in interpreting the seized material (instead of producing the material without its own interpretation) it is not consistent with what Article 14 provides. The court did not accept this objection. As per the court, the term "report" under Article 23 of the ATP does not connote "the literal words of the accused." *Federal Public Prosecutor v Getachew Shiferaw* Andarge, File No. 178771, ruling, p. 5, Tahisas 13, 2009 E.C (translation mine). According to the court, intelligence report need not be the literal words of the accused. It involves interpretation of the conduct of the accused by the intelligence agency. By allowing "intelligence report to be used as evidence", the court reasoned "Article 23(1) of Proc. 652/2009 envisions possible interpretations and analysis of the suspect's conduct and words by the Security Agency." *Federal Public Prosecutor v Getachew Shiferaw* Andarge, File No. 178771, ruling, p. 5, Tahisas 13, 2009 E.C.; *Federal Public Prosecutor v Getachew Shiferaw* Andarge, File No. 178771, Ginbot 16, 2009 E.C, Judgment, p. 6

[7] *Federal Public Prosecutor v Getachew Shiferaw Andarge*, File No. 178771, Ginbot 16, 2009 E.C, Judgment, pp. 6-7

presumed that the agency has got court authorization prior to interception."[8] The court noted that it is better to "*trust"* NISS to have collected the information with court warrant than to adjourn the case to verify whether or not it was conducted with court warrant which might take considerable time.[9] The ruling of the court in this regard reads:

> በሌላ በኩል ይህ ችሎትም ቢሆን የብሔራዊ የመረጃና ደህንነት አገልገሎት የተጠርጣሪን የፌስቡክን/የስልክ ግንኙነት ከመጥለፉ በፊት በጸረ ሽብር አዋጅ ቁጥር 652/2001 አንቀጸ 14(1) መሠረት የፍርድ ቤትን ፈቃድ መያዝ አንዳለበት የሚያምን ሲሆን መረጃውን አጠናቅሮ ለፌዴራል ፖሊሰ ወንጀል ምርመራ ዘርፍ የላከው የብሔራዊ የመረጃና ደህንነት አገልገሎት የተጠርጣሪን የፌስቡክን/የስልክ ግንኙነት የጠለፈው ወይም መረጃውን ያሰባሰበው በጸረ ሽብር አዋጅ ቁጥር 652/2001 አንቀጽ 14(1) መሠረት መሆኑን በማመን እና የሕጉን ክፍል በመጥቀስ ነው። ስለሆነም ይህ ችሎት መዝገቡም በዚህ ምክንያት ላልተወሰነ ጊዜ ተዳጋጋሚ ቀጠሮ ከሚይዝ ያለው ማስረጃ ተመርምሮ ብይን ቢሰጥበት የተሻለ መሆኑን በማመን እና የብሔራዊ የመረጃና ደህንነት አገልገሎት የተክሳሽን የፌስቡክን/የስልክ ግንኙነት የጠለፈው ወይም መረጃውን ያሰባሰበው በጸረ ሺብር አዋጅ ቁጥር 652/2001 አንቀጽ 14 (1) መሠረት መሆኑን ግምት ወስዷል።[10]

Because the court did not give due weight to their objection, the defence raised lack of court warrant for the second time in their concluding statement. This time the court dismissed their point citing its own previous ruling. Apparently referring to its *presumption of legality* and *trust* in NISS*,* the court dismissed argument of the defence noting that a "*reasoned"* decision has already been given and there is no procedure that allows it to reverse its ruling given earlier in the proceeding.[11] The court held:

> ከመረጃ አቀራረብ ጋር በተያያዘ ችሎቱ ብይን በሚሰጥበት ጊዜም ቢሆን በዚህ ረገድ የቀረበውን ክርክር በምክንያት ያለፈው ሲሆን ይህ ተመልሶ መቅረብ የሚገባ ካለመሆኑም በላይ ይህ ችሎት የራሱን ብይን በራሱ ጊዜ በፍርድ ወቅት የሚቀይርበት አሠራር የለም።

While the court puts so much faith in one of the parties –the government agency– and presumed facts in their favour, it did not accord similar weight to statements of the accused. It outrightly rejected evidence and argument of the accused (under Articles 132, 142 (3) and 27 of the Criminal Procedure Code) where the accused consistently denied his involvement in the alleged offence. The court rejected the latter stating that if not supported by other

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[8] Id., p. 7 (emphasis mine).

[9] Ibid.

[10] *Federal Public Prosecutor v Getachew Shiferaw* Andarge, File No. 178771, ruling, pp. 5-6, Tahisas 13, 2009 E.C; *Federal Public Prosecutor v Getachew Shiferaw* Andarge, File No. 178771, Ginbot 16, 2009 E.C, Judgment, p. 7.

[11] *Federal Public Prosecutor v Getachew Shiferaw* Andarge, File No. 178771, Ginbot 16, 2009 E.C, Judgment, p. 11 (emphasis mine).

evidence, it is just a mere denial that cannot be given much value.[12] By so doing the court applied double standard in assessing the admissibility of evidence of the two parties.

FPP v Mohamed Sulieman Adem[13]

Mohamed Sulieman was charged under Article 7(1) of the ATP for being a member of a terrorist organization, International State of Syria, and Iraq (ISIS), with a desire to impose Islam as the only religion in Ethiopia. The charge stated that the accused travelled from Chagni, Benishangul Gumuz Regional State, to Addis Ababa and met two individuals who were facilitating his contact with members of the ISIS in Somalia. It provided details as to what he allegedly discussed with the two individuals, his agreement to take terrorism related training, and that the accused was arrested in Addis Ababa on his way to Somalia to join the terrorist group.

Prosecution's evidence to support these allegations consisted of documents from NISS which are prepared based on interception of the communications the accused was said to have made.[14] The defence lawyer challenged the admissibility of the documents into evidence[15] (on similar grounds the defence challenged the prosecution's evidence in Getachew Shiferaw's case) stating that the documents were not prepared based on information collected through court authorized interception as required under Article 14 of the ATP.

While the challenge against the admissibility of the evidence was clearly based on the fact that the interception was not conducted with court warrant, evasively the court attempted to justify the constitutionality of Articles 14 and 23 of the ATP. The court analysed both provisions in the light of Article 26 of the FDRE Constitution and concluded that collecting evidence in accordance to these provisions is constitutional. Furthermore, still avoiding the objection to *admissibility*, the court ruled on the weight of the evidence. It

[12] *Federal Public Prosecutor v Getachew Shiferaw* Andarge, File No. 178771, Ginbot 16, 2009 E.C, Judgment, pp. 10-11.

[13] *FPP v. Mohamed Sulieman Adem* Federal High Court 1st Anti-terrorism and Constitutional Bench, File No. 254907

[14] The prosecution presented the documents characterizing one fall under Article 14 and the other under Article 23 of the ATP as if the two are different. So was in other prosecutions such as *FPP v. Mohammed Sulieman* (cr. F. No. 254907). In *FPP v. Getachew Shiferaw*, the court noted that the evidence envisioned under Article 23 is the one Article 14 relates to. Statement of the accused was also presented though challenged for not being given voluntarily.

[15] *FPP v. Mohamed Sulieman Adem* Federal High Court 1st Anti-terrorism and Constitutional Bench, File No. 254907, Hidar 24, 2013 E.C.

noted that the intelligence report, which provides the detailed steps the accused took to become member of the ISIS, as stated on the charge, *proved* the prosecution's claim as to the membership of the accused.[16]

The court's ruling fell short of addressing the objection of the defence – that the interception was not conducted with court warrant. Instead, the court admitted the evidence simply asserting that Articles 14 and 23 of the ATP are special laws which are envisioned under Article 26 of the Constitution and accorded to it a probative value.[17]

2.2 Case where the court subjected prosecutions' evidence to scrutiny

Below are three cases where the court's effort to verify the veracity of the prosecution's evidence led the court to discover its problematic nature. In the first case, the court took lack of court warrant seriously and rejected the prosecution's evidence on this ground. In the other two, though the court did not try to verify whether warrant was issued, its inquiry into the relevance of the prosecution's evidence disclosed its problematic nature. In all the three cases the court rejected the evidence in question which, in turn, brought about acquittal of the accused against whom such evidence was produced.

Federal Attorney General v. Ato Dejene Serbesa Terfusa and Ato Lelesa Gadisa Regassa[18]

In this case the court displayed what is expected of it. The charge provided details of what the accused are alleged to have done in preparation to commit a terrorist act. The prosecution's main evidence are documents relating to alleged communications of the accused intercepted from their phone conversations or obtained from their Facebook pages. In examining whether the prosecution has proved its case to an extent that justifies ordering the

[16] *FPP v. Mohamed Sulieman Adem,* Federal High Court 1st Anti-terrorism and Constitutional Bench, File No. 254907, ruling, Hidar 24, 2013; judgment Tir 27, 2013, pp. 4 ff

[17] Similarly, despite the objection of the accused that what is presented as statement of the accused was obtained through coercion, the court simply cited Article 27 of the Cr. Pro. C. to support its conclusion that the accused is found guilty of violating Article 7 (1) of the ATP.

[18] *Federal Attorney General v. Ato Dejene Serbesa Terfusa* and *Ato Lelesa Gadisa Regassa*, (Fed. H. Ct. Cr. F. No. 255296), ruling, Yekatit 30, 2013 E.C. It is a case where the accused were charged under Article 6(2) of the Terrorism Prevention and Control Proclamation No. 1176/2020 for preparation to commit a terrorist act. However, this proclamation does not have any difference from the Anti-Terrorism Proclamation regarding the requirement of court warrant to intercept communications to use them as evidence.

accused to enter their defence, the court noted that the information used to prepare the documents was supposed to be collected based on court warrant.

Furthermore, the court cited Article 24 of Proclamation No. 804/2013, NISS's enabling legislation, in support of the requirement that the Agency should have collected the information with permission from the court. Because there is no evidence to show that the agency was in possession of a court warrant at the time of interception, the court inferred that the interceptions and other restriction of privacy of the accused were made not in accordance with the law making it infringement of their right under Article 26 of the FDRE Constitution. The court acquitted the accused without a need to enter their defence for lack of evidence against them.

FPP v. Deputy Inspector Abebe Yehuala et al[19]

In this case five individuals, three of whom were members of the Amhara Regional Police at the time, were prosecuted under Article 7(1) of the ATP for communicating with representatives of *Ginbot 7*. Materials collected through interception and confession of the accused were the prosecution's main evidence. Based on these items of evidence, the court ordered the accused to enter their defence. Denying any contact with Ginbot 7, the accused challenged the prosecution's evidence. Upon application of the defendants, the court ordered Ethio Telecom, the national Telecommunication Company, to let it know: (i) if the phone numbers –the defendants were said to have used to communicate with Ginbot 7– belong to them, and (ii) if they had made the alleged communication.

Ethio Telecom advised the court that the phone numbers referred in the charge to have been used by the 2nd, 3rd and 4th defendants are not registered in their names. However, the phone number stated in the charge to have been used by the 5th defendant was in his name. Regarding the second question, the Telecom Company advised the court that it does not have the capacity to trace phone conversations. Following receipt of the Telecom Company's report, the court noted that unless the prosecution establishes that the accused had access to these phone numbers (though not registered in their names), it could not assume that they used these phone numbers simply because NISS stated so. Thus, the court concluded that three of the defendants have rebutted the prosecution's evidence and acquitted them.[20]

[19] *FPP v. Inspector Abebe Yehuala,* Fed. H. Ct., Cr. F. No. 171222.

[20] The Attorney General appealed against this decision requesting for the judgment to be suspended. Later it withdrew its appeal. The accused who were acquitted had to stay in prison pending the withdrawal.

Noting that the 5th defendant failed to rebut the prosecution's evidence, the court convicted him simply because Ethio Telecom advised the court that the phone number he allegedly used to make the intercepted communication is registered in his name. It is because whether the alleged communication was made between the accused and Ginbot 7 was contentious that the court initially requested the Telecom Company to confirm. However, when the court knew that the Telecom Company is unable to confirm what was alleged by the prosecution, the court retreated from its initial position and presumed that the 5th defendant did what the prosecution has alleged –communication with Ginbot 7– simply because the phone number he allegedly used is registered in his name. [21]

FPP v. Ato Wagari Bedassa Shiro et al[22]

In this case, four individuals were charged under Article 4 of the ATP for preparation to commit a terrorist act.[23] The details of the charge indicate that the accused discussed with Shene's leadership about killing government officials and members of the National Defence Force. The prosecution's evidence included documents that NISS prepared based on alleged communications of the accused obtained through interception.[24] Despite the objection from the accused that there was no court warrant authorizing the NISS to collect the information claimed to be used as source to prepare the document, the court did not take steps to verify whether warrant was issued. Instead, the court ordered the accused to enter their defence noting that the prosecution's documentary evidence proved what has been alleged on the charge.[25]

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[21] In view of that the technical evidence in the other four cases had been found to be unreliable and the requirement that the prosecution must prove its allegations beyond reasonable doubt, it would have been more justified to reject the prosecution's allegation even against the fifth defendant.

[22] *FPP v. Ato Wagari Bedassa Shiro et al*, Federal High Court, Cr. File No. 252993

[23] The details of the charge and the intelligence report indicated that the first accused was involved in the killing of government officials and members of the national Defence Forces. It is not clear why the accused was charged for preparation instead of committing a terrorist act.

[24] Two documents were presented –a 23-page document described as a document 'prepared in accordance to Article 14' and another 8 pages document referred to as a document 'prepared in accordance with Article 23' of the ATP. The documents have consecutive reference numbers (Reference numbers ለመ42/60/2012 (Art. 23 doc) and ለመ42/59/2012 (Art. 14 doc)). Though its relevance is unclear, the prosecution introduced Nokia mobile phone from the third accused referring to it as exhibit.

[25] *FPP V Ato Wagari Bedassa Shiro et al* (cr. File No. 252993), Federal High Court, ruling, Hamle 28, 2012 E.C.

After the case was adjourned to hear evidence and arguments of the defence, the judges of the bench were changed. Noting that the prosecution did not produce the actual record of the phone conversation the accused were alleged to have made, the newly assigned judges requested the Ethio Telecom to provide information about the contents of the communication the accused were alleged to have made. As it did in *FPP v. Deputy Inspector Abebe Yehuala et al,* Ethio Telecom wrote a letter stating that it does not record and keep contents of phone conversations.[26] However, the court learned the phone numbers –that the accused were said to have used to do the 'intercepted' communication– are not registered in their names.

Absence of evidence to show that interception was conducted with prior authorization from the court coupled with the fact that the phone numbers were not registered in their names led the court to acquit them. Essentially the court, constituting newly appointed judges, rejected the evidence based on which the accused were ordered to enter their defence. The court used Ethio Telecom's report that the phone numbers were not registered in the name of the accused as a ground to 'reconsider' and reject the prosecution's evidence which had already been admitted and given a weight good enough to order the accused to enter their defence.[27]

3. Conclusion: Implications of the Rulings

This Comment is not a comprehensive assessment of the court's approach in treating allegedly intercepted communications of the accused –the prosecution presents as evidence– in counterterrorism. It is meant to draw on some court rulings to illustrate instances where the court was reluctant to enforce the rights of the accused while what was required was to simply verify if the collection of evidence was conducted in strict compliance with the specific provision of the ATP. Though these rulings were given based on the repealed anti-terrorism law, these are still relevant in many ways and at different levels. First, as noted, the current anti-terrorism law retains court sanctioned interception as proper means of collecting evidence. Second, the rulings are relevant to other criminal prosecutions in general as the problem

[26] *Federal Attorney General v. Ato Wagari and others, File No. 252993, Y*ekatit 24, 2013 E.C, judgement, p. 8.

[27] Apparently, these defendants would have been convicted had it not been for the change of judges who were critical of the prosecution's allegation and evidence. The court's approach might be questioned in terms of procedure as it reverses its own ruling. However, the court's approach does not have any problem in terms of substance. In addition to the change of judges, the court's being critical of the prosecution might be attributable to the environment created in the wake of change of government in 2018.

of reluctance of the court to safeguard rights of the accused is not necessarily confined to counter-terrorism prosecutions.

Third, the cases could also have a broader implication on whether Ethiopian courts can be trusted guardians of human rights. One of the often-debated features of the Ethiopian constitution is its allocation of constitutional interpretation power to a political, as opposed to judicial, institution.[28] Some have argued that this feature of the Constitution has diminished the Ethiopian courts' ability to safeguard human rights.[29] This argument is premised on the assumption that courts would safeguard human rights if they have the power to interpret the Constitution.

This Comment, without taking position on the validity of this claim, has presented court cases where the Federal High Court unreasonably deferred to the executive thereby failing to safeguard rights of the accused. The court's failure to protect rights of the accused in these cases does not have much to do with its lack of power to interpret the Constitution. As demonstrated in *Federal Attorney General v. Ato Dejene Serbesa Terfusa and Ato Lelesa Gadisa Regassa*, the cases required simple application of a specific law. The court's unsubstantiated presumption in favour of the prosecution and unfounded "trust" in the security agency's lawful conduct would make one to question if the courts have been reliable guardians of human rights.

While the Comment is based on a small number of cases, it could serve as a basis to undertake a broader and deeper research on whether the courts are doing justice in enforcing rights of the accused the safeguarding of which do not require constitutional interpretation. Where the courts do not provide protection to the rights of the accused that they could under the existing constitutional framework, it is questionable if they have the readiness to meet public and legal professionals' expectation in safeguarding human rights were they empowered in the realm of constitutional interpretation. ■

[28] Yonatan Tesfaye Fessha (2008), 'Whose Power is it anyway: The Courts and Constitutional Interpretation in Ethiopia', 22 *Journal of Ethiopian Law*: 128-144; Assefa Fiseha (2011), 'Separation of Powers and its implications for the judiciary in Ethiopia', 5 *Journal of Eastern African Studies* 4: 702-715.

[29] *See* for example: Adem Kassie Abebe (2011), 'Human Rights under the Ethiopian Constitution: A Descriptive Overview' 5 *Mizan Law Review* 1: 41, 65-69; Chi Mgbako et al, (2008) 'Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights', 32 *Fordham International Law Journal 1:* 258, 284-293*;* K.I. Vibhute, (2012), 'Right to Access to Justice in Ethiopia: an Illusory Fundamental Right?', 54 *Journal of the Indian Law Institute 1: 67-83;* Mizanie A. Tadesse, (2020), 'Constitutional Rights Without Effective and Enforceable Constitutional Remedies: the case of Ethiopia', 19 *North Western Journal of Human Rights:* 80-89.

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COMMENT

Post-divorce Maintenance under Ethiopia's Revised Family Code: Some Observations

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Abstract

The Revised Family Code (RFC) of Ethiopia states the circumstance in which a spouse can claim maintenance. These are during a divorce proceeding and, ordinarily, as any person, citing the provisions that explicate the obligation to supply maintenance. The RFC puts spouses at the top rank in the maintenance claimants' order. This raises the question whether this applies to a spouse while the marriage is intact, a spouse while divorce proceedings are in progress, or an ex-spouse. This comment examines the existence (or otherwise) of a legal ground for an ex-spouse to claim maintenance under the RFC. I argue that the issue of maintenance does not arise in relation to a spouse while marriage is intact because the spouses have joint ownership and equal entitlement with regard to their property. Besides, a spouse can invoke temporary maintenance while divorce proceeding is underway due to a petition filed by one of the spouses. It can thus be argued that the obligation to supply maintenance embodied in the Revised Family Code entitles an ex-spouse (who is needy and unable to earn livelihood) to claim maintenance.

Key terms

Maintenance · Ex-spouse · Divorce · Orders of maintenance

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Frequently used acronym:

RFC Revised Family Code

Contents

1. Introduction

A claim for maintenance which can be brought by an ex-spouse has, for a long time, remained uncommon in Ethiopia. For that matter, earlier research conducted on maintenance concludes that the practical application of the duty to supply maintenance to an ex-spouse is unacceptable.[1] The quest to claim maintenance by an ex-spouse has also been little understood by legal practitioners.[2] This arises from the impression that the affinal bond is broken and divorced spouses are expected to be self-sufficient.[3] However, in several instances, divorced women face a lower lifestyle and sometimes go to the extent of destitution.[4] This leads us to question whether an ex-spouse is entitled to get spousal support from her former husband if she is needy and

[1] For instance, Wondowossen, on his research finding publiished under the title "Implementation problem of the Revised Family Code" concludes that "The man's obligation to provide maintenance to his ex-wife is not recognized in the RFC."

[2] In a training which was offered for legal practitioners in June 2017 under the theme "Legal Research Method Training for Researchers and Legal Practitioners", the participants were given a title, "can a spouse claim maintenance from her ex-spouse?" to conduct mini research. The group argued that "since obligation to provide maintenance to his/her ex-wife is not recognized in the Revised Family Code, the title contains no issue to be researched". This is an indication for the existence of consensus among legal practitioners that ex-spouses are not entitled of maintenance following the dissolution of their marriage although they are needy and are not in a position to obtain their income by their work.

[3] Dina Hummelsheim (2009). 'Germany: will the male breadwinner model survive?' in Hans-Jürgen Andreß and Dina Hummelsheim *(ed) When Marriage Ends: Economic and Social Consequences of Partnership Dissolution*, (Edward Elgar Publishing, United kingdom), pp. 51-77, p 58.

[4] Barbara Stark (2005). *International Family Law: An Introduction*, Ashgate Publishing Company, USA, p. 97.

unable to get means of livelihood. Barbara Stark observes the following on the issue:

> In many states, the answer depends on who was responsible for the divorce. An 'innocent' wife is entitled to get support from her husband, while a wife whose adultery or 'disobedience' led to the divorce is not. In some States, if the divorce is the fault of the husband, the wife may be entitled to relatively generous maintenance until she remarries or dies.[5]

Yet, variation exists in the laws of several countries in their approach to spousal support. In France, the concept of compensatory payment was introduced for divorce by consent (although this could be paid in instalments), whereas traditional spousal support was retained for a fault-based divorce.[6] Under Russian law, spouses are entitled to demand maintenance only in three situations. These are, (1), if she is needy and is unable to work, (2) if she is needy and pregnant from him (he is obliged to pay maintenance during her pregnancy and for three years after the birth of their child) or (3) if she is needy and caring for their disabled child.

On the other hand, in the United States, alimony is awarded for a spouse whose marriage lasted for a long time and who has very different living standards.[7] In the Philippines, a divorced woman is often entitled to maintenance during her waiting period or if she is nursing for up to two years.[8] From this, it can be argued that spousal maintenance is a common practice in most countries, although spousal support is limited in amount and duration.[9] It has to be underlined that "maintenance is awarded for need, not in recognition of housework as a contribution to family wealth."[10]

In Ethiopia, the Revised Family Code (RFC) provides the different circumstances and mechanisms of when and how spouses can claim maintenance. It indicates a spouse's entitlement to claim temporary maintenance during a divorce proceeding. Concurrently, the RFC, in the section that deals with the obligation to supply maintenance in general,

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[5] Ibid.

[6] Patrick Parkinson (2011). *Family Law and the Indissolubility of Parenthood*, Cambridge University Press, New York, p. 239.

[7] Stark, supra note 4, p. 98.

[8] Id., p. 97

[9] Alison Clarke-Stewart and Cornelia Brentano (2006). *Divorce: Causes and Consequences*, Yale University Press, New Haven and London, p. 62

[10] Joni Hersch (2003). "Marriage, Household Production, and Earnings" in the Shoshana A. Grossbard-Shechtman (ed.) *Marriage and the Economy: Theory and Evidence from Advanced Industrial Societies,* Cambridge University Press, Cambridge, p. 212

pinpoints a spouse's entitlement to claim financial support from the other spouse. This paves the way to the question whether an ex-spouse has a right to claim maintenance under the Revised Family Code.

The next section explains the concept and types of maintenance in general. Section 3 discusses the issue of maintenance under the RFC. The fourth section explores whether an ex-spouse can claim maintenance under the Revised Family Code.

2. The Concept and Types of Maintenance

There is a mutual obligation among family members to maintain one another financially. "The duty of maintenance derives from fairness and affection for blood relatives."[11] The existence of blood or affinal relation is a requirement to claim maintenance.[12] In this regard, the degree of relationship has a direct bearing on the entitlement to maintenance.

Maintenance is an amount of monetary support paid to the more financially dependent individual based on several factors.[13] It should be noted that the obligation to supply maintenance illustrates the unequal status of individuals in society. The claimant may have no income or, the income of the claimant might be consistently lower than subsistence needs that are required for the average person. This will inevitably place a person in an economic disadvantageous position.

Hence, the purpose of maintenance is to prevent financial and social hardship and disruption that the incapacity may cause on a financially dependent person.[14] A person may be entitled to a relatively generous maintenance until s/he becomes self-sufficient. The question of maintenance often involves a question of who is responsible for the support. The court may order maintenance if a person does not have enough income, property, or both to support his/her reasonable needs and if the claimant is unable to secure this support by one's own work.[15] It should be noted that "there is no right to maintenance unless there is a capacity to meet it and inability by the claimant

[11] Bruce W. Frier and Thomas A.J. McGinn (2004). *A Casebook on Roman Family Law*, Oxford University Press, New York, p. 238.
[12] Ibid.
[13] Nigussie Afesha (2017). "Major Differences between the Revised 'Federal' and the SNNP Regional State Family Codes", *Mizan Law Review*, Vol.11, No. 1, p. 422.
[14] Ibid.
[15] Ibid.

to meet the claimant's own self-support".[16] Reasonable needs are measured not by the poverty level but by the standard of living the claimant has during the filing of the claim. There are many variables considered in maintenance determination which include the parties' standard of living, the parties' respective economic situation, property owned by either party and the age and health of the parties at the time when a claim for maintenance is instituted.

Family law is usually expected to describe persons who are qualified to claim maintenance and against whom the claim could be instituted. The law also ranks persons who are qualified to claim maintenance on the basis of their degree of relationship and sets the requirements that need to be satisfied to petition for maintenance. The issues that are bound to arise include who is entitled to institute maintenance proceedings, the duration of the maintenance order, from whom maintenance can be claimed, and the extent of the obligation of a maintenance debtor, and so on. These issues vary depending upon the types of maintenance claim. It should be noted that the obligation to supply maintenance can be for a temporary (fixed-term) or a long period.

Temporary maintenance can be sought during the divorce proceeding.[17] This can be claimed as soon as a divorce petition is submitted to court until a final hearing is made. It is intended to be an emergency measure to provide financial support for a spouse who is financially weak until a final decision is rendered on the divorce petition. "This is useful if the couple has separated and one individual is not in employment or, if so, has a lower income than is needed."[18] In this case, the claimant's spouse needs to prove neither his/her incapacity to meet it nor the inability by the claimant to meet the claimant's own self-support. Such kind of maintenance order is intended to be a temporary one pending the final dissolution of the divorce process. This means that the maintenance order will not last after a pronouncement of divorce [19]

Unlike temporary maintenance, there is also 'ordinary' maintenance which is claimed and ordered for a long time (occasionally for life). This can be raised if the individual is unable to work and does not have enough income, property, or both to support his/her reasonable subsistence.[20] In this case, the

[16] Rosemary Dalby (2001). 'Essential Family Law', *Cavendish Essential Series*, (2nd ed.), Cavendish Publishing, Australia, p. 67.
[17] Me Rodgers (2004). *Understanding Family Law*, Cavendish limited Publisher, Great Britain, p. 62.
[18] Ibid.
[19] Ibid.
[20] Nigussie, *supra* note 13, p. 422.

law places a legal obligation on the family members (with adequate means) to support the needy until the claimant is financially self-sufficient.

3. Obligation to Supply Maintenance under the Revised Family Code

The RFC recognizes the existence of maintenance obligation among family members and devises the mechanism of how this can be exercised by a claimant.[21] As Wondowossen states, "[t]he obligation to supply maintenance exists between spouses, relatives by affinity and relatives by consanguinity."[22] He also stresses the existence of an obligation to supply maintenance between spouses under certain circumstances. He notes that "[s]uch spousal obligation exists so long as the marriage is not dissolved by divorce, even where the couples are living separately during the divorce proceeding."[23] He indicates the existence of two kinds of maintenance which are recognized in the Revised Family Code. The first one is temporary and the second is "ordinary" maintenance.

3.1 Temporary maintenance under the Revised Family Code

Temporary maintenance claims could be instituted by spouses while the proceeding for divorce has been instituted by either of the spouses. In this regard, Wondowossen argues "[t]he courts are not willing to entertain spousal claims to maintenance from the other spouses while they are living together. It is only where the spouses are living separately pending divorce proceeding that the claim is acceptable."[24] This shows that the issues of temporary maintenance can be raised (by a spouse who is not living in the conjugal home) starting from submission of divorce petition until the court pronounces dissolution of the marriage or until the spouses reconcile thereby enabling the court to close the divorce petition.

One can argue that the claim for temporary maintenance can be requested by the spouse who applies for divorce through petition, and not as a result of petition for divorce submitted to the court by both spouses based on mutual consent. The spouses who have agreed to divorce by mutual consent are

[21] See, Articles 197 and subsequent provisions of the Revised Family Code.
[22] Wondwossen Demissie, (2007). "Implementation Problems of the Revised Family Code", *Berchi* (Ethiopian Women Lawyers Association) Issue 6, 1-52, p .13.
[23] Ibid.
[24] Ibid.

supposed to agree on the issue of maintenance as well.[25] It is also to be noted that the provision that deals with temporary maintenance is found in the section that deals with divorce by petition rather than divorce by mutual consent.[26]

Unlike ordinary maintenance (discussed in section 3.2 below), a claim for temporary maintenance does not need a separate petition. This can be justifiably inferred from the provision of the Revised Family Code that deals with temporary maintenance. The provision of the family code provides: "From the time the divorce petition is brought before it, the court shall forthwith give appropriate order regarding the maintenance of the spouses, the custody and maintenance of their children and the management of their property."[27] It would not be illogical to infer from the same provision that the claim for temporary maintenance is decided by the initiative of the court. The issue of being needy and inability to work are not conditions for temporary maintenance requests. The maintenance should be assessed in the light of the marital standard of living, and the difference in income between the spouses should guide the amount of temporary maintenance.

3.2 'Ordinary' maintenance under the Revised Family Code

Article 198 of the Revised Family Code states the list of persons between whom the obligation to supply maintenance exists. According to this provision, an obligation to supply maintenance exists between ascendants and descendants, (between persons related by blood) in the direct line, and between brothers and sisters in the collateral line.[28] The obligation to supply maintenance likewise exists between persons related by affinity in the direct line.[29] The obligation to supply maintenance between persons related by affinity in the direct line applies where the marriage is intact or if the marriage which created the affinity is dissolved by death.[30] Thus, the obligation to supply maintenance shall not be sustained between relatives by affinity in case the marriage is dissolved through divorce.

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[25] For instance, article 77(1) RFC makes it clear that "Where the spouses have agreed to divorce by mutual consent, such agreement, which shall also regulate the consequences thereof, shall be submitted in writing to the court for approval." Once of the consequences of divorce is maintenance. Hence, spouses who apply to divorce by mutual consent are expected to agree on the amount of temporary maintenance as well.

[26] Article 82(6) of the Revised Family Code.

[27] Article 82(5) of the Revised Family Code.

[28] Article 197 (1) (2) of the Revised Family Code.

[29] Id., Articles, 198 (1) cum 210 1(e & f).

[30] Id., Article 199.

The obligation to supply maintenance includes the means to feed, lodge, clothe, and care for the health and education expenses of the maintenance creditor.[31] The amount the debtor bears should enable the creditor to lead decent life having regard to social conditions and local custom.[32] It should be noted that the amount of a maintenance allowance paid by the debtor to maintain a creditor shall be fixed by taking into consideration the needs of the person claiming it and the means of the person liable thereto.[33] A debtor for maintenance may offer to discharge his obligation depending on the means of his/her income, and s/he may never be compelled to pay maintenance allowance if s/he has not sufficient means of income.

Unlike temporary maintenance, the RFC sets two conditions to claim maintenance and the claimant needs also to show the satisfaction of the requirements.[34] First, the claimant should be in need, and the second requirement is the inability of claimant to earn her/his livelihood by work. According to the RFC, a needy person who is in a state of earning her/his livelihood by her/his work is not eligible to claim maintenance. Similarly, a person who is not needy but is not in a state of earning their livelihood by work is not allowed to claim maintenance. The conditions must be satisfied cumulatively. If a court finds that the requirements are met, then it may make appropriate maintenance order it considers proper.

The amount of a maintenance allowance paid by the debtor shall be fixed by taking into consideration the needs of the person claiming it and the means of the person liable thereto.[35] The debtor for maintenance may never be compelled to pay maintenance allowance if s/he has not sufficient means of income. The debtor for maintenance discharges the obligation depending on the means of income and following the degree of relationship. Article 210 requires the court to follow the hierarchical order listed in the provision.

If the person who is obliged to supply maintenance has the capacity to pay to all creditors, s/he will be liable for all of them. However, if the person against whom the obligation to supply maintenance is brought is incapable to pay for all creditors, s/he will be liable to some of them as per the degree of

[31] Id., Article 197.
[32] Ibid.
[33] Id., Article 202(2).
[34] See Article 201 of the Revised Family Code which deals with conditions for the existence of the obligation to supply maintenance. In the words of such provision, "[t]he obligation to supply maintenance shall not exist unless the person who claims its fulfillment is in need and not in a state of earning his livelihood by his work."
[35] See Article 210 of the Revised Family Code.

relation in the hierarchical order stated in Article 210 of the RFC, i.e., :(a) in the first place for the spouse; (b) in the second place for the descendants, according to their degree; (c) in the third place, the ascendants, according to their degree; (d) in the fourth place, the brothers and sisters; (e) in the fifth place, the descendants by affinity, according to their degree relation; (f) in the sixth place, ascendants by affinity, according to their degree.

The provision that lists persons who are entitled to claim maintenance places the spouse at the top. An issue arises whether the word 'spouse' in Article 210 of the RFC refers to a spouse who lives in matrimony (i.e., the conjugal home), a spouse pending divorce, or an ex-spouse? In this regard, it is argued that "[a]s courts do not welcome petitions relating to spousal maintenance obligations, enforcing similar obligations while the marriage is intact".[36] It is to be noted that spouses have similar obligations to contribute expenses to the household in proportion to their respective means.[37] Thus, the contribution of spouses to their household during the marriage is not in the form of maintenance, but as an act of sharing household expenses in proportion to their respective means. This is also linked with the obligation of spouses to support and assist each other both emotionally and materially.[38]

Yet, the issue of maintenance can be raised during marriage if the couple are living separately due to divorce proceedings. As highlighted earlier, this can involve 'temporary maintenance' until the court's decision on divorce. The question here is, whether an ex-spouse (who is needy and unable to earn livelihood through work) can –after divorce– bring a maintenance request against the former spouse

In this regard, Wondowosen underlines that "[t]he man's obligation to provide maintenance to his ex-wife is not recognized in the RFC".[39] If this is the practice of the courts and common understanding among legal practitioners, the question is, therefore, why does Article 210(a) put spouse at the top in the maintenance claim order? This needs to be examined carefully and thoroughly. This is particularly important for wives who may not have worked for many years and who had been relying upon the husband's contribution. Thus, there is a need to critically analyze what the law intends to convey in this regard.

[36] Wondwossen, *supra* note 22, p. 13.
[37] See Article 72 of the Revised Family Code.
[38] See Article 49 of the Revised Family Code.
[39] Wondwossen, *supra* note 22, p. 13.

4. An Ex-spouse's Right to Claim Maintenance under the RFC

Some argue that Article 210(a) does not refer to ex-spouse. The underlying assumption behind this argument is that if such provision anticipates the maintenance entitlement of an ex-spouse, it will use the term ex-spouses than spouses.[40] However, several provisions in the RFC use the term spouse though it indeed intends to mean ex-spouse.[41] One can read the expression used in Article 9 of the RFC. According to this provision, (1) "[m]arriage between persons related by affinity in the direct line is prohibited. (2) In the collateral line, marriage between a man and the *sister of his wife*, and a woman and the *brother of her husband* is prohibited (emphasis added)." What does '*his wife* or *her husband'* refer to?

This provision does not intend to prohibit the celebration of marriage between a man and the *sister of his wife*, and a woman and the *brother of her husband* whose marriage persists. If this is the intent of the law, this provision would not serve any different purpose. This is because the RFC already prohibits the celebration of marriage between a man and a woman as long as they are bound by bonds of a preceding marriage.[42] Hence, Art 9 of the RFC, refers to the prohibition of marriages between a man and the sister of his ex-wife (where marriage is dissolved due to divorce or death of a spouse), and a woman and the brother of her ex-husband.

Reference can also be made to the provisions that govern the liquidation of property whereby several provisions that intend to refer to ex-spouse use the term spouse. One can read provisions that deal with retaking, discharging of debts, and partition of common property.[43] Indeed, the issue of retaking, discharging of debts, or partition of common property are resolved following a pronouncement of divorce. Once a court pronounces divorce, their status is changed to ex-spouses and they are not considered spouses anymore. However, the Revised Family Code continues to use the term spouse in these cases too instead of ex-spouses.[44] In all these cases, although the RFC uses

[40] This was the central and mainstream argument raised in the training, *supra* note 2.
[41] Article 9 of the Revised Family Code.
[42] Id., Article 11.
[43] Id., Article 83-93.
[44] See article 86- 93 of the RFC. For instance, Art 86 read as follows "(1) Each spouse has the right to retake his personal property in kind where he shows that he is the sole owner thereof. (2) If one of the spouses proves that any of his personal property has been alienated and that the price thereof has fallen in the common property, he has the right to withdraw therefrom, beforehand, money or things of value corresponding to

the term 'spouse', it intends to refer to an ex-spouse. One can thus argue that the mere use of the term spouse under the RFC does not necessarily mean spouses who are still married.

One can also raise the following issues to support the claim that Article 210(a) does not refer to spouses whose marriage is intact. The *first* point, as indicated above, stems from the fact that the spouses owe an obligation to support and assist each other during marriage.[45] This obligation of spouses justifies not only the sharing of the assets acquired in the course of the marriage but also sharing of the economic advantages and disadvantages of the marriage. Thus, the obligation to supply maintenance is not applicable for married couple.

Second, the spouses have equal rights in the management of the family and are obliged to co-operate in all cases to protect the security and interest of the family.[46] The spouses' contributions do not count in the enjoyment of matrimonial property. They have been treated as a family and their financial means are lumped together so long as the spouses are a married couple. The idea that follows is that spouses have automatic equal entitlement in using their common assets. The marriage enables spouses to benefit from higher incomes of either of the spouses.[47] This allows the husband and wife to use and participate in the management of common assets of the family in equal terms irrespective of their contribution in the making of the income. Hence, the issue of maintenance will not arise during the life span of the marriage.

The *third* point relates to Article 62 of the Revised Family Code. It provides:

> 1) All income derived by personal efforts of the spouses and from their common or personal property shall be common property.
> 2) All property acquired by the spouses during marriage by an onerous title shall be common property unless declared personal under Article 58(2) of this Code.
> 3) Unless otherwise stipulated in the act of donation or will, property donated or bequeathed conjointly to the spouses shall be common property.

Spouses shall thus have equal rights in the management of their common income. One cannot give maintenance for the other if they have joint and

such price. (3) Where both spouses have such right-each of them shall take their respective share from the common property in proportion to their contribution.

[45] Article 49 of the Revised Family Code.

[46] Id., Article 50 of the Revised Family Code.

[47] Stark, *supra* note 4, p. 97.

several rights over the income and the property they generate during the marriage. Of course, the RFC allows the spouses to receive and deposit their respective earnings either in a personal or joint bank account.[48] However, the same provision obliges the spouses, at the request of any of a spouse, to render an account of the income s/he has received.

Fourth, Article 72 of the RFC enables one to argue that a spouse will not claim maintenance during the marriage because they have equal entitlements and are obliged to contribute to the household expenses in proportion to their respective means. The expression 'in proportion to their respective means' conveys the message that if one of the spouses has no means of income, such spouse will not contribute for the household expense. This shows that the obligation to supply maintenance is not applicable for married couple.

The aforementioned discussion reveals that spouses will not raise the issue of maintenance while their marriage is intact. Moreover, temporary maintenance ordered by courts in accordance with Article 82(5) and 82(6) of the RFC during divorce proceeding (in favour of a spouse who is not living in the common abode/residence) does not fall under Article 210(a) of the RFC. These points should be clearly addressed by the argument which states that the RFC does not recognize a spouse's obligation to provide maintenance to his/her ex-spouse.

The other essential provision that supports the argument –that Article 210(a) RFC recognizes the obligation of a spouse to provide maintenance to his/her ex-spouse)– is Article 199 of the RFC. It provides "[t]he obligation to supply maintenance shall not subsist between relatives by affinity unless the marriage which created the affinity is dissolved by death." The essence of this provision arises from Articles 198 and 210 and of the RFC. The former provision (Art 198) states the existence of an obligation to supply maintenance between persons related by affinity in the direct line.

On the other hand, Art 210 indicates their place in the maintenance order, which means a person who is obliged to supply maintenance, shall be liable to his relative by affinity in the fifth place (for the descendants by affinity according to their degree) and the sixth place (for ascendants by affinity according to their degree). Article 199 of the RFC in its part indicates the circumstances in which the obligation to supply maintenance between persons related by affinity in the direct line may subsist. According to Article 199 (*cum* with Art 197 and 210), the obligation to supply maintenance exists

[48] Id., Article 64(1) (2).

between persons related by affinity in the direct line if the marriage is intact or dissolved by the death of one of the spouses.[49]

This shows the cessation of the obligation to supply maintenance that exists between spouse and descendants as well as ascendants by affinity if the marriage is dissolved by divorce. Even upon the dissolution of marriage by divorce, the RFC expressly gives an end to such obligation only in the direct line. It does not extinguish the obligation that exists between spouses which is stated on the same provision –Article 210(a). This enables the obligation to supply maintenance that exists between spouses to subsist where the marriage is dissolved by divorce. I thus argue that an ex-spouse can be bound to provide maintenance support to his/her ex-spouse after divorce, and it is arguably unjustified to deprive maintenance support for an ex-spouse who is needy, has no job, and for whom the future is uncertain.

Being needy and incapable to earn means of livelihood on one's own is the justification for an obligation of maintenance support. With regard to duration, the spousal support payments should continue as long as an ex-spouse is needy and unable to generate income subject to the caveat that the maintenance support creditor has the duty to endeavour to become self-sufficient.

5. Conclusion

There is a mutual obligation among family members to maintain one another. The existence of direct relationship by consanguinity or affinity is a requirement to claim maintenance. It should be noted that the degree of relationship has a direct bearing on the entitlement to maintenance support. Being needy and inability to work are a preconditions to claim maintenance.

Maintenance can be for a fixed term or a long period. With regard to spouses, it could be temporary maintenance during a divorce proceeding based on Article 82(5) of the RFC, or ordinary maintenance in accordance with the *purposive interpretation* of Article 210(a) of the Revised Family Code as highlighted under Section 4, above. This comment has in particular focused on the entitlement of an ex-spouse to claim maintenance under the Revised Family Code. The discussion above has provided the arguments that can be raised in this regard. The discussion in the preceding sections indicates that the *purposive interpretation* of Article 210(a) of the Revised Family Code entitles maintenance support for the needy ex-spouse who is not in a position to generate income by work. ■

[49] Id., Article 210 (e) and (f).

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COMMENT

Resolution of Collective Labour Disputes by Labour Relations Board in Ethiopia: Critical Reflections

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Abstract

This comment examines the Legal framework of Collective Labour Disputes (CLD) resolution by the Labour Relation Board (LRB) in Ethiopia. Only two members of the LRB out of seven members (and two alternate members) are from the legal profession. Moreover, there is no provision (under the Labour Proclamation) regarding the selection criteria of other members of the Board. The decision of the Board is taken by majority vote and appeal is permitted only on error relating to legal issues. The establishment of LRB that is empowered to decide on CLDs is indeed an extremely important initiative as the nature of collective labour cases demands collective bargaining and labour law experts. However, legal criteria are not set out under the Proclamation for the selection of members of the LRB; and the majority of LRB members are not legal professionals. There should thus be clear criteria for the selection of members and there is the need to include more legal professionals in the LRB.

Key terms

Labour Relation · Collective Disputes · Labour Board · Disputes Resolution

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Frequently used acronyms:

ALRB	Ad hoc Labour Relations Board
CLDs	Collective Labour Disputes
LRB	Labour Relation Board
LP	Labour Proclamation
PLRB	Permanent Labour Relations Board

Contents

1. Introduction

Labour relation as a contractual relationship between an employee and his /her employer, and it exists when a person performs work or services under certain conditions in return for remuneration. In labour relations, the existence of labour disputes is inevitable due to two different interests. The two apparent interests in labour relation are the interests of employees to get fair wage (and other benefits) and the interests of employers to enhance profit out of their business.

For example, Korea's Trade Union and Labour Relations Adjustment Act, defines 'labour disputes' as "any controversy or difference arising from a disagreement between the trade union and employer or employers' association concerning the determination of terms and conditions of labour relations such as wages, working hours, welfare, dismissal, etc".[1] According to the Labour

[1] Korea Trade Union and Labour Relations Adjustment Act (1997), Section 5. *See* also an Article (2) of Ethiopia's Labour Proclamation No. No. 1156/2019, which defined conditions of work or terms and conditions of work as the entire field of labour relations between workers and employers including hours of work, wage, leave, payments due to

Proclamation No. 1156/2019 labour dispute is defined as "any dispute between a worker and an employer or trade union and employer's association in respect of the application of a law, collective agreement, work rules, employment contract and also any disagreement arising during collective bargaining or in connection with the collective agreement."[2]

As indicated in the International Training Centre of the International Labour Organization, "the causes of labour disputes range from a simple complaint by an individual employee over pay entitlements, to a complaint by a group of employees concerning to a work stoppage by all employees within a workplace claiming they are being prevented from forming a union to further their interests."[3] Labour related disputes (both individual and collective) affect labour relations between workers and employers. Rowley and Harry noted that "although there are many causes of labour disputes, non-payment or delayed payment, job loss and industrial accidents are the three major causes."[4] Resolving labour disputes which affect the labour relationship between an employer and his/her workers efficiently and effectively is for the benefit of all the parties involved in labour relations.

Generally labour disputes are divided into two categories: individual and collective labour disputes. As the term implies, i*ndividual labour disputes* are the "disagreements between a single worker and his or her employer over existing rights, and also includes situations in which several workers disagree with their employer over the same issue, but where each worker acts as an individual."[5] *Collective labour disputes* involve dispute between groups of workers represented by a trade union or sometimes between groups of workers represented by trade unions:

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dismissal, workers health and safety, compensation to victims of employment injury, dismissal because of redundancy, grievance procedure and any other similar matters.

[2] Labour Proclamation No. 1156/2019 (hereinafter Labour Proclamation) 25th Year No. 89, Addis Ababa 5th September 2019, Article 137(3). Although collective labour disputes often result in the interpretation and application of collective agreements, they are also occasionally created at the time of negotiation (collective bargaining) of future entitlements. *See* also Article 125 (2 and 1) of the Proclamation which defines collective bargaining and collective agreements. Moreover, the Collective Bargaining Convention (No. 154), adopted in 1981, defines this concept under Article 2.

[3] International Training Centre of the International Labour Organization, Labour Dispute Systems, Guidelines for improved performance (2013), p.25.

[4] Chris Rowley and Wes Harry, (2011), 'Employee Relations in China', *Managing People Globally*, p.4.

[5] Id, p. 26. The commonality of the causes of disputes or the fact that many workers may disagree with an employer on the same issues does not make the dispute collective labour dispute.

> [C]ollective disputes are related to the process of collective bargaining (interest disputes) or in the application/interpretation of collective agreements (rights disputes) and which arise between employers and groups of workers represented by trade unions.[6]

Therefore, it is obvious that collective labour disputes involve a group of workers or their representatives and one or more employers. For a labour dispute –involving a group of workers– to be a real collective labour dispute involving a group, it must have the same grievance or claim.[7]

The next section of this comment deals with to the nature of CLD. The third section discusses the jurisdiction of LRB in Ethiopia relating to collective disputes, and the justifications for conferring this adjudicative power on the LRB rather than ordinary courts. It also discusses the powers and responsibilities listed under the Labour Proclamation and Labour Relation Board Re-establishment Directive in Ethiopia. The fourth section presents the organization and membership requirements of LRB. Under this section, issues of the composition and operations of LRB under the Labour Law are discussed. The fifth section deals with appeal from the decision of LRB and the power of the labour appellate court followed by conclusion.

2. The Nature of Collective Labour Disputes (CLDs)

Ethiopia's labour law provides minimum working conditions, and the conditions of work are determined through collective bargaining between an employer and workers association or their representatives. According to the Labour Proclamation No. 1156/2019, collective bargaining is defined as "the negotiation process between an employer and his/her workers' association or their representatives to reach the collective agreement or renewal of already exiting collective agreements."[8] The issues involved in collective bargaining include minimum wage, limiting daily/weekly working hours, maintenance of safe and healthy working conditions or compensation for employment

[6] International Labour Office, Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives, High–Level Tripartite Seminar on the Settlement of Labour Disputes through Mediation, Conciliation, Arbitration and Labour Courts in Nicosia, Cyprus from October 18th – 19th, 2007, p.2.

[7] Robert Heron and Caroline Vandenabeel (1999), 'Labour Dispute Resolution: An Introductory Guide,' ILO, p.6. Having the same grievance of claim refers to the issues affecting workers in general like setting new terms of working conditions or amending collective agreements.

[8] Labour Proclamation, *supra* note 2, Article 125(2).

injuries.[9] In terms of minimum working conditions, for instance, an employer, employee, or trade union representative may negotiate and agree upon the terms of their labour relations, provided that the terms of the agreement cannot be lower than the legally required minimum standards.

In the bargaining process, agreement on all issues may not be expected. There might be disagreement on certain matters, and this is the first aspect of collective labour disputes known as *interest-based collective labour disputes.* After the bargaining, the agreement reached is called collective agreement which encompasses issues such as conditions of work, work rules and grievance procedures.[10] Once the collective agreement is concluded between the parties, rights of parties are created and the next step is interpretation and the implementation of the agreed terms. However, disputes may arise in the course of interpretation, and this scenario indicates the second aspect of CLD known as *rights-based disputes*. The CLD classification as interest-based and rights-based refers to its basic features

2.1 CLDs that emanate in the negotiation process of new entitlements

While trying to create new entitlements or rights through negotiation, labour disputes may occur between an employer and workers associations or their representatives. New entitlements or rights refer to new privileges that parties may have during their labour relations. According to the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), "disputes which arise in the course of collective bargaining over terms and conditions of employment are disputes over interests."[11]

Interest-based collective labour disputes are the disagreements between the negotiating parties over the determination of terms and conditions of work to be included in their collective agreement. As Foley & Cronin noted, "In essence, the interest-based labour disputes are negotiable and often compromisable or at least subject to design and customisation by the parties

[9] Id., Article 53, 61, 92 and 101 respectively.

[10] Id., Article 130 (4). The other sub-articles deal with subject matters of the collective agreement including conditions for maintenance of occupational safety and health and the manner of improving social services, workers' participation, particularly, in matters about promotion, wages, transfer, reduction and discipline, apportionment of working hours and interval break times, parties covered by the collective agreement and its duration of validity, and the establishment and working system of bipartite social dialogue.

[11] Committee of Experts on the Application of Conventions and Recommendations (CEACR), Collective bargaining in the public service: A way forward – General Survey concerning labour relations and collective bargaining in the public service (ILO, Geneva, 2013).

to the disagreement."[12] Interest-based CLDs may include the party's disagreement over the future payment rates or disagreement on the newly proposed working arrangements.

2.2 CLDs that arise during the interpretation and application of Collective Agreements

As indicated earlier, collective labour disputes over rights may arise in the process of interpretation and application of existing collective agreements if one of the parties invokes the violation of rights or non-performance by the other party. This necessitates decision by an independent court or tribunal. According to Foley and Cronin, "rights-based CLDs include non-payment of wages, unilateral modification of working hours, non-observance of agreed rates of pay or holidays, anti-union practices or any of the broad range of existing rights and obligations set out in applicable collective agreements which have the force of law."[13]

2.3 CLD under the Ethiopia's labour law

Labour Proclamation No. 1156/2019 does not expressly categorize the collective labour disputes into interest and rights-based. However, the contextual reading of the list of collective labour disputes under Article 143 may help one to observe that both collective labour disputes –over *interest* and *rights*– are recognized. For instance, according to the Proclamation "disputes related to the issues of wages and other benefits which are not determined by work rules or collective agreements are classified as CLDs."[14] As discussed above, disputes related to the creation of new entitlements or on issues that are not regulated by a collective agreement are *interest-based* CLD. Moreover, the Proclamation states that the dispute concerning the establishment of new conditions of work is considered as CLD.[15] The phrase 'establishment of new conditions of work' clearly implies the case of *interest-based* CLD.

With regard to rights-based collective labour disputes, Article 143(1)(c) and 143(1)(d) of the Proclamation provide that "disputes arising from the conclusion, amendment, invalidation of collective agreements and the interpretation of any provisions of this Proclamation, or work rules are CLDs." Moreover, disputes connected with "procedure of employment and

[12] Kevin Foley and Maedhbh Cronin (2015), 'Professional Conciliation in Collective Labour Disputes, a Practical Guide,' International Labour Organization, p. 12.
[13] Ibid.
[14] Labour Proclamation, *supra* note 2, Article 143 (1) (a).
[15] Id., Article 143 (1) (b).

promotion of workers, issues affecting workers in general and the very existence of the undertaking, suits related to procedures issued by the employer regarding promotion, transfer and training and issues on reduction of workers are CLDs."[16] This demonstrates that the scope of the Proclamation is broad and includes issues that may not be even designated into interest and rights-based classification of CLDs.

3. The Jurisdiction of Labour Relation Board in Ethiopia

The Labour Proclamation No. 1156/2019 classifies labour disputes into individual and collective labour disputes, and it entrusts different organs with the jurisdiction of dispute settlement. The labour division of a Federal and Regional First Instance Court shall have jurisdiction to settle and determine individual labour disputes[17] whereas the Labour Relation Board (LRB) has the jurisdiction to hear and decide on collective labour disputes.[18] The LRB that is established to hear and decide on CLD may be Permanent or Ad hoc[19] with different jurisdictions. The Permanent Labour Relation Board (PLRB) is empowered to see and entertain issues related to:

> the establishment of new conditions of work, the conclusion, amendment, duration and invalidation of collective agreements, the interpretation of any provisions of this Proclamation, collective agreements or work rules, the procedure of employment and promotion of workers; issues affecting workers in general and the very existence of the Undertaking, suits related to procedures issued by the employer regarding promotion, transfer and training and issues on reduction of workers.[20]

The Ad hoc Labour Relation Board (ALRB) is given the power to hear collective labour cases related to issues of wages and other benefits which are

[16] Id., Article 143 (1) (e-h).

[17] Id., Article 139(1). Individual labour disputes include issues related to disciplinary measures including dismissal, claims related to the termination of employment contracts or hours of work, remuneration, leaves and rest day, issuance of a certificate of service and clearance and claims about employment injury, transfer, promotion, training and other similar issues. Besides the listing of individual labour disputes, the provision identifies the courts having first instance as well as appellate jurisdiction over the individual labour cases. Accordingly, individual labour cases can be brought to the regional or federal first instance court and appeal can be lodged in the appellate jurisdictions of each court.

[18] Id, Article 143(3) (a-h).

[19] Id., Article 145 (1) and (2).

[20] Id., Article 143 (3) (b-h).

not determined by work rules or collective agreements[21] and connected to essential public service undertakings such as electric power, air transport, water supply, sanitation services, telecommunication services etc.[22]

3.1 Rationale of LRB to decide on CLD

The experience of other countries like Finland and Belgium shows entrusting separate labour courts with the jurisdiction over labour disputes[23] while Ethiopia has a labour division system within the ordinary court structure to entertain individual labour disputes.[24] The reasons for the establishment of a separate labour court in other jurisdictions include the slow process of ordinary courts of law in deciding cases and the need for expertise to settle disputes arising out of collective agreements.[25]

Although there is no separate labour court system designed to entertain labour disputes in Ethiopia, collective labour disputes are adjudicated by a separate organ: the Labour Relations Board (LRB). Similar practices can also be observed from the experience of other countries. For instance, in a judgement of the Supreme Court of Japan it is stated that it is difficult to define appropriate remedies in advance for unfair labour practices, which can take different forms in each case.[26] The Court also indicated that the Labour Relation Commissions (LRCs) are the most capable bodies to provide the appropriate remedy since its members have expertise regarding collective labour relations.[27]

Yet, the parties of CLDs are advised to exhaust amicable dispute resolution mechanisms, particularly through conciliation and arbitration. A close reading of Article 142 of the Labour Proclamation indicates that, when CLD comes to the attention of the Ministry or another appropriate organ, *it shall assign a conciliator* to negotiate the settlement of disputes. It is however to be noted that according to Article 144 of the Labour Proclamation, going through arbitration mechanisms is optional (and not mandatory) as it can be observed

[21] Id., Article 143 (1) (a).
[22] Id., Article 137(2) *cum* Article 143 (3)
[23] Bert Essenberg (Ed) (1986), Labour Courts in Europe in Proceedings of a Meeting Organised by the International Institute for Labour Studies, International Institute for Labour Studies), p.7.
[24] Labour Proclamation *supra* note 2, Article 139(1).
[25] Ibid.
[26] Daini Hato Taxi case (Sup. Ct., Grand Bench, Feb. 23, 1977), 31 Saiko Saibansho Minji [Collected judgments in civil cases by the Supreme Court] 93, 96, as cited in (Ryuichi Yamakawa, The Law of the Labour Relations Commission: Some Aspects of Japan's Unfair Labor Practice Law, (Japan Labor Review, Vol. 12, No. 4, Autumn 2015), p.2.
[27] Ibid.

from the phrase which reads: 'parties to a dispute may agree to submit their case to arbitrators or conciliators, of their own choice for settlement by the appropriate law.'

3.2 The powers and responsibilities of LRB

The powers of LRB to see and decide on CLD cases are stipulated in the Labour Relation Board Re-establishment Directive, which is issued by the Ministry of Labour and Social Affairs. According to this Directive, amending or modifying the existing labour relation laws, regulations and directives as well as enacting new ones are among the powers and responsibilities of the LRB.[28] Only two among the LRB members are from the legal profession. And this may negatively affect the functions of amending, modifying and enacting new labour relations directives. Apart from listing the power of LRB in general, the LRB Re-establishment Directive does not embody provisions relating to permanent and ad-hoc divisions.

Unlike the LRB Re-establishment Directive, the Proclamation separately regulates the powers of the Permanent Labour Relations Board (PLRB) and the Ad hoc Labour Relations Board (ALRB). The power of PLRB is broader than that of ALRB because as per Article 143(1)(a) of the Proclamation, ALRB has the power only to entertain labour disputes over wages and other benefits not addressed by the collective agreements or work rules. The PLRB has the powers to entertain collective labour disputes listed in Sub-article (1) (b-h) of Article 143. According to Sub-article 3 of Article 143, in case parties at dispute fail to reach an agreement through conciliation, one of the parties can submit the case to LRB and the Board has the power to entertain and decide such cases.

In principle, workers shall have the legal right to strike to protect their interests; and employers shall have the right to lockout following necessary legal requirements.[29] However, a strike or lock-out shall be unlawful and prohibited if it is initiated after a dispute has been referred to a Board and if 30 days have not yet elapsed before any order or decision is given by the Board.[30] Once the case is submitted to the PLRB, the Board has the power to:

> [r]equire any person or organization to submit information and documents required by it for the carrying out of its duties, to

[28] Federal Democratic Republic of Ethiopia (FDRE) Labour Relation Board Re-establishment Directive No. 180/2013 EC, Article 5(a), issued on Tikimt 17, 1997 EC (October 27, 2004) and registered at the Ministry of Justice (Legal Drafting, Study and Consolidation Directorate General/ LDSCDG) in 2013 EC.

[29] Labour Proclamation, *supra* note 2, Article 158(1) and (2).

[30] Id., article 161(1).

> require parties and witnesses to appear at its hearings, to administer oaths or take affirmations of persons appearing before it and examine any such persons after such an oath or affirmation, to enter the premises of any working place or undertaking during working hours to obtain relevant information, hear witnesses or to require the submission of documents or other articles for inspection from any person in the premises.[31]

The other power of a Permanent or an Ad hoc Labour Relation Board is the power to adopt their own rules of evidence and procedure. The Proclamation has allowed the LRBs to deviate from rules of evidence and procedure. Permanent and Adhoc Labour Relation Boards may devise their own rules of evidence and procedure; and where they do not have their own rules of evidence and procedure, the provisions of the Civil Procedure Code shall apply.[32] In this regard, Article 150 provides that a Permanent or an Adhoc Board shall not be bound by the rules of evidence and procedure applicable to Courts of law and it may apply any method as it thinks fit.[33] This is meant to provide a broader procedural spectrum to the Board so that it can resolve labour disputes.

4. Organization and Membership Requirements of LRB

4.1 Organization of LRB

As mentioned above, PLRB and ALRB were established at the federal and regional levels to handle CLDs within their respective jurisdictions.[34] However, the Proclamation does not clearly indicate the working relationship between the two levels of Boards and the level of authority in the relationship between them. It also lacks clarity whether each board at the federal and regional level is independent.

Where the assigned conciliator fails to settle disputes amicably within 30 days or if a party is aggrieved by the decision of the arbitration, the case may be brought to the Board or the appropriate court, as the case may be.[35] It is to be noted that the right to appeal can be exercised only after the decisions of PLRB or ALRB.[36]

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[31] Id., Article 148(1) (d-g)
[32] Id., Article 149.
[33] Id., Article 150(5).
[34] Id., Articles 145(1) and (2).
[35] Id., Article 144(2).
[36] Id., Article 140(1) (g).

4.2 The composition of LRB under the Ethiopia labour law

With regard to the composition of the LRB, the Labour Proclamation provides:

> Permanent or Ad hoc Labour Relation Board appointed by the Ministry or appropriate authority shall comprise of a chairperson, two members who have the knowledge and skill on labour matters, four members out of which two represent trade unions and two represent employers' associations, and two alternate members one from each association.[37]

Accordingly, two members who have knowledge and skill on labour matters are the members of the LRB, and it can be inferred that these two members have expertise on labour law. This provision does not require the remaining members to be legal professionals. It is again clear that two members are from trade unions and two members are representatives of employers' associations. There are also two alternative members of the LRB (i.e., one from trade unions and one from employers' association).

The involvement of representatives of trade unions and employers associations is indeed appropriate because it allows stakeholders to participate in the dispute resolution process. The issue that can be raised is whether the selection of the two alternative members in LRB is based on knowledge, skills and their experience in collective disputes settlement. In particular, the fact that only two professionals are selected based on their knowledge and skills on labour matters out of seven members plus two alternate members of the LRB, evokes the question whether mere majority votes under such settings can be conducive to fair, reasoned and law-based decision on collective labour disputes.

It is to be noted that the criteria for the selection of the chairperson, the general professional or experience profile of the four representatives from trade unions and employers' association and the two alternative members of the LRB are not expressly stated in the Proclamation. It merely provides that members and alternative members serve on a part-time basis without remuneration and are appointed for the term of three years.[38]

[37] Id., Article 146 sub-article 1.
[38] Id., Article 146 (4) and (5).

4.3 LRB membership requirements and independence in other jurisdictions

In Alberta (a province located in western Canada). "LRB members are recruited through the competency-based process as the Chair and Vice-Chairs are required to have a law degree or related degree, combined with an extensive labour relations background."[39] With regard to other members of the LRB, they must be experienced labour relation professionals who are active in the labour relations community and have knowledge about Alberta's labour legislation.[40] In the United State of America, almost all members of the National Labour Relations Board are legal professionals such as Judges of Administrative Law, Attorneys and other Legal Assistants.[41] Contrary to such clarity, Ethiopia's Labour Proclamation is silent regarding the criteria for selection or with regard to the required competence of LRB members.

The other issue that needs attention relates to whether there could have been membership in the LRB in addition to the stakeholders that are represented (i.e. trade unions and employers' association). For example, according to the Labour Union Act of Japan, "Labour Relations Commission shall be composed of equal numbers of persons representing employers, persons representing workers and persons representing the public interest."[42] However, according to Yamakawa "only members representing public interests can participate in deciding unfair labour practice cases and members representing labour and management can only participate in hearings and submit their opinions."[43]

Selecting four members (i.e., two from trade unions and two from employers' associations) is aimed at representing the interest of parties in labour relations. In Ethiopia, though trade union representatives or employers' associations can protect the interest of stakeholders that they represent, there are no members who are assigned to represent public interest. The Labour Proclamation is silent in this regard. The Proclamation requires the presence of at least one trade unions representative and employers' association in all

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[39] Alberta Labour Relation Board, Available at: http://www.alrb.gov.ab.ca. accessed on January 03, 2022.

[40] Id.

[41] United States of America National Labour Relations Act (1935), Section 3, Article 153 (d). Available at: https://www.archives.gov/milestone-documents/national-labor-relations-act. Accessed on 12 July, 2022.

[42] Japan Labour Relation Act No. 174 of June 1, 1949, Section 1, Article 19.

[43] Ryuichi Yamakawa, (2015), 'The Law of the Labour Relations Commission: Some Aspects of Japan's Unfair Labor Practice Law' *Japan Labor Review*, Vol. 12, No. 4, p. 2.

meetings of the Board. One can argue that, allowing them to decide on their case is antagonistic to the principle of *Nemo judex in causa sua.*[44]

Such caution is indeed required to ensure the independence of the LRB and the credibility of its decisions. Ethiopian Labour law is silent about the institutional independence of LRB, and the Labour Proclamation does not assert the independence of LRB. In South Africa, for example, the Labour Relations Amendment Act states that "the Labour Dispute Resolution Commission is independent of the State, any political party, trade union, employer, employers' organisation, a federation of trade unions or federation of employers' organisations."[45]

4.4 Meeting procedures of board members under the Labour Proclamation

Critically Examining Article 147 of Labour Proclamation No. 1156/2019 reveals its inclination towards the delivery of decisions over CLD rather than due concern for the quality of reasoning and fairness of decisions. Article 147(1) provides that "in the case where the Chairperson is absent in meeting, the person designated by him may act in his place and when there is no any designated member, the member of the Board who is senior in terms of his service shall act as a Chairperson." Article 147(2) stipulates that if a member is absent at any meeting, "the Chairperson may designate an alternate member to replace the absentee in the designated meeting." Therefore, the absence of the Chairperson or other members in the meeting of the Board cannot be a reason for adjournment or delay of decision.

With regard to quorum, Article 147(4) states that "the presence of four members shall constitute a quorum at any meeting, provided, however, that a minimum of one member representing the workers' side and another member representing the employers' side shall be present." This shows that the computation of the quorum takes the *seven* members of the LRB (other than the alternate members) into account.

4.5 Rules of evidence, procedures, hearing and decisions

According to the Article 149 of the Proclamation, a Permanent or an Ad hoc Board may adopt its own rules of evidence and procedure and in the absence of that procedure, the provisions of the Civil Procedure Code shall apply.

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[44] The Principle of '*Nemo judex in causa sua a dictum*' ("no one should be a judge in his/her own cause") is widely considered a pre-requisite to a reliable, trustworthy judicial system.

[45] The Republic of South Africa, Department of Labour, Labour Relations Amendment Act, No 12 of 2002, Article 113.

Moreover, Article 150(5) of the Labour Proclamation provides that a Permanent or an Ad hoc Board shall not be bound by the applicable to Courts of law and may apply any method as it thinks fit. Such flexibility in procedures can indeed facilitate the operational efficiency of the LRB.

With regard to hearing, the Labour Proclamation provides that "after receiving the case, the Board shall summon the parties concerned and provide them the opportunity to be heard and if any of the parties or any other person properly summoned fails to appear at the time and place, the Board may proceed with the hearing."[46] If the failure to appear was not attributable to the person concerned, the Board shall grant that person another opportunity to appear before it.[47]

After the verification of the parties' appearance the Board entertains the merit of the case in detail. In this regard, "the Board shall exert all possible effort to settle the disputes before it amicably, and to this end, it shall employ and make use of all conciliatory means as it deems appropriate."[48] As mentioned earlier, parties before bringing their cases to the attention of the Board may try to solve their disputes through a conciliator or arbitrator, which is advised even if it is not mandatory.

Although dispute resolution through conciliation is preferred, Article 148(1)(a) states the power of the LRB to entertain collective labour disputes and *conciliate the parties, issue orders and render decisions.* This shows that the LRB can go beyond amicable settlement and conciliatory means because it can give remedial orders and render merits-based decisions. In order to give such decisions, "the PLRB or ALRB shall take into account *the main merits of the case* (emphasis added), and need not follow strictly the principles of substantive law followed by Civil Courts."[49]

There is the need for caveat regarding the interpretation of the words "merits of the case" and "strict adherence to principles of substantive law." 'Merits of the case' are the essential issues or the main question which is at issue in an action or it is the substantive right presented by action or the strict legal rights of the parties to an action.[50] Hence, the merits of the case submitted to the Board may include the violation or otherwise of substantive rights determined and defined under substantive law. On the one hand, the

[46] Labour Proclamation, *supra* note 2, Article 150(1) and (2).
[47] Id.
[48] Id., Article 151(1).
[49] Id., Article 151(3).
[50] Merits of Case law and Legal Definition. Available at: https://definitions.uslegal.com/m/merits-of-case/. Accessed on 01 January 2022.

Proclamation requires the merits of the case to be taken into account, and on the other hand it states that LRB members need not strictly follow the principles of substantive law followed by Civil Courts. This lacks clarity because decision on the merits of the case inevitably necessitates due attention to substantive laws that embody substantive rights and duties of the parties in dispute.

The "decision of the LRB entertaining CLDs shall be taken by a majority vote of the members present."[51] As indicated above, only two members are required to have the legal knowledge and skill, and the quality of the decision can be questioned under the context that the minimum quorum is only four members.

The same concern applies to other powers of the LRB. According to Labour Relation Board Re-establishment Directive, the Board has the power to forward necessary ideas with regard to the amending or modifying the existing labour relation Laws, Regulations and Directives as well as enacting new ones.[52] These tasks apparently necessitate knowledge and skills in labour law.

According to Article 153 of the Labour Proclamation, any decision of a Permanent or an Ad hoc Board shall have an immediate effect.[53] The phrase 'immediate effect' indicates the timely execution of the decision of the Board. It is, however, to be noted that "where the decision of a Permanent or an Ad hoc Board relates to working conditions, *it shall be considered as the terms of the contract of employment between the employer and the worker*, to whom it applies, and the contract shall be adjusted accordingly" (emphasis added).[54] As stated earlier, the condition of work means the entire field of labour relations between workers and employers including hours of work, wage, leave, effects of dismissal, health and safety measures and any other similar matters. Thus, the decision of the Board concerning the conditions of work listed above and other similar matters are immediately considered as binding terms that are agreed upon by the parties.

[51] Labour Proclamation, *supra* note 2, Article 147(4) and (5).
[52] Relation Board Re-establishment Directive, *supra* note 28, Article 5 (a).
[53] Labour Proclamation, *supra* note 2, Article 153 (1).
[54] Id., Article 153 (2).

5. Appeal from the Decision of LRB and the Power of Labour Appellate Court

Unlike the experience of other countries like Japan, where the Labour Relation Commission decision on unfair labour practice can be reviewed by District Courts,[55] there is no judicial review system in Ethiopia on the decision of the LRB except for appeal on error of law. According to Article 155(1) of the Labour Proclamation, "in any labour dispute, an appeal may be taken to the High Court by an aggrieved party on questions of law, within 30 days after the decision has been served to the parties."[56]

As indicated above, many of the members of the LRB are not legal professionals; and the criteria for their appointment are not expressly mentioned. Yet, these members are legally allowed to adopt their own rules of evidence and procedure in rendering decisions. Moreover, they need not strictly follow the principles of the civil procedure law applied in civil courts. I argue that it seems inappropriate to restrict the scope of appeal from decisions rendered by the LRB under such settings,

With regard to error of law (Art. 155/1), the appellate court after evaluating the decision of the LRB, can affirm, reverse or modify the decision of the Board.[57] This requires due attention to the bench that handles the file of appeal thereby necessitating specialized labour law benches (referred to as labour divisions under Article 138(1) rather that reference of the case to ordinary benches irrespective of specialization.

6. Conclusion

The comment has critically investigated the legal frameworks for the resolution of collective labour disputes (CLDs) by LRB in Ethiopia. Even though the Proclamation does not expressly identify collective labour disputes from individual labour disputes, we can refer to Article 139 of the Proclamation that lists down individual labour disputes that are adjudicated by the Labour Division of the First Instance Court. Reference can be made to Article 148(1(a) that states the power of the Permanent LRB to "to entertain collective labour disputes except those in sub-article (1)(a) of Article 143", and Article 148(2) states the power of the Ad Hoc LRB. In both cases, the relative complexity of collective labour disputes require the involvement of

[55] Yamakawa, *supra* note 43.
[56] Labour Proclamation, *supra* note 2, Article 155(1).
[57] Id, Article 155(2).

expertise or legal professionals of labour relations or those who have extensive experience on labour matters.

As discussed in the preceding sections, there is the need for clear criteria for the selection of LRB members. Unlike the experience of various countries, Ethiopia's Labour Proclamation requires knowledge and skills on labour matters for only two members out of the seven members of the LRB (plus two alternate members). Moreover, there are various gaps highlighted above such as inadequate scope of judicial review, lack of express statement regarding the independence of the LRB, and inadequate clarity with regard to the power of the LRB to deviate from the principles of substantive law in rendering decisions. These problems thus necessitate addressing the gaps through express details in the Proclamation. ■

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MIZAN LAW REVIEW

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Cultural Problems in Research and Publications

Source:
Reform Document on Legal Education and Training in Ethiopia (2006) § 2.4.1/A

1. [R]esearch, reading, and writing culture
   - Complacence with our work merely as teachers.
   - [The need for] sense of urgency ... to engage in research and turn up research products.
   - [The need for] '*publish or perish*' attitude.
   - [Working] beyond the positive laws.
2. [I]nstitutional Commitment
   - In terms of budget, time, and resource allocation for R&P
   - In terms of reduction of teaching load or granting (Research Leave).
3. [T]eam spirit for Research and Publications
   - Among staff members;
   - Between staff and students;
   - [The need for] collaboration among institutions.
4. [I]nnovation in diversification of publications, and problems regarding spheres of focus in research.
5. Raising the stakes too high in assessing the quality of publishable manuscripts (despite) shortage of (such) manuscripts.
6. [T]radition of salvaging "distressed" manuscripts through sympathetic editing without compromising quality.
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8. Inadequate attention to relevance of research to the real life or actual problems of the society.

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