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Business and Human Rights in Ethiopia: The Status of the Law and the Practice

Bantayehu Demlie Gezahegn ♣

Abstract

Business activities in Ethiopia by both multinational and national companies are under growing scrutiny. Ongoing court cases in Kenya against Meta (formerly Facebook) for allegedly helping fuel the two-year deadly conflict in northern Ethiopia, increased reports of alleged poor labour conditions in apparel factories in industrial parks, and allegations of land grabbing by commercial agribusiness are some examples. The existing research and practice approaches the issue of private sector accountability predominantly from corporate social responsibility (CSR) perspective. The CSR landscape itself is regulated in a fragmented manner. In contexts lacking well-developed CSR frameworks, a growing body of research examines the promise of a newly evolving Business and Human Rights (BHR) paradigm. To date, there is a dearth of scholarly and policy discussion employing the term 'business and human rights' in Ethiopia, attesting the status of the field in academic and public discourse. This article presents a modest attempt at exploring the status of business and human rights law and practice in Ethiopia. By analysing relevant laws and reviewing selected practical cases, the article identifies salient issues, opportunities, and challenges toward developing and enforcing business and human rights standards.

Key terms:

Business and human rights · Corporate social responsibility · Ethiopia · Soft law · Due diligence

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1. Introduction

Ethiopia is on a path to continued economic liberalization. Advancing economic and social development is one of the objectives of the Ethiopian State.[1] Attracting foreign direct investment (FDI), creating a vibrant private sector that generates jobs and other opportunities to the country's youthful population, integrating the economy to the global market are high on the national agenda. Meanwhile, in Ethiopia and elsewhere, expectations are growing for business and economic interests to be balanced with other social interests such as the environment and human rights. These expectations are generally framed in terms of *corporate social responsibility* (CSR). There are also related paradigms such as *environmental, social, and corporate governance*, otherwise known as environmental, social, and governance (*ESG*).

In Ethiopia, the dominant discourse is CSR. The relevant literature shows that the development of CSR is at "an infancy stage" and that CSR is largely

Frequently used acronyms:

BHR	Business and human rights
CSR	Corporate social responsibility
UNGPs	United Nations Guiding Principles on Business and Human Rights
UN	United Nations
AU	African Union

[1] Constitution of the Federal Democratic Republic of Ethiopia (1994) [FDRE Constitution], Preamble, Para 1.

"unregulated" or "under regulated."[2] Others argue that the CSR practice manifests priorities different from the global trend.[3] Observations further indicate a tendency to "synonymize CSR with philanthropy,"[4] which fails to view business activity in the broader environmental and social context.[5] Related to this is thus another tendency to view CSR as a tool for brand management –which in turn feeds to the profitability mindset– rather than viewing CSR as an act of responsibility.[6] Finally, yet importantly, there is a lack of comprehensive legal and policy framework on CSR. Ethiopia does not have a self-contained legislation or policy on CSR. The existing legal scholarship that explores the potential of existing laws observes that such laws in general govern CSR impliedly or incidentally.[7]

In the past decade, a discourse on *business and human rights* (BHR) is emerging, from and/or alongside the CSR framework. This article attempts to assess the status of BHR law and practice in Ethiopia. In contexts with fragmented CSR landscape, BHR could help consolidate the regulatory framework. This is because human rights are moral claims that are supposed to be "binding and pre-existing, whether or not they are protected by States or respected by businesses."[8] Another important justification is that BHR aims to govern the activities of transnational companies, which may at times be

[2] Tasew Abitew (2021). "Approaches to Regulating Corporate Social Responsibility in Ethiopia: The Case of Manufacturing Companies" (LL.M. thesis, Addis Ababa University).

[3] Sumeyye Kusakci and Ibrahim Bushera (2023). "Corporate social responsibility pyramid in Ethiopia: A mixed study on approaches and practices," *International Journal of Business Ecosystem & Strategy,* Vol. 5 No. 1, pp. 37-48.

[4] Tasew Abitew, *supra* note *2*.

[5] Berihu Gereziher and Yohannes Shiferaw (2020). "Corporate Social Responsibility Practice of Multinational Companies in Ethiopia: A Case Study of Heineken Brewery S.C," *British Journal of Arts and Humanities* Vol. 2 No. 2, pp. 36-55.

[6] Dakito Alemu Kesto (2017). "Corporate Social Responsibility Practices and Stakeholders' Awareness: Case of Ethiopia," *Global Journal of Management and Business Research: D Accounting and Auditing,* Vol. 17, No. 1 (1).

[7] See for example, Bereket Alemayehu Hagos (2022), "Legal Aspects of Corporate Social Responsibility in Ethiopia: A Sustainable Development Perspective," *The Journal of Sustainable Development Law and Policy*, Vol. 13 No. 2.
See also Alemayehu Yismaw Demamu (2020), "Towards Effective Models and Enforcement of Corporate Social Responsibility in Ethiopia," *Mizan Law Review,* Vol. 14 No. 2, pp. 276-309.

[8] Judith Schrempf-Stirling, Harry J. Van Buren, and Florian Wettstein (2022). "Human Rights: A Promising Perspective for Business & Society," *Business and Society,* Vol. 61 No. 5, p. 14.

beyond the ambit of domestic laws or the regulation capacity of the State.[9] This applies equally to multinational companies of Ethiopian origin, which would come under increased expectations based on BHR norms elsewhere with Ethiopia's integration to the global economy.

The following section discusses CSR and BHR in comparison to each other. Section 3 deals with the evolution of the international BHR framework. Given its potential applicability in the Ethiopian context, the fourth section discusses BHR developments in Africa. Sections 5 and 6 examine the BHR law in Ethiopia followed by the seventh section that highlights the practice. Section 8 identifies salient issues, opportunities, and challenges.

2. Business and Human Rights *vs*. Corporate Social Responsibility

BHR is a relatively new field.[10] At the center of this new field's discourse is how businesses in general and multinational companies in particular can be held responsible (and/or can take responsibility) for the impact of their activities on human rights. The traditional discourse on human rights is centered on the idea of the State. In a nutshell, it is the State that has the obligation to *respect* human rights, *protect* human rights (from being violated by third parties such as companies or other non-State actors), to *fulfill* and *promote* human rights. Human rights are thus claims against the State. According to the traditional discourse, if companies impact human rights, it is the State that is responsible for failing to protect the victims from their rights being violated by third parties.

Based on unfolding realities, BHR is seeking to redefine this traditional understanding of human rights by asking the question: Can companies – especially multinational corporations (some more powerful than some States)– be directly held responsible for human rights violations? That is not to negate the primary obligation of the State to protect –but to concurrently hold companies responsible for the violations. One may envisage it as a framework of "allocation of tasks" between States and companies, in the words of Oyeniyi Abe and Damilola S. Olawuyi.[11] With this overall mission

[9] Mizanie Abate Tadesse (2016). "Transnational Corporate Liability for Human Rights Abuses: A Cursory Review of the Ethiopian Legal Framework," *Mekelle University Law Journal,* Vol. 4, p. 34.

[10] Surya Deva (2022). "Treaty tantrums: Past, present and future of a business and human rights treat," *Netherlands Quarterly of Human Rights*, Vol. 40(3), p. 211.

[11] Oyeniyi Abe and Damilola S. Olawuyi, "Introduction – Business, human rights, and the United Nations Guiding Principles: The search for good-fit approaches in Africa,"

of ensuring *responsible* business activity, BHR shares "common foundations" with CSR.[12] Judith Schrempf-Stirling, Harry J. Van Buren, and Florian Wettstein analyzed BHR and CSR as tools for the 'social control of business'[13] –i.e. "in terms of why and how society makes business act responsibly and channels business behaviors toward socially desirable ends."[14]

In spite of overlaps, BHR and CSR do have important differences too. Firstly, BHR is a new discourse compared to CSR.[15] Responsibility of businesses towards society has for long been addressed through the CSR framework. BHR was born as an outgrowth of CSR –in particular as a reaction to the "perceived failure" of CSR in regulating the behavior of multinational corporations.[16]

Secondly, CSR encourages businesses to "do good" while BHR requires them to do "no harm."[17] As such, CSR is an inherently voluntary approach (through internal self-regulation of businesses), while BHR could entail regulation by the State through a mix of incentives and disincentives (such as binding laws and non-binding guidelines). As a result, BHR takes CSR "out of the private, voluntary sphere into the public sphere," as Schrempf-Stirling *et al* rightly put it.[18] Thirdly, corollary to the second key difference is how BHR and CSR view the contribution of businesses to human rights. While CSR highlights the "positive" role of businesses in "fulfilling rights" (such as by creating jobs), BHR focuses on how businesses should "respect" rights by not doing harm.[19]

Overall, while some observe increasing "divergence"[20] between BHR and CSR, others underline the "significant promise" of human rights for CSR.[21]

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in Damilola S. Olawuyi and Oyeniyi Abe (eds.), *Business and Human Rights Law and Practice in Africa* (Edward Elgar Publishing, 2022), p. 11.

[12] Judith Schrempf-Stirling, Harry J. Van Buren, and Florian Wettstein, *supra* note 8.

[13] Ibid.

[14] Ibid.

[15] Nojeem Amodu (2021). "Business and human rights versus corporate social responsibility: Integration for victim remedies," *African Human Rights Law Journal*, Vol. 21 No. 2, p. 855

[16] Anita Ramasastry (2015). "Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability," *Journal of Human Rights,* Vol. 14.

[17] Judith Schrempf-Stirling, Harry J. Van Buren, and Florian Wettstein, *supra* note *8.*

[18] Id., p.16.

[19] Anita Ramasastry, *supra* note 16, p. 250.

[20] Ibid.

[21] Judith Schrempf-Stirling, Harry J. Van Buren, and Florian Wettstein, *supra* note *8*.

This article can be seen as a further examination of the potential to bridge between BHR and CSR as it seeks to search for a comprehensive BHR framework that builds on existing CSR practices in Ethiopia.

3. International Business and Human Rights Framework

The global BHR framework currently encompasses the UN Global Compact (2000) and the UN Guiding Principles on Business and Human Rights (2011). Both instruments are non-binding. With no agreement yet reached in ongoing negotiations for a binding instrument, the system is still based on voluntary commitment by businesses.

The UN Global Compact is a voluntary membership scheme encouraging businesses to follow a set of 10 principles in the areas of human rights, labor, environment, and anti-corruption. The principles are compiled from norms already set out in relevant human rights instruments and International Labour Organization (ILO) standards. Principles 1 and 2 pertain to *human rights*. According to these principles, businesses are required to "support and respect the protection of internationally proclaimed human rights" and to be "not complicit in human rights abuses."[22]

Principles 3 to 6 are about *labour* standards. Accordingly, businesses should uphold "freedom of association" and the "right to collective bargaining;" eliminate "all forms of forced and compulsory labour;" abolish "child labour;" and eliminate "discrimination" pertaining to employment.[23] The next three principles (Principles 7 to 9) are related to the *environment*. They require business to "support a precautionary approach to environmental challenges;" "promote greater environmental responsibility;" and "encourage the development and diffusion of environmentally friendly technologies."[24] The last (and the tenth) principle prohibits "*corruption* in all its forms, including extortion and bribery."[25]

The UN Guiding Principles on Business and Human Rights (UNGPs) were adopted in June 2011 by the UN Human Rights Council through resolution 17/4. On the enduring question of whether businesses can be directly held responsible for their impact on human rights, the UNGPs settle for a "Protect, Respect, Remedy" framework and stand on these three pillars. Pillar I is the State *duty to protect* against human rights by third parties including

[22] UN Global Compact (2000), Principles 1 and 2.
[23] UN Global Compact (2000), Principles 3 to 6.
[24] Id., Principles 7 to 9.
[25] Id., Principle 10.

businesses. Pillar II is the corporate *responsibility to respect* human rights. Pillar III is about ensuring effective *access to remedy* (by both States and businesses). It is to be noted that the UNGPs uses the word "duty" (for States) and "responsibility" (for businesses). Legally speaking, this is intended not to imply new obligations on businesses, yet responsibility can arise from ethical, social, and other grounds short of requirements by law. Thus in the language of UNGPs, one can speak of "obligations" of States but not of businesses. The non-binding nature of UNGPs is emphasized in the very opening (General Principles section) of the document which reads: "Nothing in these Guiding Principles should be read as creating new international law obligations."[26]

The UNGPs elaborate both general and operational principles for States and businesses to follow under each of the three pillars. After underscoring the State *duty to protect* in Pillar I, Principle 11 (under Pillar II) elaborates the business *responsibility* to *respect* human rights. In a nutshell, the responsibility entails that businesses "should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[27] The UNGPs underline that there should be no confusion about what the business *responsibility to respect* human rights entails with regard to the State's *duty to protect*. It can neither be used as an excuse to shift nor to imply reduced obligations on the part of States. The responsibility to respect human rights by businesses "exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations."[28]

Business activities have the potential to affect virtually all rights. The UNGPs expect businesses to respect at least internationally recognized human rights. Paragraph 12 of the UNGPs provides that the "responsibility of business enterprises to respect human rights refers to internationally recognized human rights –understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work."[29] With regard to

[26] UN Guiding Principles on Business and Human Rights (UNGPs) (2011), General Principles section, Para 4.
[27] UNGPs, Principle 11.
[28] See UNGPs, Commentary on Principle 11.
[29] The international bill of human rights consists of the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 covenants [the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)].

scope, the UNGPs apply to all types of businesses (both transnational and others, irrespective of size, sector, location, ownership, and structure).[30]

The UNGPs require businesses to adhere to the standard of "human rights due diligence." The exercise is meant to "identify, prevent, mitigate and account for how they address their adverse human rights impacts," and entails "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[31] If and once harm materializes, Pillar III outlines mechanisms to ensure effective remedy through State-based judicial and non-judicial mechanisms, and non-State-based grievance mechanisms.

Coming to the UN draft BHR treaty, the ongoing negotiation process –for a binding instrument– is one of at least three such attempts. A draft Code of Conduct[32] (1990) and draft norms (2003)[33] did not lead to binding instruments. Both businesses and several States resisted the 2003 draft norms in particular for their own respective reasons. The norms (if operational) would have provided for direct human rights obligations on corporations, which would also amount to bestowing legal personality for corporations under international law. Corporations resisted the possibility of bearing direct obligations. States were also not sure about the precedent the norms would set in upgrading the status of transnational corporations as legal persons in the eyes of international law. Developed States also preferred a non-binding framework. The process was replaced by a procedure that ultimately led to the drafting and the final adoption of the non-binding UNGPS in 2011.

The effort to come up with a binding UN BHR treaty still endures. In 2014, the UN Human Rights Council established an open-ended intergovernmental working group (OEIGWG) to work on an international legally binding instrument.[34] As of 2023, the OEIGWG held its 9th session[35] and a third

[30] UNGPs, *supra* note 26, Principle 14.
[31] Id., Principle 17.
[32] United Nations Code of Conduct on Transnational Corporations (1990). Available at: https://digitallibrary.un.org/record/105591?ln=en, last accessed August 2023.
[33] UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003). Available at: https://digitallibrary.un.org/record/498842?ln=en, last accessed August 2023.
[34] Human Rights Council Resolution 26/9 (2014) [A/HRC/RES/26/9].
[35] For more, see https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc, last accessed August 2023.

revised draft is available from its 8th session (2022).[36]

Surya Deva, who served as a member of the UN Working Group on Business and Human Rights (2016-2022),[37] summarizes *sticking points* that continue to dominate the current negotiations.[38] First –*scope of the treaty*– in particular on whether the proposed instrument would apply to only multinational corporations *or* all business enterprises. And on whether the treaty would cover only serious violations or all kinds of human rights abuses.[39] Second –*relation with the UNGPs*– whether the treaty would replace or rather complement the UNGPs.[40] Third –*direct corporate obligations*– whether the treaty should impose direct human rights obligations on corporations.[41] Fourth –*the treaty's relation with trade and investment agreements*– whether the treaty should prevail over trade and investment agreements, including bilateral investment treaties.[42] Last but not least –*form of the treaty*– with recent proposal by newly joining U.S. delegation for a flexible framework convention with a menu of options combining soft law and hard law.[43]

Faultlines across the above sticking points vary between Global North and Global South States, and between human rights CSOs and businesses. For example, the recorded votes in the Human Rights Council for the adoption of resolution 26/9 (2014) –that initiated the ongoing binding treaty process– show that those who voted *against* the resolution are predominantly States from the Global North.[44] As for non-State stakeholders, while businesses

[36] See latest draft at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/268/13/PDF/G2226813.pdf?OpenElement, last accessed August 2023.

[37] The UN Working Group on Business and Human Rights is not to be confused with the open-ended intergovernmental working group (OEIGWG). The UN Working Group on BHR was established in 2011 through resolution 17/4. It consists of five independent experts from different geographical regions for a term of three years. The core mandate of the Working Group is "to promote the effective and comprehensive dissemination and implementation" of the UN Guiding Principles on Business and Human Rights. See Human Rights Council resolution 17/4 (Human rights and transnational corporations and other business enterprises) A/HRC/RES/17/4, Para 6.

[38] Surya Deva, *supra* note 10.

[39] Id., p. 216.

[40] Id., p. 217.

[41] Id., p. 218.

[42] Id., p 219.

[43] Id., p. 220.

[44] Human Rights Council Resolution 26/9 (2014) [A/HRC/RES/26/9].

would view even voluntary frameworks such as UNGPs as taking them out of their comfort zone (of mainly self-regulation CSR), some criticize the UNGPs (and the BHR framework to date) for failing to give precedence to human rights over business interests (e.g. on trade and investment agreements) and for failing to achieve consensus on a legally binding international framework on business and human rights.[45]

Outside the UN system, BHR norms continue to develop in national and regional contexts, especially in the Global North. Some European countries – namely the United Kingdom, France, the Netherlands, Switzerland, Norway, and Germany– have issued their own national mandatory due diligence laws, with varying nomenclature and scope.[46] At the level of the European Union, a draft Corporate Sustainability Due Diligence Directive (CSDDD) is currently under negotiation by EU institutions such as the Commission, Council, and Parliament.[47] The CSDDD, being a directive, is considered as secondary law under EU law (adopted by EU institutions by virtue of existing treaty mandates, and binding while the form and methods of implementation are left to Member States).[48]

States that voted against the resolution are Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, the UK, and USA. Those that voted *in favour* are Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela, and Viet Nam. And *abstaining* votes are from Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, the Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, and the United Arab Emirates.

[45] See for example, Flávia do Amaral Vieira (2021), "The Implementation of the Guiding Principles on Business and Human Rights in Brazil: A Critical Perspective," *Revista Internacional de Derechos Humanos*, Vol. 11, No. 2, p 333 *et seq*.

[46] Surya Deva (2023). "Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?," *Leiden Journal of International Law*, Vol. 36 Issue 2, pp. 389- 414.

[47] See Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF, last accessed July 2023.

[48] Article 288, Treaty on the Functioning of the European Union (as amended).
For a comparative analysis of UN and EU draft BHR instruments, see Nadia Bernaz, Markus Krajewski, Kinda Mohamadieh, and Virginie Rouas (2022) "The UN Legally-Binding Instrument and the EU Proposal for a Corporate Sustainability Due Diligence Directive: competences, comparison and complementarity." Available at: https://friendsoftheearth.eu/wp-content/uploads/2022/10/Complementarity-study-on-EU-CSDDD-and-UN-LBI-October-2022.pdf, last accessed July 2023.

Another important instrument is the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (also known as *OECD Guidelines*). It embodies a set of recommendations on responsible business conduct that are not legally binding. The guidelines were adopted in 1976 by the Organisation for Economic Cooperation and Development (OECD) and are recently revised in June 2023.[49]

4. Business and Human Rights in Africa

Despite a long recorded history of exploitation of Africa's human and natural resources by foreign and multinational companies,[50] BHR is gaining momentum in the continent only recently. The African Union (AU) organized the first African BHR Forum in October 2022. The AU is also working on a draft Policy Framework on BHR. In March 2023, the African Commission on Human and Peoples' Rights (hereinafter the African Commission) –passed a resolution on "Business and Human Rights in Africa."[51] Most notably, the resolution tasks its relevant working groups to draft an African regional legally binding BHR instrument.[52]

Until gathering momentum in recent years, the African system's focus on BHR issues developed incrementally, like in the UN system and elsewhere. A notable example is the African Commission's initial focus on the *extractive sector*. In 2009, the African Commission established (as one of its subsidiary mechanisms) the Working Group on Extractive Industries, Environment and Human Rights Violations (WGEI).[53] Among the mandates of the Working Group are examining the impact of extractive industries in Africa, studying violations of human and peoples' rights by non-state actors, and advising the Commission on the possibility of holding non-state actors liable.[54]

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[49] See OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, https://www.oecd.org/publications/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct-81f92357-en.htm, last accessed August 2023.

[50] Wubeshet Tiruneh (2022). "Holding corporations liable for human rights abuses committed in Africa: the need for strengthening domestic remedies," *African Human Rights Yearbook,* Vol. 6, pp. 227-246

[51] Resolution on Business and Human Rights in Africa- ACHPR/Res.550 (LXXIV) 2023. Para. 1(c).

[52] Ibid.

[53] Resolution on the Establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa - ACHPR/Res.148(XLVI)09

[54] Ibid.

In further consolidating BHR norms under the African system, at least three "favorable conditions" are noteworthy. *Firstly*, the African system offers a unique potential for establishing a strong legal basis for a comprehensive BHR regime. The African Charter on Human and Peoples' Rights requires "State Parties to eliminate all forms of foreign exploitation particularly practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources."[55] The Charter further provides the right of peoples to "freely dispose of their wealth and natural resources,"[56] the right to "economic, social and cultural development,"[57] and the right to "a generally satisfactory environment favorable to their development."[58]

There is also uniqueness in the African human rights system in being the only international/regional instrument to codify the right to development as a binding norm and to affirm the justiciability of economic, social, and cultural rights. All this is highly relevant given the implications on addressing BHR issues in more holistic manner, including when ensuring effective remedies (for example, justiciability of all rights expanding the potential for judicial remedies).

Secondly, there is a legal basis in the African system for going to the extent of "direct obligations" on businesses. This is based on the notion that the African Charter is the only binding human rights instrument to embed "duties" besides rights. Article 27(1) stipulates: "Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community." Articles 28 and 29 elaborate these duties. From the text of the Charter, duties are apparently stipulated only for the "individual." The Charter does not make reference to "business enterprises" or "peoples" or other non-State entities in the "Duties" section. Yet the African Commission on Human and Peoples' Rights has interpreted the relevance of Article 27 of the Charter in the context of BHR, as follows:

> *"*Under the African Charter, obligations of business enterprises towards rights holders have a clear legislative basis. Article 27 of the African Charter provides for the duties of individuals and its sub-provision 2 lays down the obligation to exercise rights 'with due regard to the rights of others.' Clearly, if this obligation can be

[55] African Charter on Human and Peoples' Rights (1981), Article 21.
[56] Ibid.
[57] Id., Article 22.
[58] Id., Article 24.

> imposed on individuals, there is an even stronger moral and legal basis for attributing these obligations to corporations and companies."[59]

The concept of individual duties was present in the early days of the international human rights discourse but did not feature in subsequent binding instruments, except in the African Charter. For instance, the 1948 Universal Declaration of Human Rights (UDHR) too has a provision on duties. Article 29(1) provides: "Everyone has duties to the community in which alone the free and full development of his personality is possible." However, unlike the African Charter, the UDHR is not legally binding. Moreover, binding conventions that followed the UDHR do not carry similar provisions on individual duties.

The African Charter's provisions on individual duties are not necessarily seen in a positive light. While many would consider the language of individual duties in the African Charter as an unusual undertaking for a human rights instrument to speak of duties, some appreciate the unique framing of both rights and duties in one document. Mumba Malila (incumbent chief justice of the Supreme Court of Zambia) makes a case for a nuanced understanding of the African Charter's concept of individual duties (with some duties implying legal effect and others having only moral appeal). Although the manner of inclusion of duties in the Charter can be considered as somewhat problematic, he argues, it also "can be regarded as an opportunity for the African continent and, by extension, for the global human rights framework to redefine itself."[60]

The *third* favorable condition is that, without prejudice to differences among individual States, the African position favors a binding instrument at the global level.[61] The UN treaty proposal was tabled by South Africa (along with Ecuador). Voting patterns of African States to pass the resolution that

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[59] See African Commission on Human and Peoples' Rights (2019), Advisory Note to the African Group in Geneva on the Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Legally Binding Instrument). Available at: https://achpr.au.int/en/news/communiques/2019-11-04/advisory-note-african-group-geneva-legally-binding-instrument, last accessed July 2023.

[60] Mumba Malila (2017). "Individuals' Duties in the African Human Rights Protection System: Challenges and Prospects," in Stephan Parmentier *et a*l (eds.), *Between Rights and Responsibilities: A Fundamental Debate* (Cambridge University Press), pp. 187-228.

[61] See African Commission Advisory Note, *supra* note 59.

sets the UN treaty process in 2014 supports the argument.[62] This is further confirmed by the explicit position of the African Commission. In 2019, the Commission prepared an advisory note to the African Group in Geneva on the UN binding BHR treaty process. The Commission notes that current inadequacies in the BHR regime globally "can only be rectified through a binding international framework, which is applicable across jurisdictions, and taking into account the interests of the most vulnerable."[63]

The promises and favorable conditions at the level of the continental human rights system are however yet to translate in the regulatory frameworks and practices in the individual African States. Many African States are expressing their commitment to attract foreign direct investment and achieve development objectives. However, a host of factors makes it difficult to ensure the observance of environmental, social, and human rights standards by corporations.[64] Some of the challenges relate to the capacity and behavior of States such as limited State capacity, imbalance in the bargaining powers of multinational corporations and States, and at times collusion between States and corporations. Other factors relate to the regulatory and policy framework such as lack of policy coherence and lack of "good-fit" approaches for contextualizing global standards including the UNGPs into local and national realities.[65] The subsequent sections discuss the Ethiopian example.

5. Business and Human Rights in Ethiopia's Constitution

Ethiopia does not have a self-contained legislation on BHR. However, this does not mean that the human rights dimensions of business activities are left unregulated. In fact, there is a broad range of laws related either to the regulation of business or the protection of human rights that are directly or indirectly relevant to BHR. This section and Section 6 deal with an illustrative overview of generic laws and sector-specific laws. The selection and discussion of the laws and their relevant provisions are by no means exhaustive. The approach is based on their applicability to any one or more of the three pillars of BHR as provided in the UNGPs. Consideration is also made

[62] See United Nations Development Programme (UNDP) (2022), "A Baseline Assessment on Business and Human Rights in Africa: From the First Decade to the Next," https://www.undp.org/africa/publications/baseline-assessment-business-and-human-rights-africa-first-decade-next*, last accessed March 2023.*

[63] African Commission Advisory Note, *supra* note 59.

[64] See Oyeniyi Abe and Damilola S. Olawuyi, *supra* note 11, p. 4.

[65] Ibid.

to align the legal analysis in Sections 5 and 6 to the selection of case studies in Section 7 so that they can be read together.

The Ethiopian Constitution holds considerable relevance to BHR at least in two respects. *The first aspect* is in its *overall emphasis* and *substantive content on human rights*. Beginning from the preamble, Paragraph 2 provides that "full respect of individual and people's fundamental freedoms and rights" is required to achieve the objective of advancing "economic and social development" under Paragraph 1. In Chapter 2, "human and democratic rights" form one of the five fundamental pillars of the Constitution.[66] Under Article 55(14), the Constitution mandates the House of Peoples' Representatives to establish a Human Rights Commission and determine by law the Commission's powers and functions.

Further into the substantive provisions, the whole chapter three is an extensive catalogue of individual and collective human rights and freedoms. The chapter is also considered as the Constitution's *bill of rights* section. Given the indivisibility and interdependence of human rights, no right is irrelevant for BHR. Thus, without implying any hierarchy or priority whatsoever, to highlight some of the provisions, Articles 14-17 provide for the right to life, security of the person, and liberty. Article 18 prohibits inhuman treatment –which includes protection against cruel, inhuman or degrading treatment or punishment; prohibition of slavery or servitude; and prohibition of forced or compulsory labour. Article 25 is the non-discrimination clause. Articles 29, 30, and 31 guarantee freedoms of expression, assembly, and association, respectively. Article 37 on the *right of access to justice* is particularly relevant to the *remedy* pillar of BHR (the third pillar in the UNGPs).

Article 40 on the "right to property" guarantees the right of Ethiopians to the ownership of private property, including immovable property (note the citizenship requirement as well). The provision stipulates that ownership of land and natural resources is "exclusively vested in the State and in the peoples of Ethiopia." Thus there is no private ownership of land. While Ethiopian peasants and pastoralists have the right to use land for their own respective purposes for free, private investors have the right to land use (not ownership) on the basis of payment.

[66] FDRE Constitution, Article 10. The remaining four fundamental principles of the Constitution are Sovereignty of the People (Article 8), Supremacy of the Constitution (Article 9), Separation of State and Religion (Article 11), and Conduct and Accountability of Government (Article 12).

Article 41 enshrines a set of economic, social, and cultural rights, including the right of Ethiopian farmers and pastoralists to "to *receive fair prices for their products*, that would lead to improvement in their conditions of life and to enable them to obtain an equitable share of the national wealth commensurate with their contribution"[67] [emphasis added]. Article 42 stipulates *labour rights* including the right to collective bargaining, right to strike, right of women to equal pay for equal work, and the right to a healthy and safe work environment. Article 43 embodies the *right to development*. This includes the right of nationals to participate in national development and "to be consulted with respect to policies and projects affecting their community." The State is duty bound to protect and ensure sustainable development in "all international agreements and relations concluded, established or conducted."[68] The right to a clean and healthy environment is enshrined under Article 44.

There are also relevant provisions in Chapter 10 on "national policy principles and objectives." As policy principles, these provisions are not as such justiciable before courts of law but guide the Government in implementing the Constitution and other subsidiary laws and policies.[69] An example that stands out for the purpose of BHR is Article 92, which outlines *environmental objectives*. Notably, the provision stipulates that the design and implementation of development programmes and projects "shall not damage or destroy the environment."[70] It reiterates the right of people to "full consultation and to the expression of views in the planning and implementation of environmental policies and projects that affect them directly."[71] It also imposes upon the Government and citizens the "duty to protect the environment."

The *second aspect* in the FDRE Constitution's promise to BHR lies in *its incorporation of treaties ratified by Ethiopia into domestic law*. According to Article 9(4), international agreements ratified by Ethiopia are "part and parcel of the law of the land." Moreover, human rights provisions of the Constitution are to be interpreted "in a manner conforming to" treaties adopted by Ethiopia.[72] The cumulative reading of these two provisions (Articles 9(4) and 13(2)) means that all treaties ratified by Ethiopia (under the UN, African

[67] FDRE Constitution, Article 41 (8).
[68] Id., Article 42 (3).
[69] Id., Article 85 (1).
[70] Id., Article 92 (2).
[71] Id., Article 92 (3).
[72] Id., Article 13 (2).

Union, or other frameworks) are considered as part of domestic law. This includes not only human rights instruments but also treaties related to business and the economy such as bilateral investment treaties. It also means that human rights principles enshrined in instruments adopted by Ethiopia hold higher interpretive authority.

Ethiopia already subscribes to the minimum set of human rights that the UNGPs for instance under Paragraph 12 require businesses to respect. These are the international bill of human rights (consisting of the UDHR, ICCPR, and ICESCR) and ILO's Declaration on Fundamental Principles and Rights at Work. Ethiopia acceded to both ICCPR and ICESCR in 1993.[73] Ethiopia being a member of the UN and ILO respectively, the UDHR and the ILO Declaration apply as well. Moreover, Ethiopia has ratified a number of other conventions, including the African Charter on Human and Peoples' Rights, which as discussed earlier enshrines norms (such as duties) that serve as a strong normative basis for BHR.

At this point, it is important to note that a strong constitutional basis for human rights is an essential aspect, and yet only a piece of the puzzle in a BHR framework. This is because as discussed at the beginning of this article, the nature of the 'obligations' of businesses towards human rights remains a critical question to answer. It remains a question in international human rights law, even in the existence of a number of binding instruments. That is why in the current non-legally binding international BHR framework, the term 'responsibilities' is preferred to conceptualize the status of the norm.

In the context of the Ethiopian Constitution, the question leads to discussion of the apparent gap this article identifies. The above strengths of the Constitution (more or less) fall within two of the three pillars the UNGPs framework: substantive provisions on the State duty to protect (and ensure respect) and provisions on access to justice (remedies). The *business responsibility to respect human rights* is (arguably) not explicitly stated in the Constitution. On this critical question, it is possible to read potentially relevant provisions in two approaches.

The *first approach* starts with Article 9(2), which provides: "All citizens, organs of state, political organizations, other associations as well as their officials have the duty to ensure observance of the Constitution and to obey

[73] For complete overview of Ethiopia's ratification of UN treaties, see UN Treaty Body Database at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=59&Lang=EN, last accessed August 2023.

it." This is a provision from the supremacy clause of the Constitution. Based on this provision, one line of argument interprets the term "other associations" to include business organizations and corporations and thus holds that the Constitution requires companies to respect all relevant provisions related to human rights, environmental, and social issues. According to this interpretation, the Constitution provides a normative basis even for mandatory human rights due diligence.[74]

A *second approach* of reading the Constitution (to which this article contributes) argues that at least as far as the human rights are concerned the Constitution enshrines the conventional approach of centering the State. Article 13(2) which defines the scope of application of the third chapter on fundamental rights and freedoms states: "All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter." Accordingly, it is the State and its agencies that have the duty to respect and ensure respect of the human rights enshrined in the Constitution. This provision defines the scope of obligations for human rights in the Constitution.

The only explicit exception when private actors come into the picture is under Article 36(2) on the rights of children. The provision states: "In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interests of the child." The reference to "private welfare institutions" departs from Article 13(2) because it imposes an obligation on non-state actors (in addition to State institutions). One could still argue that this is far from implicating businesses proper, which would reaffirm the second line of interpretation that companies are outside the intent and ambit of the Constitution's allocation of human rights obligations.

A closer reading of a few other provisions supports the second stream of thought. For instance, the other provision with explicit mention of private actors is Article 40(6), which stipulates the right of private investors to the use of land on the basis of payment of fees. But again this is about the right not the obligation of private investors. Furthermore, in the "environmental rights" clause, Article 44(2) states: "All persons who have been displaced or whose livelihoods have been adversely affected as a result of State programmes have

[74] See Yehualashet Tamiru Tegegn (2022), "The missed opportunity for effective CSR regulation in Ethiopia," Addis Fortune, https://addisfortune.news/the-missed-opportunity-for-effective-csr-regulation-in-ethiopia/, last accessed March 2023. The discussion is in the context of CSR but the argument can hold for BHR as well.

the right to commensurate monetary or alternative means of compensation, including relocation with adequate State assistance."

An issue arises with regard to those displaced as a result of private sector investment. Although one can find the answer in relevant subsidiary laws including treaties ratified by Ethiopia,[75] the Constitution is silent on this. Moreover, in the tenth chapter that embodies national policy principles and objectives, Article 89(4) provides: "Government and citizens shall have the duty to protect the environment." The duty to protect the environment is upon the Government and citizens, while private actors are, once more, not expressly mentioned.

6. Business and Human Rights in Various Ethiopian Laws

6.1 The Commercial Code of 2021

The 1960 Commercial Code of Ethiopia was revised in 2021.[76] The previous Commercial Code came to effect as part of massive codification of laws to aid Emperor Haile Selassie's modernization project. After sixty years, its revision comes as part of a reform of several legislations following political changes in 2018. The Preamble of the Code recognizes the many changes that transpired in the area of commerce over the last six decades and the gaps felt in the Code especially after Ethiopia started to pursue "market-led economic system" in early 1990s.[77] One of the justifications for the revision is the need to "strike the right balance between the interests of investors, traders and other stakeholders that are directly affected by [the law]." Balancing such interests is considered necessary "to bolster commerce and improve the standard of living of citizens.[78]

Relevant to the discussion at hand, there is no explicit mention of human rights or any other reference to corporate human rights responsibility. The

[75] For instance, Article 10(1) of the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (Kampala Convention) – which Ethiopia acceded to in 2020 – provides that "States Parties, as much as possible, shall prevent displacement caused by projects carried out by public or private actors."

[76] For background information about the several attempts of revising the Code, see Bantayehu Demlie (2016), "Private Sector's Concerns for Ethiopia's Commercial Code Revision," *Ethiopian Business Review,* 4th Year, No. 38. (April 16 2016 – May 15 2016) Available at: https://ethiopianbusinessreview.net/private-sectors-concerns-for-ethiopias-commercial-code-revsion/. Last accessed August 2023.

[77] Commercial Code of Ethiopia, (Proclamation 1243/2021), Preamble Para 2.

[78] Id., Preamble Para 3.

closest notion is what one may arguably consider as the Code's introduction of a *voluntary CSR* regime. In relation to management of companies, the Code provides for the establishment of a Board of Directors as one of the actors. Shareholders elect between three and thirteen directors to the Board.[79] One of the duties of directors is the duty of loyalty as enshrined under Article 316. The provision states: "Directors shall act in the way they consider, in good faith, would be most likely to promote the success of the company;" and "they shall act for the benefit of shareholders of the company as a whole." In discharging this duty, "a director shall have regard to the long-term interests of the company, the interests of the company's employees, the interest of company's creditors and *the impact of the company's operations on the community and the environment.*"[80]

Although this is a significant move compared to the previous Code, it is interpreted as reflective of a shareholder primacy approach that renders social and environmental considerations merely discretionary.[81] As the two sub-articles of Article 316 are linked and are to be read together, directors make those considerations (including regard to impact on community and the environment) in order to discharge their duty of loyalty and in the interest of the success of the company and for the benefit of shareholders.

When it comes to BHR, Article 316 is open to interpretation and in fact could be the starting point, particularly if read together with other provisions in the Code or even other laws such as the human rights provisions of the Constitution. Article 315 of the Code for instance provides that directors shall be responsible for exercising duties imposed on them "by law, memorandum of association, and resolutions of general meetings of shareholders." Duties of directors may thus arise from laws other than the Code such as human rights law. In addition, Article 330 reserves the right of third parties "to bring legal action for damages where they have been personally injured directly owing to the fault or fraud of the directors." Hence, although there is no explicit human rights language, the impact of a company's operations on the community and the environment may manifest as an impact on human rights.

For example, polluting the environment in the locality of a certain community may affect access to clean water and food and thus impair the health of community members. In this case, directors even acting within the bounds of their duty of loyalty may make the case that it is not in the long-term interest of the company to infringe upon human rights. Or, it may be

[79] Id., Article 296
[80] Id., Article 316 (2) [emphasis added].
[81] See for example, Yehualashet Tamiru Tegegn, *supra* note 74.

argued (for example based on the supremacy clause of the Constitution) that human rights are not discretionary and thus the voluntary component of Article 316 becomes mandatory when the impacts of company operations manifest as human rights harms. Overall, the apparent silence of the Code on human rights may rather provide a room for a dynamic BHR framework that ultimately depends on two important factors: (i) how directors integrate human rights in their management and (ii) the nature of duties arising from other existing or future laws.

6.2 Investment law

Investment law is another area of Ethiopian law that underwent recent overhaul. The revised laws include the *Investment Proclamation No. 1180/2020* (the primary legislation enacted by the Parliament) and the accompanying regulations: *Investment Regulation No. 474/2020* and *Investment Incentives Regulation No. 517/2022*. The Investment Proclamation and the two regulations amend previous legislations. The Investment Proclamation applies to "all investments carried out in Ethiopia except to investments in the prospecting, exploration and development of minerals and petroleum."[82] Article 5 of the Proclamation lists out Ethiopia's investment objectives. The overall objective is "to improve the living standard of the peoples of Ethiopia by realizing a rapid, inclusive and sustainable economic and social development." One of the Proclamation's objectives is to encourage "*socially and environmentally responsible investments.*"[83]

As for BHR, there is no explicit reference to human rights. However, Article 54 –which imposes on all investors "a duty to observe other laws and social and environmental sustainability values"– could potentially be relevant to BHR. Sub-article 1 states: "All investors shall carry out their investment activities in compliance with the laws of the country." The second sub-provision reads: "All investors shall give due regard to social and environmental sustainability values including environmental protection standards and social inclusion objectives in carrying out their investment projects." This provision has already been interpreted as an imposition of *mandatory CSR* on investors.[84]

[82] Investment Proclamation No. 1180/2020, Article 3.
[83] Id., Article 3 (8).
[84] See, for example, Bereket Alemayehu Hagos (2022), "Major features of Ethiopia's new investment law: an appraisal of their policy implications," *Transnational Corporations Journal,* Vol. 29, No. 1, p 138.

Under Article 13(1)(f) of the Proclamation, one of the grounds for suspension of investment permit is violating provisions of the Proclamation, or regulations or directives issued to implement the Proclamation, or other pertinent laws. The wording of Article 54 (the use of "shall") coupled with sanctions for violating any provisions of the Proclamation indeed supports the interpretation about the "mandatory" nature of CSR. To the extent mandatory CSR overlaps with BHR, Article 54 remains relevant. However, the duty to respect other laws is even more directly relevant since it implies laws such as the Constitution, human rights-related legislations and even international human rights treaties ratified by Ethiopia. This is obviously an argument based on interpretation, and the absence of direct reference adversely affects its practical implementation.

Another important theme in Ethiopia's investment law regime relates to *bilateral investment treaties* (BITs). According to the United Nations Conference on Trade and Development (UNCTAD) database, there are 22 BITs currently in effect between Ethiopia and other countries.[85] There are also BITs that are either terminated or signed but awaiting ratification to be binding. As a general observation, some of the most recent BITs (which are signed but not ratified) have a CSR clause with only few of them making specific reference to human rights while most of the BITs currently in force do not employ language on social or human rights responsibility.

The Brazil-Ethiopia BIT (signed in 2018 but not yet in force) has a dedicated clause on CSR with specific elements that include human rights as one of them. Article 14 makes reference to the OECD Guidelines as may be applicable and requires investors to "respect the *internationally recognized human rights* of those involved in the investors' activities"[86] and "refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to *human rights*, environment, health, security, work, tax system, financial incentives, or other issues."[87]

The BIT between Ethiopia and Qatar (signed in 2017 but not yet in force) does not explicitly mention human rights. However, it refers to "sustainable development" (Preamble paragraphs 1 and 2), "corporate responsibilities and rights" (Preamble paragraph 3), and includes an obligation for investors to comply with the "labor and environment laws and regulations" of the Host

[85] See United Nations Conference on Trade and Development (UNCTAD) database, https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia, last accessed August 2023.
[86] Brazil-Ethiopia BIT (2018), Article 14 (2) (b) [Emphasis added].
[87] Id., Article 14 (2) (e) [Emphasis added].

State (Article 14). Similarly, the BIT between the Belgium-Luxembourg Economic Union (BLEU) and Ethiopia (signed in 2006, yet not in force) does not have explicit reference to human rights but employs detailed provisions on labour and environmental standards.[88]

Among the BITs currently in force, the BITs with UAE (effective since 2021) and Finland (in force from 2007) are the only ones that explicitly refer to labour and environmental standards (albeit no express language on human rights). All other BITs currently in force do not make any reference to human rights, sustainable development, labour or environmental standards.[89]

6.3 Labour law

Labour law is another important area of law where *business* and *human rights* intersect. Ethiopia's labour law regime consists of relevant provisions of the Constitution, treaties ratified by Ethiopia including ILO conventions, the *Labour Proclamation No.1156/2019*, and the *Overseas Employment Proclamation* of 2016 (with its amendments in 2021). As discussed earlier, the Ethiopian Constitution enshrines directly applicable provisions on issues such as the prohibition of slavery or servitude and of forced or compulsory labour (Article 18), and labour rights (Article 42).

Furthermore, Article 35 on the *rights of women* guarantees –among others– "the right to maternity leave with full pay" and "the right to equality in employment, promotion, pay, and the transfer of pension entitlements." Article 36 on the rights of children stipulates the right of every child not to "be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being." In addition to generic human rights treaties, Ethiopia is a party to 9 of the 11 ILO core conventions on labour standards. The two fundamental conventions Ethiopia has not yet ratified are *the 2014 Protocol to the 1930 Forced Labour Convention* and *the 2006 Promotional Framework for Occupational Safety and Health Convention (No. 187).*[90]

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[88] BLEU (Belgium-Luxembourg Economic Union) - Ethiopia BIT (2006), Article 1 (5) & (6), Article 5 & Article 6.

[89] See Ethiopia's BITs with (in reverse chronological order of year of signature): Sweden, Egypt, Austria, Libya, Germany, Israel, Islamic Republic of Iran, France, the Netherlands, Algeria, Denmark, Tunisia, Turkey, Sudan, Yemen, Malaysia, Switzerland, China, Kuwait, Italy.

[90] See the ratification status of the core ILO conventions at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:::NO:10011:P10011

In domestic subsidiary legislation, the most important piece of law is the *Labour Proclamation 1156/2019*, which has substituted the previous proclamation enacted in 2003. The new labour law has, *inter alia*, changed the working age from 14 to 15 (Article 89(2)). The law does not set a minimum wage; but paves the way for the Council of Ministers to set up a Wage Board. Composed of representatives from the Government, employees, trade unions, and other stakeholders, the Board "will periodically revise minimum wages based on studies which take into account the country's economic development, labour market and other considerations."[91] The Proclamation also stipulates specific provisions related to the working conditions of women (Article 87), young workers aged 15-18 (Article 89), employer obligations to safeguard occupational safety and health (Article 92), and the right of workers to strike and the right of employers to lock-out (Article 158).[92]

To reframe the discussion in light of BHR, the labor law's relevance is inherently direct as it mainly applies to private employers and attempts to set minimum standards of labour rights in labour relations.[93] The regulation of private employment agencies in the labour law regime is another example where private actors are involved in labour relations. Article 174 of the Labour Proclamation stipulates the legal basis for private employment agencies to participate in the provision of local employment service. *The Overseas Employment Proclamation No. 923/2016* and its amendment *Proclamation No. 1246/2021* apply for overseas employment.

According to Article 3 of Proclamation No. 923/2016, the law applies on employment relations facilitated by either public or private employment agencies or through direct employment. Failure by employment agencies or their members to provide remedies for complaints related to violations of "the *rights, safety and dignity* of workers" is one of the grounds for refusing to issue a license to such agency under Article 23 or for suspending license of

_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F last accessed August 2023.

[91] Labour Proclamation 1156/2019, Article 55(2).

[92] According to Article 158(3) *cum* Article 137(2) of the Labor Proclamation: The right of workers to strike and the right of employers to lock-out do not apply to "essential public service undertakings" – defined as services "which shall be rendered without interruption to the general public and are the following undertakings." These include: air transport services; electric power supply; water supply and city cleaning and sanitation services; urban light rail transport service; hospitals, clinics, dispensaries and pharmacies; fire brigade services; and telecommunication services.

[93] See Article 3 of the Labour Proclamation for its scope of applications.

the agency under Article 42 of the Overseas Employment Proclamation No. 923/2016.

The term "human rights" is not used in the Overseas Employment Law (and that is the case for the Labour Proclamation as well). One may thus contend that the "rights" in this context may have a narrow connotation to mean rights arising from the employment contract only. Despite this potential ambiguity, the Overseas Employment Law's stipulation of *direct responsibility of private actors* to remedy rights violations and sanctions (such as suspension of licenses) for failing to do so is an important step from the perspective of BHR.

6.4 Other relevant laws

Further analysis can be made across a range of other substantive and procedural laws, including Regional State legislations and customary laws compatible with the provisions of the Federal Constitution. In the *mining* sector, the main legislation is the *Mining Operations Proclamation No. 678/2010*, which has to be read together with amendments from 2013 and 2020, as well as the relevant regulations.[94] The law applies to all mining operations in Ethiopia.[95] Article 34 of the Proclamation requires mining license holders to conduct mining operations "in accordance with appropriate laws" and to ensure the "health and safety of agents, employees and other persons." One of the grounds of suspending and revoking mining licenses is breach of the terms of an approved environmental impact assessment, and safety and health standards.[96] Article 60 of the Proclamation requires the approval of an environmental impact assessment prior to awarding mineral licenses, except for reconnaissance, retention and artisanal mining.

In the realm of *environmental law*, an important piece of legislation is the *Environmental Impact Assessment Proclamation No. 299/2002*. The law requires the responsible government authority to "make any environmental impact study report accessible to the public and solicit comments," and to "ensure that the comments made by the public and in particular by the communities likely to be affected by the implementation of a project are incorporated into the environmental impact study report as well as in its evaluation."[97]

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[94] These are the Mining Operations (amendment) Proclamation No. 816/2013, the Mining Operations (amendment) Proclamation No. 1213/2020 and the Mining Operations Council of Ministers Regulation No. 423/2018.

[95] See Mining Operations Proclamation No. 678/2010, Article 3.

[96] See Id., Article 44.

[97] Environmental Impact Assessment Proclamation No. 299/2002, Article 15.

Laws, procedures, and mechanisms related to access to justice are also relevant. The *Criminal Code of 2004* (which replaces the Penal Code of 1957) introduces the notion of *corporate criminal liability* into the Ethiopian criminal justice system. Article 34 of the Code provides that juridical persons (except State bodies) may be liable as principal criminal, instigator or accomplice if the law expressly provides so. Furthermore, corporate criminal liability arises "where one of its officials or employees commits a crime" and "in connection with the activity of the juridical person with the intent of promoting its interest by an unlawful means or by violating its legal duty or by unduly using the juridical person as a means."[98]

Penal provisions for corporate entities are further stipulated in few specific laws. The *Corruption Crimes Proclamation No. 881/2015* provides for the criminal liability of juridical persons (Article 5) and penalties (Article 25 (6)). The *Computer Crimes Proclamation No. 958/2016* specifies penalties imposed on a juridical person under Article 20. The *Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020* stipulates the punishment of a juridical person –including fine, dissolution of the juridical person or confiscation of its property, and the individual liability of employees or officials of the juridical person (Article 17). Penal provisions are also included in tax laws. The *Value Added Tax Proclamation No. 285/2002* (as amended by Proclamation No. 1157/2019) specifies tax offences committed by entities (Article 56).

Civil liability is another avenue (particularly in view of the limited scope of criminal liability arising from its requirements of higher standard of proof and express provision of the law). Both substantive and procedural codes and laws are pertinent, including tort law and civil procedure law. For instance, civil procedure law determines the question of whether or not public interest litigation may be lodged against corporations. Article 33(2) of the *Civil Procedure Code of 1965* requires one to have "vested interest" to be a plaintiff in a civil case. The Constitutional provision on access to justice (Article 37) has been interpreted to "relax" the requirement in the Civil Procedure Code but remains debatable.[99] The only area where the law explicitly introduces public interest litigation is environmental law under Article 11 of the *Pollution Control Proclamation No. 300/2002*.

[98] Criminal Code of Ethiopia (2004), Article 34(1).

[99] Yenehun Birlie (2017). "Public Interest Environmental Litigation in Ethiopia: Factors for its Dormant and Stunted Features," *Mizan Law Review*, Vol. 11, No. 2, p 320.

7. Business and Human Rights in Practice

Ethiopia is considered as "one of the last remaining unindustrialized frontiers."[100] For over a decade until the recent two-year armed conflict (2020-2022),[101] Ethiopia's economy witnessed fast growth.[102] An important face of this phenomenon is the inflow of foreign companies –attributable to factors such as government incentives to attract foreign direct investment (FDI), large population (second in Africa), and natural resources.[103]

Ethiopia's economic growth is largely state-driven. However, in recent years hitherto government-owned sectors are opening up for private and foreign investment. As investment by the private sector (both national and multinational) expands, regulatory issues that may not be necessarily resolved by the existing framework are already surfacing. Multiple studies have flagged the social, environmental, and human rights impacts of business activity in sectors such as horticulture, commercial agribusiness, textile, and mining –to name a few. A discussion of three examples follows.

7.1 Textile and garment: *the case of Hawassa Industrial Park*

Ethiopia's garment and textile sector is one of the sectors witnessing growing scrutiny from the perspective of BHR. A 2019 report by New York University (NYU) Stern Center for Business and Human Rights outlines the challenges in balancing between the government's ambition of establishing Ethiopia as the latest global apparel and textile hub (and thereby achieve goals such as increased employment and foreign investment) on the one hand *and* the conditions for garment workers such as being paid the lowest wage anywhere

[100] Marie Durane (2015). "Made in Ethiopia: The New Norm in the Garment Industry," *Sustainable Development Law & Policy,* Vol. 15*,* p. 24.

[101] The full range of human and economic costs of the recent conflict in Ethiopia has yet to be comprehensively investigated and disclosed. Some estimates are emerging. In June 2023, a government-led loss and damage assessment for the first year of the two-year conflict estimates an economic loss of USD 28.7 billion. See Metasebia Teshome, "Ethiopia still nursing 28.7 billion USD in conflict wounds, study shows," *Capital (19 June 2023),* https://www.capitalethiopia.com/2023/06/19/ethiopia-still-nursing-28-7-billion-usd-in-conflict-wounds-study-shows/, last accessed July 2023.

[102] See for example, Deloitte & Touche (2014), "Ethiopia: A Growth Miracle," https://www2.deloitte.com/za/en/pages/strategy/articles/ethiopia-growth-miracle.html, last accessed July 2023.

[103] Ibid.

in the world (with all its wider implications) on the other hand.[104] The NYU Stern report focuses on the Hawassa Industrial Park as a case study. The Hawassa Industrial Park is located in Hawassa, capital of the Sidama Regional State. By the time NYU conducted the study, the park employed about 25,000 workers (a number which can double when the park operates in full capacity).[105] The park is one of at least ten such parks in other locations across the country.

Globally known brands in the garment sector have opened factories in Hawassa Industrial Park. They shifted focus to Ethiopia and other African countries for a number of reasons including rising costs in Asia and following growing scrutiny after the Rana Plaza factory collapse in 2013 in Bangladesh (considered to be "the deadliest garment industry disaster in history"[106]). The Ethiopian government promised widely available supply of raw materials, low cost labor, and low cost energy.[107] Most of the garment workers in Hawassa Industrial Park are young women from low-income rural families and receive the lowest wage in the global garment supply chain at USD 26 a month.[108] This is compared to for instance USD 95 in Bangladesh and Myanmar, USD 180 in Vietnam, USD 207 in Kenya, USD 326 in China, and USD 340 in Turkey.[109]

The NYU Stern report finds that the wage being non-livable coupled with other local and contextual factors (including conflict and insecurity, cultural issues) results in high level of "worker disillusionment and attrition"[110] with implications on expected productivity. The situation led to an outcome that in the end is undesirable to workers, manufacturers, and the government. From the perspective of manufacturers, for instance, "Ethiopian labor turned out to be considerably more costly than the government had initially advertised."[111]

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[104] Paul M. Barrett and Dorothée Baumann-Pauly (2019). "Made in Ethiopia: Challenges in the Garment Industry's New Frontier" (New York University Stern Center for Business and Human Rights) https://issuu.com/nyusterncenterforbusinessandhumanri/docs/nyu_ethiopia_final_online?e=31640827/69644612, last accessed March 2023.

[105] Ibid, p. 3.

[106] Business and Human Rights Resource Centre (2018), "The deadliest garment industry disaster in history, five years later," https://www.business-humanrights.org/en/latest-news/the-deadliest-garment-industry-disaster-in-history-five-years-later/, last accessed July 2023.

[107] Paul M. Barrett and Dorothée Baumann-Pauly, *supra* note 104, p.3.

[108] Ibid, p.1.

[109] Ibid.

[110] Ibid.

[111] Id., p. 13.

The government also finds the garment sector at "crossroads" –between what the NYU Stern report observes as the "Bangladesh example" and the "China example." Bangladesh despite being a garment hub remains unable to develop a supply chain that substitutes imports, creates many jobs, and enhances quality of jobs for workers. China's apparel and textile sector served as springboard to transition to diversified manufacturing. Ethiopia can follow the China path and match it with human rights standards, the report concludes.[112]

Based on findings from the NYU Stern study and other assessments, a recent *policy brief* by ActionAid Ethiopia (May 2023) argues that Ethiopia's economic growth and investment should not come at the cost of workers' rights. In addition to low wages, the *policy brief* documents further instances of wage deductions as disciplinary measures, discrimination towards pregnant women, routine verbal abuses by managers, uncompensated overtime labour, and so on. The *policy brief* further observes that "in several sectors including in the production of hand-woven textiles where children, mostly boys as young as seven years old and some of them victims of trafficking, are working under conditions of forced labour."[113]

One of the recommendations from observations on recent developments in the textile and garment sector is the establishment of a minimum wage system. The Ethiopian Human Rights Commission took up the issue and called for prioritizing the establishment of the Wage Board as envisaged under the Labour Proclamation.[114] The Commission notes that "while minimum wage is not a panacea to all the problems that workers are facing in Ethiopia, it is a crucial step that can ensure decent living for the workers and their families, in particular, if it is coupled with other necessary socio-economic measures."[115] The Commission frames minimum wage as a way to realize several other rights such as the right an adequate standard of living, the right to work, and the protection of the family.[116]

[112] Id., p. 2

[113] ActionAid Ethiopia (May 2023), "People before Profit: Why Urgent Action is needed to hold Businesses Accountable for Respecting Human Rights (A Policy Brief)," https://ethiopia.actionaid.org/ethiopia-policy-brief, last accessed July 2023.

[114] Ethiopian Human Rights Commission (April 2022), "Call to Prioritize the Establishment of a Minimum Wage System" (Public Statement), https://ehrc.org/call-to-prioritize-the-establishment-of-a-minimum-wage-system/.

[115] Ethiopian Human Rights Commission, ibid.

[116] Ibid

For investors in the sector, on the other hand, raising minimum wage should be accompanied by addressing challenges in the textile sector particularly political unrest and conflict that remains unabated particularly since 2018. A 2020 case study of French company Decathlon's partnership model in Ethiopia observes: In an industry where wages are "the only major flexible element" –and in a context where political uncertainty and conflict push companies to "a point where they question the wisdom of continuing to source from Ethiopia at all"[117]– wage levels can indeed be the decisive factor. The case study summarizes the dilemma: "[w]hile public pressure from a growing community of business and human rights advocates may encourage fashion brands to assess their human rights impact, it may also deter them from considering Ethiopia as a sourcing destination."[118]

7.2 Mining: *the case of Lega Dembi goldmine*

According to the Ministry of Mines, mining is expected to be part of Ethiopia's development ambitions through *–inter alia–* encouraging private sector investment.[119] Considered as "virtually untapped, diverse and vast," Ethiopia's mineral resources include gold, tantalum, potash, gemstones, iron ore and various industrial, energy and construction minerals.[120] The mining sector's current contribution to the economy remains marginal, accounting only for 1% of the total gross domestic product (GDP) despite the potential and the goal to increase its contribution to the GDP to 10% by 2025.[121] According to the latest available report of the Ethiopia Extractive Industries Transparency Initiative (EEITI), Ethiopia's mining exports are dominated by gold.[122] Gold mining is also the sector where concerns relevant to the discussion at hand have already been raised.

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[117] Dorothée Baumann-Pauly, Lorenzo Massa, & Natasja Sheriff (2020). "Manufacturing in Ethiopia: Decathlon's Partnership Model (Case Study)," p. 8, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3724583, last accessed August 2023.

[118] Ibid

[119] Ministry of Mines of Ethiopia, Overview of Ethiopia's mining sector, http://www.mom.gov.et/index.php/mining/learn-more-about-ethiopias-mining-sector/, last accessed August 2023.

[120] Ibid

[121] Ibid

[122] See report of the Ethiopia Extractive Industries Transparency Initiative (EEITI) (published August 2019), https://eiti.org/sites/default/files/attachments/ethiopia_eiti_report_2016-17.pdf, last accessed August 2023.

In one particular case, various reports by media and rights groups indicated that residents near Lega Dembi gold mining site in Guji zone of Oromia regional state reported health impacts such as disabilities in newborn children.[123] Following protests, the Government suspended the mining license of the MIDROC Investment Group in May 2018. After three years of halt, MIDROC resumed operations in March 2021. Concerns remain on whether the necessary steps have been followed to ensure that there are no more health risks.[124] A report by the Rift Valley Institute indicates that the government has also transferred one of MIDROC's mines to a newly established local mining company in an attempt to "co-opt local elites and businessmen."[125] The report states: "[t]he socio-economic and environmental impacts of newly established companies such as GODU are not yet clear due to a lack of transparent environmental impact assessments and the relatively recent commencement of mineral extraction."[126]

The case exemplifies the human rights dimensions of environmental and health effects of corporate activities, not limited to the site under consideration but manifesting in the extractive sector more broadly.[127] The case also evokes underlying governance issues such as transparency. In this connection, it is worth highlighting Ethiopia's membership and participation in the Extractive Industries Transparency Initiative (EITI).

Established in 2003, the EITI is a multi-stakeholder initiative to strengthen transparency and accountability in the extractive sector (mining, oil and gas). Its secretariat is based in the Norwegian capital, Oslo. By committing to EITI standard, countries agree "to disclose information along the extractive

[123] See for instance, Human Rights Watch (April 2023), "Ethiopia: Companies Long Ignored Gold Mine Pollution," https://www.hrw.org/news/2023/04/26/ethiopia-companies-long-ignored-gold-mine-pollution#:~:text=People%20living%20near%20Lega%20Dembi,%2C%20inhuman%2C%20and%20degrading%20treatment, last accessed August 2023. See also BBC Amharic (11 December 2017), "**ኦዶ ሻኪሶ-ወርቅ 'መርዝ' የሆነባት ምድር**" https://www.bbc.com/amharic/news-42266025, last accessed August 2023.

[124] Asebe Regassa and Damena Abebe (2023). "Gold Glitters, Grievances Grow: Contestation and Uncertainty around MIDROC and GODU Gold Mines in Guji, Oromia," (Rift Valley Institute/Ethiopia Peace Research Facility). Available at: https://riftvalley.net/sites/default/files/publication-documents/RVI%202023.06.23%20Gold%20Glitters%2C%20Grievances%20Grow_FINAL_compressed.pdf, last accessed August 2023.

[125] Ibid.

[126] Ibid.

[127] ActionAid Ethiopia policy brief, *supra* note 113.

industry value chain –from how extraction rights are awarded, to how revenues make their way through government and how they benefit the public."[128] In addition to government commitment, countries have to ensure a multi-stakeholder engagement such as companies and civil society.

Ethiopia's EITI membership and participation presents a mixed picture. The EITI database shows that Ethiopia is currently "suspended for missing deadline." Ethiopia was admitted to the EITI in March 2014. The latest available report is for 2018/2019, based on data from 2017.[129] Ethiopia was also suspended between September 2017 and January 2018, for not meeting the publication deadline of the report for 2014/2015. In fact, the issue with Ethiopia's EITI membership seems to go beyond missing deadlines.

There were some critical voices that opposed the admission of Ethiopia in the EITI in the first place, the main concern relating to the space for civil society in the context of the former controversial Charities and Societies Law from 2009.[130] For the same reason, the EITI Board had declined Ethiopia's earlier application for membership in 2010. The law was revised after a decade in 2019 as "Organizations of Civil Societies Proclamation No. 1113/2019." After admitting Ethiopia as a member, the EITI Board in its validation decision observed that Ethiopia made "meaningful progress" in implementing the EITI Standard, and stated that "[t]he strong country ownership on the part of the government has not been matched by an equivalent engagement from industry or civil society."[131]

7.3 Technology and human rights: *the case of Meta*

In December 2022, two Ethiopians and a Kenyan rights group filed a lawsuit against Meta (formerly Facebook) before a Kenyan court alleging that the company's content moderation policies helped fuel the conflict in the northern Ethiopian region of Tigray.[132] Meta's sub-Saharan Africa operations are based in Nairobi. In April 2023, the court paved the way for petitioners to serve

[128] See Extractive Industries Transparency Initiative (EITI) Standard, https://eiti.org/collections/eiti-standard, last accessed July 2023.

[129] See Ethiopia's EITI report, *supra* note 122.

[130] Carey L. Biron (2014). "In Accepting Ethiopia, Transparency Group 'Sacrifices Credibility'," Available at: https://www.globalissues.org/news/2014/03/20/18403 Last accessed July 2023.

[131] See EITI Board decision, https://eiti.org/board-decision/2019-21, last accessed July 2023.

[132] Annie Njanja (28 April 2023), "Kenyan court paves way for lawsuit alleging Facebook played role in fueling Ethiopia's Tigray conflict, *Tech Crunch*, https://twitter.com/TechCrunch/status/1652026672571465728

Meta's headquarters in California after establishing that Meta does not have a physical presence in Nairobi with employees working only remotely. One of the petitioners alleges that his father was killed after violent viral Facebook posts which the social media platform failed to remove. The petitioners requested the court to render a decision that would "compel Meta to stop viral hate on Facebook, ramp up content review at the moderation hub in Kenya, and to create a USD 1.6 billion compensation fund."[133] This is a pending case and much may not be said at this stage.

The case highlights an important dimension of BHR involving technology (and social media platforms in particular). There were other instances of allegations of Facebook's role in fanning violence in Ethiopia and other conflict situations such as Myanmar, according to a testimony by a whistleblower before the U.S. Congress and several other reports.[134] In the case of Ethiopia, the company's Oversight Board in 2021 in its resolution to a case entitled "Alleged Crimes in Raya Kobo" recommended that Meta "commission an independent human rights due diligence assessment on how Facebook and Instagram have been used to spread hate speech and unverified rumors that heighten the risk of violence in Ethiopia."[135] In a November 2021 update, Meta recognized that Ethiopia is "an especially challenging environment" partly due to the many languages spoken, even if only less than 10% of the population uses Facebook.[136]

Ethiopia's Hate Speech and Disinformation Prevention and Suppression Proclamation No. 1185/2020 imposes duties on social media service providers to "endeavor to suppress and prevent the dissemination of disinformation and hate speech" through their platforms.[137] In particular, it requires the providers to "act within twenty four hours to remove or take out of circulation disinformation or hate speech upon receiving notifications about such communication or post," and to put in place policies and procedures to

[133] Ibid.

[134] See for example npr (11 October 2021), "Facebook is under new scrutiny for its role in Ethiopia's conflict," https://www.npr.org/2021/10/11/1045084676/facebook-is-under-new-scrutiny-for-its-role-in-ethiopias-conflict last accessed August 2023.

[135] Meta Oversight Board decision, 2021-014-FB-UA, "Alleged crimes in Raya Kobo," https://www.oversightboard.com/decision/FB-MP4ZC4CC last accessed August 2023.

[136] Meta (2021). "An Update on Our Longstanding Work to Protect People in Ethiopia," https://about.fb.com/news/2021/11/update-on-ethiopia/ last accessed August 2023

[137] Article 8, Hate Speech and Disinformation Prevention and Suppression Proclamation No. 1185 /2020.

discharge their duties. The law's direct stipulation of duties for social media companies is highly relevant from BHR angle. Yet as the case of Meta before the Kenyan court shows, its implementation will be challenged by the extent to which the law can be enforced extraterritorially as major social media platforms do not have presence in Ethiopia.

8. Salient Issues pertaining to BHR in Ethiopia: Challenges and Opportunities

From the forgoing discussion of relevant laws and selected cases, it is possible to identify some salient BHR issues (highlighted below) that are particularly noteworthy in the Ethiopian context and which indicate challenges in developing and implementing BHR standards.

8.1 Business and human rights in conflict

Conflict is a recurring theme in almost all of the cases highlighted above. Since conflict transforms the context for human rights, it is important to understand the relationship between business and conflict in contemporary Ethiopia. While the nexus between the two is complex, at least two dimensions deserve consideration. The *first aspect* is the impact of conflict on businesses and the conditions for their compliance with human rights standards. Continuous political unrest and conflict in Ethiopia since around 2016 has undeniably complicated the environment for businesses. In addition to costs and destruction related to generalized violence, some firms (including foreign investors) were either specifically targeted or felt the pressure to meet expectations to adjust their hiring practices in line with local autonomy demands.

The NYU Stern study, for example, documents how the Sidama people's demands for a regional statehood status was also accompanied by demands by a local youth group that the factories in Hawassa Industrial Park employ only Sidama workers. As companies resisted, the confrontation distracted employees from other backgrounds and slowed productivity, according to the report.[138] To cite another example, some estimates are also starting to reveal the impacts of the two-year armed conflict in northern Ethiopia. For instance, a *research brief* (2022) by the Center for Private International Enterprise (CIPE) about the war's impact on micro, small and medium-sized enterprises

[138] Paul M. Barrett and Dorothée Baumann-Pauly, *supra* note 104, p. 15.

(MSMEs) and marginal economic actors (MEAs) estimates a total loss of about 600,000 industrial jobs (coupled with COVID-19).[139]

The *other dimension* is the impact of businesses in local and national conflict dynamics. While the allegation about Meta's role could be a direct example, the role of the private sector in conflict may manifest in more subtle ways. In the Ethiopian context, private businesses are often expected to contribute to fundraising to support pro-government forces during conflict.[140] While businesses may loosely try to view their contribution as part of their social responsibilities, this can be problematic if it is not in harmony with conflict sensitivity and BHR standards. In fact, even well-intentioned social responsibility initiatives in the form of community development projects may be a source of conflict if, for instance, they are used to offset negative impacts on communities.[141]

Charity may not be a substitute for the business responsibility to respect human rights. A commentary on Principle 11 of UNGPs reads: "Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations."[142]

According to a May 2020 *guidance note* by International Alert, in the context of Ethiopia, foreign direct investment may fuel community tension and conflict for reasons related to land acquisition, unmet expectations of economic benefits (including low wages), hiring practices, lack of adequate community consultation, and environmental impacts.[143] The note adds that

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[139] Center for International Private Enterprise (CIPE) (December 2022), "The Impact of the War in Northern Ethiopia on Micro, Small and Medium-Sized Enterprises (MSMEs) and Marginal Economic Actors (MEAs)," (Research Brief). Available at: https://www.cipe.org/resources/the-impact-of-the-war-in-northern-ethiopia-on-micro-small-and-medium-sized-enterprises-msmes-and-marginal-economic-actors-meas/, last accessed August 2023.

[140] Lydia Tesfaye (2022). "The Business of Peace," *Ethiopian Business Review*, 11th Year, Dec 2022, No. 113, https://ethiopianbusinessreview.net/the-business-of-peace/, last accessed July 2023.

[141] International Alert (May 2020). "Conflict-sensitive business practice for foreign direct investment in Ethiopia," (Guidance note), 2020, https://www.agroberichtenbuitenland.nl/documenten/publicaties/2021/01/26/conflict-analysis-of-ethiopia-and-assessment-of-the-implications-for-fdi last accessed July 2023.

[142] UNGPs, *supra* note 26, Commentary on Principle 11.

[143] International Alert, *supra* note 141.

such sources of grievance may easily be politicized, and "foreign investments represent a considerable resource to the government" thereby becoming "targets for those seeking to leverage and highlight their political agenda."[144]

8.2 The space for independent media and civil society

Another feature of the BHR practice in Ethiopia relates to the hitherto limited space for independent institutions such as media and civil society. Alongside the active involvement of businesses themselves, civil society and media play a critical role in the development and effective implementation of BHR standards. This is because BHR is ultimately about promoting governance values such as accountability and transparency. In practice, the engagement of such actors is limited.[145] The limited participation of non-state stakeholders in Ethiopia's EITI membership discussed above is one example.

Another example is the limited involvement of Ethiopian businesses and other stakeholders in UN Global Compact. Based on the latest information on the database of the Global Compact, only five entities from Ethiopia are active members. Of these, two are companies (private sector), two local NGOs, and one local business association. Another company is delisted ("expelled due to failure to communicate progress") and one local NGO is not communicating.[146] To put this into perspective, neighboring Kenya has 291 participant entities (business and non-business), South Africa and Egypt 94 each, Germany 1019, and France 1879 participants.[147] The comparison is certainly without prejudice to a number of important factors such as national regulatory environment for business activity, level of economic development, the environment for civil society actors, and so on.

8.3 A legacy of state economic monopoly

Another contextual factor is the historical legacy of the State being the key economic force (even to date despite gradual privatization since 1991) while the private sector's role is widening only recently.[148] This has its own

[144] Ibid.

[145] Mathias Nigatu Bimir (2015). "Corporate Social Responsibility Learning in the Ethiopian Leather and Footwear Industry" (Master's thesis, International Institute of Social Studies, The Hague).

[146] UN Global Compact database, https://unglobalcompact.org/what-is-gc/participants/ last accessed March 2023.

[147] Ibid.

[148] See Solomon Abay Yimer (2015), "Market Development and Human Rights Protection: Enforcing the UN Guiding Principles on Business and Human Rights in Ethiopia", in: Eva Brems, Christophe Van der Beken and Solomon Abay Yimer (eds.),

implication on the level of development of private sector standards such as BHR. Another manifestation of this legacy is the hitherto dominance of State-owned enterprises in the economy. A plan to open-up major State-owned enterprises for private and foreign investment was announced in 2018. The first private telecom operator license was awarded in 2021 to a global consortium led by Kenya's Safaricom. The momentum of privatization plan in other sectors is yet to materialize.

Meanwhile, the State is expected to continue to be a key economic actor. State-owned enterprises present a unique challenge to implement BHR standards, which should not be perceived to be applicable to private sector businesses alone. In fact, more is expected from State-owned enterprises. The UNGPs provide: "States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies."[149] States are directly responsible for violating international law obligations for human rights abuses by State-owned businesses.[150]

8.4 Opportunities and the way forward

Despite the above challenges, there are opportunities for consolidating the BHR framework in Ethiopia. Firstly, the existing legal framework particularly the Constitution can serve as a starting point. As discussed above, the Constitution already has pertinent provisions in relation to pillars of the *State duty to protect* and *remedies*, while the key element of the *business responsibility to respect* human rights needs further elaboration. Recent legislations are also paying attention to the social and environmental dimensions of business activity. This trend can serve as a basis to consider human rights dimensions as well.

Secondly, Ethiopia's international commitments related to BHR can help strengthen the required political will. A quick look at Ethiopia's positioning in international and regional processes shows a relatively clear commitment towards better regulation of BHR issues. Ethiopia voted in favor of establishing the Working Group tasked to draft the UN binding treaty and continues to engage in the process, for example, by commenting in the draft treaty.[151]

Human Rights and Development: Legal Perspectives from and for Ethiopia, *International Studies in Human Rights* Vol. 111.

[149] UNGPs, *supra* note 26, Principle 4.

[150] Ibid.

[151] UNDP Baseline Study, *supra* note 62.

Ethiopia is one of the 12 Sub-Saharan African States targeted by a UNDP baseline study and considered to have "the potential political will" for BHR.[152] The selection is based on criteria such as willingness to rollout the UNGPs in-country, to promote BHR in universal periodic reviews (UPR) and other treaty review procedures, and having "business activities with material human rights impacts and/or have an active stakeholder community promoting business and human rights (e.g. [national human rights institutions], CSOs and international organizations)."[153] In Ethiopia's latest and third cycle Universal Periodic Review (UPR) finalized in 2019, developing a national action plan for the implementation of the UNGPs is one of the recommendations (made by Norway). Ethiopia has accepted the recommendation, which shows a public commitment.[154] In Africa, only Kenya and Uganda have adopted national action plans on BHR.[155]

Looking forward, a clearer and more comprehensive BHR framework could streamline already existing standards and regulatory practices. While many laws and constitutional provisions are relevant, they are not self-evident. As such, their operationalization through policy and practice becomes problematic. As a next step, developing a policy framework on BHR including a national action plan to implement the UNGPs could serve as a vehicle to diagnose problems such as existing challenges, inconsistencies within the laws and gaps in practice. In this regard, the Ethiopian Human Rights Commission's recent uptake of BHR issues in Ethiopia is promising. The Commission, among others, co-organized the first multi-stakeholder dialogue on BHR in Ethiopia and highlighted the need for a national strategy and action plan on BHR (March 2023),[156] and published a report on health and safety standards in the construction sector (July 2023).[157]

The evolution of the BHR agenda and the practice of several States show that there is no "one-size-fits-all" approach for an effective regulatory framework. At the UN level, the UNGPs (soft law) and the draft treaty (binding if successful) are growingly seen in complementarity to each other.

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[152] Ibid.

[153] Ibid. Other African States include Kenya, Tanzania and Uganda from East Africa; Côte d'Ivoire, Ghana, Liberia, Nigeria and Sierra Leone from West Africa; and Mozambique, Zambia and Zimbabwe from Southern Africa.

[154] See Recommendations part, Ethiopia UPR 3rd Cycle 2019.

[155] Wubeshet Tiruneh, *supra* note 50.

[156] See report at: https://ehrc.org/wp-content/uploads/2023/03/Multi-stakeholder-Dialogue-on-Business-and-Human-Rights-in-Ethiopia_March-2023.pdf, last accessed August 2023.

[157] Report available at: http://ehrc.org/?p=23709, last accessed August 2023.

States also continue to rely on a mix of regulatory approaches (private sector self-regulation, co-regulation through voluntary and/or mandatory due diligence). For Ethiopia, the path ahead can be charted out by taking into consideration the salient features that underpin the national context identified above. An effective BHR framework is indeed a function of viable institutions, as it requires the concerted efforts of a vibrant business and CSO environment, and independent institutions such as courts and national human rights institutions. There is thus the need to follow a genuinely participatory approach that includes a wide range of actors.

Some other issues to consider are (i) how a potential national action plan on BHR is positioned alongside or within a spectrum of other strategic documents such as the National Human Rights Action Plan; (ii) how a BHR framework can be developed to consolidate existing CSR mechanisms and good practices; (iii) on striking the right balance between detail and generality in a potential policy/legislative framework, i.e., whether to adopt an overarching framework first and leave details for further sector-specific articulation and regulation; (iv) institutional set up for the implementation of a potential BHR framework (relying on existing bodies and remedy mechanisms or introducing special entities); and (v) settling on feasible policy choices such as whether to balance between human rights and business (development, trade, investment) or to establish priority for one over another.

9. Conclusion

In this article attempt has been made to assess the status of the law and the practice relevant to business and human rights in Ethiopia. While the State duty to protect and remedy pillars are evident in the Constitution and in recently revised or introduced subsidiary legislations, the key question of the nature and extent of responsibilities of businesses remains either unclear or addressed only incidentally. The reality of conflict and socio-political unrest, the legacy of a State monopoly and the slow pace of private sector empowerment in the economy, and limited space for independent institutions (such as media, CSO, and courts) underpin the challenges in the practice of developing and enforcing BHR standards. To maximize existing opportunities such as the potential and recent trends in the legal framework, a comprehensive and participatory process to develop a policy or strategic framework including but not limited to developing a national action plan on BHR is recommended as a way forward. ■

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Compensation Assessment for Personal Injury Owing to Extra-Contractual Liability: Case Study on Selected Courts

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Abstract

Assessment of compensation for personal injury is an intricate part of the law of extra-contractual liability (torts) since such kind of injury results in loss of a job, part of a body, total permanent disability or death. As personal injury may involve irreparable harm, it challenges courts in quantifying reasonable expenses a victim incurs and determining the amount of disability indemnity. By using decisions of the SNNP and Sidama regional courts together with selected Federal Cassation decisions, this article aims to explore practices of compensation assessment for personal injury. The Civil Code, which applies in federal and state courts, requires assessment of damage and award compensation based on a *rule of equivalency*. Given the generality of this, courts are facing difficulties in making compensation assessments for extra-contractual wrongs that result in personal injury. The problems are related to quantifying reasonable expenses for treatment, determining the amount of disability indemnity, or deciding which kinds of pecuniary losses are included in and excluded from compensation assessment. These problems have caused arbitrary decisions of the courts for personal injury. Variation also exists among court decisions at various levels in determining the extent of harm a claimant sustains and its corresponding compensation. Lack of detailed provisions contributes to such variation, and this calls for legal reform.

Key terms:

Extra-contractual liability · Personal injury · Compensation assessment · Damage

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Contents

1. Introduction

Damage resulting from extra-contractual liability includes physical injury to a person, physical damage to property, injury to reputation, damage to economic interests, and others. These damages –caused to a person's legitimate material interest– may result in the occurrence of loss, prevention of gain, an increase of liability, or future damage, which is certain to occur.[1] Congruent with these sorts of damage, the law of extra-contractual liability[2] provides different remedies to put the claimant in the position he would have been in if the accident had not occurred. Monetary compensation is the usual remedy for such liability.[3] The other essential remedies are injunction and restitution.[4]

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[1] George Krzeczunowicz (1977). The Ethiopian Law of Compensation for Damage, Finfinne Printing Press & Publishing SC, Addis Ababa p 11.

[2] Extra-contractual liability law has two objectives: redressing the damage (Insurance goal) and discourage extra-contractually wrongful acts (Deterrence goal).

[3] Brendan Greene (2012). *Course Note: Tort Law*, Routledge, London and New York, p. 173; Catherine Elliott and Frances Quinn (2011), *Tort Law*, 8th ed., Pearson Education Limited England, p. 375; Gilbert Kodilinye, (2000), *Commonwealth Caribbean Tort Law*, 2nd (ed.) Cavendish Publishing, Great Britain, p.1.

[4] Kodilinye, *supra* note 3, p.1.

Once extra contractual liability is established, the court's next task is to assess the amount of compensation to be paid to a victim by a way of compensation.[5] Yet, the assessment of compensation is the most challenging part of the extra-contractual liability law. This is further complicated where damage results in physical injury- as it involves financial losses that cannot be calculated in monetary terms (non-pecuniary losses), which cover pain, suffering and loss of amenities.[6]

Although these categories of loss cannot be accorded monetary valuation, compensation is nevertheless assessed and awarded with the aim of not only putting the claimant in the position he/she would have been in had the accident never occurred but also providing security and a more comfortable lifestyle for the victim by predicting what kind of life he/she would have lived had s/he not sustained any injury.[7] Due to the uniqueness of each case, it is highly probable that assessing the extent of harm and awarding compensation for physical injuries –followed by loss of a job, parts of the body, or disability of various kinds– involves some discretion in the decision-making process.[8]

Under Ethiopia's Extra-contractual liability legal regime, a victim who claims entitlement to compensation is required to show the causation of the damage by his/her action that constitutes an offence (liability due to fault), or its causation by an object s/he possesses (strict liability), or should show that a third party for whom defendant is answerable incurs a liability (vicarious liability) arising out of an offence.[9] It is to be noted that the alleged act that gives rise to liability should fall under one of the categories of harm recognized as the source of extra-contractual liability under the Civil Code. The source of extra-contractual liability recognized by the law for which compensation is awarded should thus be identified.

After the occurrence of harm is proven, courts assess compensation. Courts are required to assess the extent of damage and award compensation using the 'rule of equivalency'.[10] This principle conveys the notion that "losses (both material and non-material losses) must be made good in their entirety. In doing so, the idea is to place the victim in the same position that he would

[5] Id., p. 477.
[6] Graham Stephenson (2000). *Source Book on Tort Law*, 2nd ed., Cavendish Publishing Limited, Great Britain, p. 582.
[7] Anita Stuhmcke (2001). *Essential Tort law*, 2nd ed., Cavendish Publishing Limited, United Kingdom, p. 142.
[8] Stephenson, *supra* note 6, p. 582.
[9] See the Civil Code, Article 2027.
[10] See Id., Article 2091.

have been had the accident not occurred, and hence, a defendant must make full reparation for the damage he/she has caused."[11]

It is important to note that the assessment of compensation may deviate from the rule of equivalency if the act that gives liability emanates from strict or vicarious civil liability. For instance, if a person, in state of necessity, deliberately causes harm to another in order to save himself or another from imminent damage to person or property, in this case, courts will not apply the rule of equivalency.[12] Instead, they use equity to fix the amount of compensation due from a person who, without committing an offense, causes damage to the property of another in order to save himself or another from imminent damage or danger.[13]

Another ground that justifies deviation from the rule of equivalency relates to physical injury caused by a building or domestic animal of a person. In such cases, the owner may relieve himself from liability by surrendering the ownership of the building or the animal to the person who has suffered the damage.[14] Yet, the owner of the building or animal may not relieve himself of liability by surrendering ownership if the damage is a consequence of an offense committed by himself or a person for whom he is liable.[15] Hence, it is essential to note that the assessment of compensation for personal injury arising from a fault-based liability differs from the assessment of the similar damage arising from strict or vicarious liability.

In line with this, the equivalency rule applies to all extra-contractual claims, be it for personal injury or property loss. The rule is susceptible to very wide judicial discretion. Due to the generality of this principle and lack of detailed subsequent law to this effect, courts also encounter difficulties in determining what types of pecuniary losses are included in and excluded from the compensation assessment. This has made it very difficult for courts to assess the extent of the damage and award compensation for extra-contractual wrongs resulting in personal injuries. This problem has created variation in judicial decisions at various levels regarding the extent of damage the claimant sustains and its corresponding compensation. The variation ranges from awarding very minimal and very high amounts of compensation for similar damage/injury. The dearth of detailed provisions in the Civil Code

[11] Michel Cannarsa (2002). 'Compensation for Personal Injury in France', 8 *Cardozo Electronic Law Bulletin*, p. 12.
[12] See the Civil Code, Article 2067(1).
[13] Id., Article 2103.
[14] Id., Article 2074 (1and 3) and 2078(1)
[15] Id., Article 2074 (2), and 2078(2)

contributes to such variations. Yet, the inconsistency seen in various court decisions is not well explored and documented.

This article examines the assessment of compensation for physical injury owing to extra-contractual liability. It mainly seeks to address how much compensation should a defendant pay when s/he causes physical injury to a given person, how courts can determine the amount of disability indemnity, and also the kinds of pecuniary losses included in and excluded from compensation assessment. This article also aims to highligh the problems that courts encountered in practice concerning compensation assessment for personal injuries using selected cases, mainly from the Sidama and SNNPR state courts and a few from Federal Supreme Court Cassation decisions.[16]

Following introduction, the next two sections deal with conceptual and theoretical frameworks of damage and its mode of compensation as well as the assessment of compensation for physical injury. Sections 4, 5, and 6 deal with the legal framework. They also examine the various components of the assessment of compensation for bodily injury and illuminate issues related to the compensation assessment for physical injury. Court decisions concerning the assessment of compensation for physical injury are also examined. Moreover, the elements that are (or are not) considered in personal injury compensation assessment are discussed based on some judicial decisions.

2. Compensation for Personal Injury: Overview of Concepts

2.1 Damage and its mode of Compensation

A tort may be defined broadly as a civil wrong involving a breach of duty fixed by the law, which attracts legal liability on a person who causes the damage, and its breach is redressable, primarily by awarding damages.[17] Liability that arises from extra-contractual harm is an action for damages

[16] The practices of the courts were viewed in qualitative terms. Data was gathered from court cases. Courts were selected purposely for investigation. The selection of particular courts constituted the second stage of the sampling procedure. Courts that have entertained ample extra-contractual liability matters were preferred. In this regard, three first instances and two high courts were selected for investigation out of the technological villages of Hawassa University. By taking relevant cases, which involve the assessment of compensation for personal injury, the experience of these courts was surveyed and sufficiently elucidated in the research. The study has also included relevant Federal Cassation decisions.

[17] John Cooke (2017). *Law of Tort*, 13th Ed., Pearson Education Limited, United Kingdom, p.3 and Kodilinye, *supra* note 3, p. 1.

because the law of extra-contractual liability protects personal and property interests from being harmed by other persons and obliges everyone not to interfere with the interests of other persons.[18] Where a person interferes with the rights (interest) of another person, without legal justification, the law of extra-contractual liability intervenes to apportion blame and award damages or other appropriate remedies.[19]

Nevertheless, the law of extra-contractual liability does not redress every type of harm caused by a person to another.[20] In some circumstances, the mere fact that the acts of a person have caused harm to another does not in itself give the victim a right to sue the one who caused the damage.[21] Conventionally, extra-contractual liability law contains principles that can be used to determine when the law will (not) grant redress for the damage sustained by a victim.[22] Hence, the claimant, to be entitled to the remedies available, is supposed to prove the occurrence of extra-contractual harm and provide individualized evidence that shows the extent of the loss[23] and such act committed by the defendant and the occurrence of damage. And also, the claimant should prove that such damage is a kind of harm recognized as a civil wrong and attracts legal liability.[24]

Damage, in extra-contractual liability, is harm (injury) caused to a person's legitimate material or moral interest.[25] Moral damage is an injury to a person's moral interests, which affects his/her feelings or emotions. Moral compensation cannot be assessed in pecuniary terms and compensated as such since feelings cannot be quantified in monetary value. Krzeczunowicz noted that "equivalence between harm and pecuniary compensation is, by definition, impossible in cases of moral damage."[26] It is rather unrealistic to make monetary assessment to a person's feelings although the person is in vegetative state due to the damage he/she sustained. How much money can repair the disruption of feeling of a person who has been in vegetative state or who encounters grave livelihood difficulties due to a physical injury arising from extra-contractual wrong? Thus, in principle, moral damage is made good

[18] Cooke, *supra* note 17, p. 3.
[19] Ibid.
[20] Kodilinye, *supra* note 3, p. 1,
[21] Cooke, *supra* note 17, p 4.
[22] Kodilinye, *supra* note 3, P 1.
[23] Martha Chamallas and Jennifer B. Wriggins (2010). *The Measure of Injury: Race, Gender, and Tort law*, New York University Press, New York and London, p. 155.
[24] Cooke John, *supra* note 17, p 3.
[25] Krzeczunowicz, *supra* note 1, p 11.
[26] Ibid.

by awarding non-pecuniary compensation whereas monetary awards are supposed to be exceptions.

In contrast, material damage is an injury to a person's economic or financial interest.[27] The material damage may be present or future material damage. The present material damage deals with the occurrence of loss (loss or deprecation of asset/increase of liability) or prevention of gain (non-increase of the estate).[28] In contrast, future damage is a kind of damage, which has not occurred yet but is certain to occur in the future, and compensation is assessed even if the damage has not yet materialized.[29] These various forms of harm arising from extra-contractual liability may be grouped into three categories: personal injury, property damage, and moral harm.[30]

Property damage, in extra-contractual liability, largely involves damage to the property itself and its consequential economic losses which flow from the damage.[31] Depending on the nature of the damage and property concerned, points considered in property compensation assessment are diminution in value, profit-earning value, cost of purchasing the replacement, loss of profits, and other related matters.[32] So, remedies for property damage are intended to be compensatory to place the claimant into as close as the possible position to which s/he was in before the property damage occurred.[33]

Recovery for damaged or destroyed property involves relatively little controversy as compared with personal injury. Yet, there are some challenging issues that need to be seen with caution. These issues include questions such as: how could the loss be assessed? Is it loss of value or cost of replacement or repair that is assessed? How is the amount of loss determined? (Is it determined as per the market price at the time the loss occurred, or by other means?) What if the property has no market price? How do courts determine the amount of compensation in such a situation? It is to be noted that

[27] Ibid.
[28] Ibid.
[29] Id., p 17.
[30] Mo Zhang (2011). 'Tort Liabilities and Torts Law: The New Frontier of Chinese Legal Horizon', 10(4) *Richmond Journal of Global Law & Business*, 415-495, p. 470.
[31] Id., p. 471.
[32] Anita Stuhmcke (2001). *Essential Tort law*, Cavendish Publishing, London, pp.143-145.
[33] Id., p. 142.

assessment of damage involves a prediction of what would have happened to the claimant if the accident had not occurred.[34]

When one sees personal damage, it is an infringement of the right or interests of the life or health of another person, causing injury, disability, or death.[35] Unlike property damage, "[e]conomic analysis of damages for death and serious permanent physical injury differs substantially from the standard analysis of property damage because these injuries include … irreplaceable [harm]."[36] In this situation, "victims are not compensated for their total losses arising from an accident that results in death or serious permanent injury. Rather, victims are compensated for the monetary losses associated with the injury plus an award for the 'pain and suffering' occasioned by the loss."[37]

This makes compensation assessment of personal damages the most controversial area of the extra-contractual liability law.[38] Opinions are so divided over who is entitled to compensation and how much.[39] The assessment of damages, in such cases, remains the most unsatisfying and challenging aspect of the law of extra-contractual liability.[40] The actual amount of compensation differs substantially depending on the particular type of personal damage, the age of a victim and employment record, mainly in cases that involve disability or death.[41]

Assessment of compensation for personal damage has multifaceted aspects. The first aspect includes the costs and expenses for treatment and rehabilitation, such as medical treatment expenses, nurse fees, travel expenses, and lost wages.[42] Such kind of compensation seems to be less controversial because most of the costs in this category are measurable. It is possible to calculate more or less exactly the award of such damages: it includes the actual financial losses to the date of trial.[43] The issue that may

[34] Vivienne Harpwood (2000). *Principles of Tort Law*, (4th ed.), Cavendish Publishing Limited, Great Britain, p. 409.
[35] Zang, *supra* note 30, p. 471
[36] Jennifer Arlen (2000). "Tort Damages", *Encyclopedia of Law and Economics*, 682-734, p. 697.
[37] Ibid.
[38] Zang, *supra* note 30, p. 471, and Greene, *supra* note 3, p. 173.
[39] Zang, *supra* note 30, p. 471.
[40] Klar N. Lewis (2011). *Recent Developments in Canadian Law: Tort Law*, Ottawa Law Review Vol. 17, 325-415, p. 407.
[41] Zang, *supra* note 30, p. 471.
[42] Ibid.
[43] Harpwood, *supra* note 34, p. 409.

lead to dispute is whether the costs are reasonable or not and determining costs/expenses that were incurred by the victim.[44]

The second aspect of personal damages concerns the victim's physical disabilities for which the costs of disability life assistance equipment and disability indemnity are paid. Compensation for disability encounters certain difficulties. For instance, the cost of disability life assistance equipment may only be a matter of reasonableness, but disability indemnity is considerably knotty.[45] It is impossible to predict what the claimant has lost for the future or to translate intangible losses such as pain and suffering into money, and it is in this area of the assessment of personal damage where most of the problems arise, and most of the injustice or unfairness is seen to exist.[46] Besides, what constitutes a disability, what should the disability indemnity cover and determining the amount of disability indemnity remains questionable.

The third aspect of personal injury involves disputes relating to death damages.[47] Descendants or survivors who sustain material damage as a result of the death of the victim, are thus allowed to claim compensation. The central issue is determining the descendants or survivors that are eligible to claim compensation. An issue also arises as to how the amount of death damage can be determined. The aforementioned points reveal that assessment of compensation for personal injury involves complex and controversial issues highlighted below.

2.2 Damages for Personal Injury

As indicated above, the term personal injury covers physical harm to the person, disease, and illness, including psychiatric illness.[48] Personal injury sustained by the victim may cause separate facets of damage. The first aspect is the personal injury itself which arises from the loss of some part of the body and may result in loss of pleasure in life.[49] This kind of personal injury may expose the victim to (loss of physical amenities, pain, shock, and suffering) or various kinds of disabilities (temporary disability, permanent partial or total incapacity), which are difficult to quantify and estimate in monetary terms.[50] The second dimension relates to the loss of earnings (obtained by the victim

[44] Zang, *supra* note 30, p. 471.
[45] Ibid.
[46] Harpwood, *supra* note 34, p. 409.
[47] Zang, *supra* note 30, p.471.
[48] Cooke, *supra* note 17, p 514.
[49] Ibid.
[50] Ibid.

and potential incomes the victim would have continued to earn),[51] medical [52] and extra expenses such as nursing costs.[53]

2.1.1 Loss of earnings

Loss of earnings is usually the main item of financial loss for a victim of personal injury. It can be assessed by contrasting the position before and after the accident and assessing the difference. Loss of earnings, which is borne by victims of personal injury, could be actual loss and future loss.[54] Actual loss of earnings is a loss that runs from the date of the accident to the date decision is made after making the necessary deduction to ascertain the net loss.[55] On the other hand, "future loss is speculative and relates to losses the plaintiff will suffer after the date of assessment."[56] Such kind of loss which has not materialized yet but can be speculated is spread over many years to come and needs to be turned into a single capital sum payable at the date of pronouncement of judgment.[57]

Depending on the severity of the personal injury, such loss of earnings may be total or partial, and for a limited period or continuing.[58] Moreover, when calculating the loss of future earnings, there are certain factors that are taken into consideration including any possible promotions and salary increases from which the claimant may have benefited during his career had it not been for the injury he/she sustained.[59] Yet, a minor is the victim of personal injury, the calculation of future loss of earnings becomes complicated since the minor does not have earnings. In some countries, the practices of courts suggest that the awards in these cases are usually very low and it is awarded only exceptionally if the child has a special talent or is exceptionally good at something such as being a promising football player or another similar career.[60]

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[51] Cannarsa, *supra* note 11, p. 13
[52] Cooke, *supra* note 17, p. 514.
[53] Cannarsa, *supra* note 11, p. 13.
[54] Richard Owen (2000). *Essentials Tort Law*, Cavendish Publishing Limited, Great Britain, p. 173.
[55] Ibid.
[56] Ibid.
[57] Cannarsa, *supra* note 11, p. 15.
[58] Ibid.
[59] Vivienne Harpwood (2007). *Modern Tort Law*, 7th Ed. Routledge-Cavendish, London and New York, p. 435
[60] Id*.,* p. 436.

2.1.2 Pain and suffering

Pain and suffering are non-pecuniary damages that the victim of personal injury sustains besides loss of earnings.[61] Such sufferings include pain, discomfort, anguish, inconvenience, or emotional trauma that are compensable as non-economic damages.[62] They are related to the loss of enjoyment of life and the damages for such losses compensate for the frustration and anguish caused by the inability to participate in activities that once brought pleasure.[63] While damages like medical expenses and loss of earnings can easily be calculated in economic terms, pain and suffering are completely subjective.[64] "Non-pecuniary damages cover intangibles such as loss of physical amenity, pain, shock and suffering."[65]

Intangible injuries cannot be precisely measured, resulting in two types of pain and suffering: physical, mental or both. Physical pain and suffering are the pain of the victim's actual injuries in his/her physique. Mental pain and suffering are more a by-product of those bodily injuries, which include mental anguish, emotional distress, fear, anger, humiliation, anxiety, and shock. Pain and suffering are subjective feelings: only the victim can explain the pain and the effects of the pain. This, in turn, leaves the judges adjudicating personal injury claims associated with pain and suffering to award what they deem a fair compensation depending on the gravity of the pain and suffering. Courts may set different value and award fair compensation to victims of pain and suffering.[66]

3. Compensation Assessment for Personal Injury: General Considerations

Assessment of compensation presupposes quantifying an actual loss of a victim of personal injury. Quantifying the exact loss is complicated by several factors such as the age of the victim, the extent of the damage, the level of a

[61] Joseph H. King (2004). "Pain and Suffering, Non-economic Damages and the Goals of Tort Law" 57 *Southern Methodist University Law Review*, 163-209, pp. 167- 168.
[62] Id., 164.
[63] Id., 168.
[64] John J. Kircher (2007). "The Four Faces of Tort Law: Liability for Emotional Harm", 90 (4) Marquette Law Review, 789- 920, p. 802.
[65] John Cooke (2011). *Law of Tort*, Tenth Edition, Pearson Education Limited, England, p. 543.
[66] Paul V. Niemeyer (2004). "Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System", 90(5) *Virginia Law Review*, 1401-1421: 1404.

disability, health, and financial position of a victim. The rule in compensation assessment is a full reward which means compensation must be proportionate to the damage suffered.[67] As shown above, a victim of personal injury incurs both pecuniary and non-pecuniary losses which include pain and suffering, and loss of a body part.[68] Pecuniary and non-pecuniary losses are recoverable and compensable, so long as a direct cause-and-effect relationship is established between an act that gives rise to liability and the damage sustained.[69] Thus, the most relevant issue is what counts as a direct and immediate consequence of the act that gives rise to liability.

Apart from the medical and transport expenses, the victim incurs other expense items that are recoverable contingent on whether they have a direct relation with the act that gives rise to liability. For instance, expenses to cover the cost of special living accommodation or other capital assets can be claimed as part of the award of damage. The measure of damages, in this case, will be the sum spent to obtain the particular facility and its running costs, but not the capital cost of any facility, such as a car, which the claimant would have had. Hence, in the case of a car, the cost of its peculiar adaptation to suit specific disabilities would be claimed but not the full cost of the vehicle itself.[70]

This special adaptation is applicable for accommodation to suit specific disabilities. A victim may be forced to adapt his/her accommodation (house) and its intrinsic elements in a way that fits with the disability. For instance, the victim may be required to move light switches lower down the wall to make it accessible for a victim in wheelchairs, special lifts may need to be installed to allow people to negotiate stairs or special equipment may be needed in restrooms.[71] The claim is that "[i]f the plaintiff has to change to special accommodation due to his injuries, then the additional cost over ordinary accommodation is recoverable."[72] It is also argued that the "cost of adapting a car to special needs is also recoverable."[73] Hence, the victim can claim all these expenses (which have a direct association with or emanate from the injury), starting from the date of the accident to the date of the trial.[74]

[67] Cannarsa, *supra* note 11, p. 12.
[68] Owen, *supra* note 54, p 172.
[69] Cannarsa, *supra* note 11, p 15.
[70] Harpwood, *supra* note 34, p 418.
[71] Harpwood, *supra* note 59, p. 429
[72] Owen, *supra* note 54, p. 172.
[73] Ibid.
[74] Harpwood, *supra* note 59, p. 429.

Moreover, a victim of physical injury may be exposed to various kinds of inability to enjoy life in various ways. This will include impairment of the senses, inability to run, walk, or play football, and inability to enjoy sexual functions or marriage. The injury may put the claimants in a persistent vegetative state or a coma so that s/he will receive a very high award for loss of amenity.[75] Thus, the victim is entitled to damages for the inability to enjoy life in various ways and remaining in a persistent vegetative state, in a coma, or for loss of amenity.[76] It should be noted that

> "[s]ome injuries are virtually impossible to assess in money terms. For example, what would be the amount of compensation a court would give for a woman who has lost a fetus and became permanently infertile as a result of medical negligence or a broken arm will be worth a certain amount, loss of an eye worth a certain figure, a scar would be worth a certain sum and so on."[77]

This requires the court to fix the market value of an injured body part. Computing the market value of a harmed eye, broken leg, or scar is something that courts have to grapple with. Assessing damages for intangibles such as pain, shock, and suffering is impossible.

Other serious difficulties are the problems related to calculating future pecuniary losses and estimating the future medical condition of the victim.[78] One has to ask about the level of damages for pain, suffering, and loss of amenities in personal injury. As Cannarsa states:

> "[p]ain and suffering are subjective and are impossible to measure in terms of money. However, an award will be made to cover nervous shock, psychiatric symptoms, and physical pain and suffering. It is believed that unconscious people do not suffer any pain, and therefore, no award will be made under this head in cases where the claimant is in a coma."[79] … [I]t should be noted that the pain and extra expense the victim of the physical injury incurs should be measured throughout the injury, "whereas the loss of earnings and the enjoyment of life should be measured over the period for which the victim would have enjoyed the benefits."[80]

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[75] Id., p. 448.
[76] Ibid.
[77] Id., p. 450.
[78] Cooke, *supra* note 17, p. 514.
[79] Harpwood, *supra* note 59, p. 448.
[80] Cannarsa, *supra* note 11, p. 13.

Forms of payment

Once a claimant succeeds in an action for extra-contractual liability and after courts decide the amount of compensation payable to the victim, the compensation payment modality may take the form of a sum or a periodic payment award.[81] However, there is an argument regarding the choice between a lump sum money *vis-à-vis* periodic payments depending on the form of payment that is more appropriate, particularly in view of the interest of victims.[82] It is important to note that granting a sum or a periodic payment has its own respective merits and demerits.

Lump-sum awards give wider discretion and freedom to victims of physical injury to choose what they wish to do with their compensation so that they devote their energies to recovery.[83] The lump-sum payment also enables "the claimant to concentrate on recovery without reducing their entitlement to compensation, enabling the insurer to pay up and incur no further inconvenience, and enabling the claimant to plan their life, taking into account any disability suffered."[84]

Despite its multitude of advantages, lump sum payment is not without drawbacks. First, lump-sum payment can never be an accurate reflection of what was lost because the assessment is made "based on a series of predictions and rely on the crude formulae; of multiplier and multiplicand."[85] Second, victims of physical injury may "use the capital unwisely; no account can be taken of any improvement or deterioration in the claimant's medical condition and it is difficult to take account of inflation, which may erode what at the time was adequate compensation."[86] Moreover, provisional payments of damages, which can be adjusted at a later date, may be made in cases where the medical prognosis is uncertain and where there is a chance that a serious disease or serious deterioration in the claimant's physical or mental condition will occur at a later date.[87]

The following section examines the practices of courts in connection with the assessment of compensation for physical injury in Ethiopia. The question is how courts apply the rule of equivalency in assessing compensation for

[81] European Group on Tort Law (2004), *Principles of European Tort Law: Text and Commentary*, Springer, Austria, p. 153.
[82] Ibid.
[83] Harpwood, *supra* note 59, p. 458.
[84] Cooke, *supra* note 17, p., p. 514.
[85] Harpwood, *supra* note 59, p. 458.
[86] Cooke, *supra* note 17, p. 515.
[87] Harpwood, *supra* note 59, p. 459.

physical injury. It also examines what items are included and excluded in different personal injury compensation assessments using selected judicial decisions.

4. Personal Injury Compensation Assessment under Ethiopia's Extra-contractual Liability Law

As mentioned above, the Ethiopian extra-contractual liability law makes a person responsible for damage arising from his/her own fault, for damage caused by things that are under his/her control or a third person to whom he is responsible.[88] The Civil Code requires a respondent to make the damage good to put a victim in a position had his/her property has not been destroyed.[89] Like other legal systems, the first mode of redress is monetary compensation, followed by other remedies such as injunction and restitution.[90] The Civil Code gives wider discretion to courts to choose an appropriate remedy that fits with the damage and makes the damage good. In this logic, courts may award either monetary compensation only, injunction, or restitution (in lieu of/addition to compensation).[91]

If courts decide to award monetary compensation, they are expected to use a rule of equivalency as their vital consideration in extra-contractual liability decisions. It follows that a victim is compensated for what s/he has lost by the act giving rise to liability.[92] The Civil Code vividly shows the kind of compensation a victim of physical injury is entitled to. It could be present or future damage.[93] As stipulated in the Civil Code, future damage shall be made good without waiting for it to materialize so long as it is certain to occur. Thus, irrespective of the kind of damage (present or future), the amount of compensation due by the person legally declared liable shall be equal to the damage caused to the victim by the act giving rise to the liability.

There are issues that arise concerning the assessment of sum of money that will be given to a victim who loses his/her job permanently, part of a body, or is permanently disabled. As indicated earlier, it is difficult to determine the market value of an injured body part, such as a harmed eye, broken leg, or damaged teeth, or the amount of compensation given to a woman who lost a

[88] See the Civil Code, Article 2027.
[89] Id., Articles 2028 *cum*. 2090.
[90] Id., Article 2090(1) & (2).
[91] Id., Article 2090(2).
[92] Owen, *supra* note 54, p. 168; see also the Civil Code, Article 2090(2).
[93] The Civil Code, Articles 2091 & 2092.

fetus and became permanently infertile due to physical injury from a car accident. The Civil Code does not give detailed provisions that indicate how courts calculate compensation in such cases. The compensation assessment could be more complex when minors, students or self-employed persons sustain severe physical injury, permanent disability or loss of part of a body.

How do courts calculate compensation for the victim who graduated from a university but has no past work experience? What is the equivalent compensation awarded to a minor who sustains total permanent disability, and how do courts assess compensation? What amount of compensation would put a permanently disabled minor in a position s/he would have been in if the accident had not occurred? What is the amount of compensation a court can give for a chef (professional cook) who loses his/her ability to taste or smell due to an accident? What if the chef lost his business and livelihood since his senses are compromised? What references do courts use to assess compensation in the above cases? Can courts use age, employment record, health condition, financial position, unique talent or the prospect of a victim to earn income in the future as a reference to compute the amount of compensation? This shows that the assessment of compensation for cases involving physical injury has many variables to be taken into account.

Decisions –such as how much is enough and what type of items are considered in quantifying the amount of compensation– are knotty issues since the provisions of the Civil Code that regulate the assessment of compensation lack answers to these matters. Thus, courts encounter problems in quantifying reasonable damage the victim sustains and computing the amount of compensation.

Form the above discussion, it is logical to argue that compensation assessment for physical injury remains the most unsatisfying in cases where the harm involves the loss of part of the body. This is also indirectly inferred from the Civil Code provisions that allow the insured victim and victim pensioned off to bring an action for compensation for the damage s/he has suffered on the same term as though he had not been insured and had not received a pension, respectively.[94] These facts indicate that compensation assessment is the most challenging task for courts, and a reference guide is needed in this regard.

The Cassation Bench of the Federal Supreme Court, observing a lack of clarity in the Civil code in this regard, has (in a series of its decisions) underscored that the aim of extra-contractual liability law is neither to enrich

[94] Id., Articles 2093 & 2094.

the victim by giving an exaggerated compensation nor undermine the damage that the victim sustained by awarding a small amount of damages.[95] This is the guiding principle common to all extra-contractual liability cases, be it for damage to property or personal injury. Hence, the claimant must show the occurrence of damage in his/her legitimate interest, the extent of the damage, and the person who caused the damage.

The damage which is caused to the victim may be material and moral harm. Concomitant with the types of damage, the Civil Code envisages material and moral damages that can be granted to a victim by way of redress for the harm or loss s/he sustains. It is important to note, in case of property damage, the applicant may claim either for costs of damaged property or the cost of a substitute or/and loss of profits. The extent of the compensation could be assessed based on the magnitude of the damaged property. This is with an assumption that the award should put the victim in a pecuniary position that prevailed before his/her property was destroyed.[96]

There is a common understanding that harms resulting from property damage are losses that are capable of being calculated more or less precisely. However, applying the principle of equivalency could be very problematic in cases where the harm involves physical injury. As stated earlier, there are serious practical difficulties in assessing precisely the actual financial loss, predicting exactly what the claimant has lost for the future, translating intangible losses such as pain and suffering into money, etc. This may demand a reader to pose a question about how courts value and determine the loss in personal injury cases. It is argued that "[d]amages are awarded for the injury sustained by the victim, and for all the consequential losses and expense which flow from the injury."[97]

Depending on the nature of the interest harmed, damage sustained by the claimant of personal injury may be pecuniary loss or non-pecuniary losses. It is clear in the Civil Code that an applicant is entitled to claim the cost of treatment and care that s/he reasonably incurs as a result of his/her injuries.

[95] See Zeyneba Hassen vs. Firew Tekalign (Cassation File No. 19338, Federal Supreme Court Cassation Division Case Reports, Vol. 5, pp. 106-112,) and Genet Getachew and Nahom Abebe vs. Wondwesen Hailu (Cassation File No. 34138, Federal Supreme Court Cassation Division Case Reports, Vol. 5, pp. 171-173). In both decisions, the Federal Supreme Court Cassation Bench underlined that Article 2091 and 2092 should be interpreted in a way the principle of equivalency is implemented effectively.

[96] Steele Jenny (2014), *Tort Law: Text, Cases, and Materials*, 3rd Ed., Oxford University Press, New York, p. 454.

[97] Cannarsa, *supra* note 11, p. 12.

However, it is inexplicit in the Civil Code whether the plaintiff can claim compensation for pain and suffering and loss of amenity other than moral compensation. Such kinds of claims are incapable of precise calculation. Thus, courts encounter problems in quantifying reasonable cost and expenses for treatment and rehabilitation, assessing victims' disability, computing the amount of disability indemnity and also what constitutes a disability and related issues.

The compensation assessment could be more complicated if the damage is sustained by children and students. A problem arises in determining the value of the lost earning capacity of children and students who have no past work experience but probably would have gone into the paid work or who would likely have been able to earn more income than they are able to earn given the long-term disabling condition caused by the act giving rise to liability. The issue that needs an answer is whether minor children victims of physical injury should be compensated. If yes, how is the amount assessed? In this regard, the Federal Cassation Bench, on the case *Ato Birhanu Feyissa vs. Nile Insurance S.C. and Ato Solomon Ahmed,* decided that it is not always necessary for the victim to be above 18 years and earning income to claim compensation.[98] Under such situation, courts are expected to apply equity and fairness to award compensation (as per Article 2095 of the Civil Code) to persons of next of kin.

Another issue worth discussing is determining a value of a loss of future earning capacity of a victim who has had a past history of employment but who was unemployed at the time of the extra-contractual wrong. Courts have faced difficulty in compensation assessment for such cases, especially when the victim has been unemployed for quite some time. This kind of scenario is

[98] In Ato Birhanu Feyissa vs. Nile Insurance S.C. and Ato Solomon Ahmed, the applicant, sought compensation for the death of his 11 years son. The applicant alleged that the respondent (Ato Solomon Ahmed), the driver of Nile Insurance S.C, ran over his 11 years son. Owing to the death of his son in the fatal accident, the applicant claimed the court to award compensation alleging that had it not been for the accident, his son (after attaining 18) would have provided him maintenance and other financial support. The respondent, on his part, argued that the applicant has not provided proof on whether his son would even have his own earnings let alone provide financial support. The Cassation Bench, after thoroughly examining the case and the relevant provisions of the civil code (Article 2091, 2092 and 2095), revised the decisions of lower courts by stating that the mere fact the victim is a minor and not earning income is not a bar to claim compensation by the next of kin. The Cassation Bench awarded moral compensation and material damages to Ato Birhanu using the principle of equity. (See Cassation File No. 38117, Federal Supreme Court Cassation Division Case Reports, Vol. 11, pp. 423-425).

one of the instances where the obvious difference is observed in the courts' compensation assessment decision. To attain consistent application of the law and narrow down the difference observed in the decisions of the courts, the Federal Cassation Bench, in *Ato Ayele Admassu vs. Ato Ajebu Shume*, clearly stated that it is not necessary for the claimant of compensation to earn income at the time when the extra-contractually wrongful act occurred.[99] The Federal Cassation Bench saw the matter in light of the constitutional right of a person to be protected against an act that endangers one's liberty, physical integrity, and freedom.

The cassation decision noted that the aim of extra-contractual liability law is not to measure damage based on special utility the victim losses regarding a specific job. Instead, it assessed injury based on the general utility rule so that an assessment is made about the incapacities the victim has to live with as a normal person as a result of the extra-contractual act. Thus, to get compensation, it is not a prerequisite for a physically injured victim to be employed or earn income at the time s/he sustained the injury. In this situation, courts are required to equitably decide compensation as per Article 2102 (1) of the Civil Code rather than entirely rejecting the claim.[100]

5. Practices of Personal Injury Compensation Assessment: Overview of Some Judicial Decisions

The SNNP and the recently formed Sidama Regional State's courts are organized in accordance with the FDRE Constitution.[101] Under respective Court Establishment laws of the two regions, the courts have material jurisdiction over several criminal and civil matters. One of the civil matters that are reviewed by the state courts is extra-contractual liability cases. In these courts, extra-contractual liability cases are settled as per Book IV, Title XIII of the 1960 Civil Code.

According to the Civil Code, the damages payable to a victim of personal injury, depending on the nature of the harm, could be moral and material. As a rule, moral harm may not be made good by monetary compensation.[102] Yet, a pecuniary compensation can be awarded to victims of moral injury if an express stipulation exists in the extra-contractual liability law that pronounces

[99] Ayele Admassu vs. Ato Ajebu Shume (See Cassation File No. 42962, Federal Supreme Court Cassation Division Case Reports, Vol. 10, pp. 242-243).
[100] Ibid.
[101] FDRE Constitution, Article 78.
[102] Civil Code, Article 2105(1).

moral harm shall be made good by way of damages.[103] Moral harm resulting from extra-contractual liability can be remedied in monetary terms when the damage is related to physical injuries or death. The Civil Code stipulates that, in the event of harm that involves physical injuries or death, courts may award fair moral compensation to the victim of bodily injury or, in the event of his/her death to his/her family.[104] Hence, courts have the discretion either to grant, reduce or deny compensation. In most of the cases examined in this article, courts award moral compensation depending on the nature and intensity of the moral harm.[105]

5.1 The practice of moral compensation assessment for personal injury

The Civil Code has stipulated the maximum amount of moral compensation that courts can award to a victim of personal injury or his/her family in the event of death.[106] Many question the fairness and suitability of the one thousand Ethiopian Birr threshold as the maximum moral compensation that the law has set. This concern is logical since it has been more than six decades since the Civil Code was enacted in 1960. Since then, significant changes have been made that resulted in the devaluation of Birr and the reduction of its purchasing power. In this regard, Negatu argues that during the time of the provision's enactment (in 1960) Birr 1,000 could suffice to construct a house to a poor person, but at present it cannot even be enough to buy a single suit:

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[103] Id., Article 2105.

[104] Id., Article 2113.

[105] In Belaynesh Balcha vs. Admassu Duba, the applicant, W/ro Belaynesh Balcha, stated that Ato Admassu Duba (respondent) attacked her and snatched her bag (which has 9,500 Birr) and pushed her into a water ditch. As a result, the applicant sustained major injury including sever crack in her left knee for which she demanded 33, 666 and 1,000 Birr compensation for material and moral injury respectively. The respondent contested the credibility of evidence produced and requested the court to relieve him from any liability. The court, after examining the evidence produced and the respondent's criminal conviction, awarded the applicant 4,666 Birr for the medical expenses, 5,000 Birr to cover the costs she incurred to buy food and other necessary items and 1,000 Birr for the moral injury. (File No. 15201, Wolayita Sodo, First Instance Court (decision made, 23/7/2007EC). See also Habitamu Tadesse vs. Afework Elias. In this case, the applicant alleged that, due to the acts of the respondent, he suffered physical injury. He claimed material and moral damages. The court awarded 1,000 Birr moral compensation. (Hawassa City First Instance Court, File No. 31148, decision render, 22/7/2006EC). Similarly, in Ato Temesegen Abinew vs, Ato Abebayehu Temsegen, the court awarded 1,000 Birr moral compensation for moral injury arising from the extra-contractually wrongful acts of the respondent. (File No. 06382, Hawassa City First Instance Court, decision render, 05/04/2009EC).

[106] See Civil Code, Article 2116(3).

ሕጋችን ለሕሊና ጉዳት የሚከፈለው ካሣ በማንኛውም ሁኔታ ከአንድ ሺህ ብር ሊበልጥ አይችልም ስለሚል ዳኞች ካሣውን ወደ አንድ ሺህ ብር ዝቅ ማድረግ ይኖርባቸዋል። ሕጉ በወጣበት በ1950ዎቹ ዓመታት ይሄ ገንዘብ ለአንድ ደሃ ቤት ሊሠራለት ይችል ነበር። አሁን ግን አንድ ሙሉ ልብስ እንኳን አይገዛም። በአሜሪካን አገር ለእንደዚህ ዓይነቱ ኪሣራ እስከ 525 ሺህ ዶላር የተከፈለበት ጊዜ አለ።[107]

According to Nigatu, a thousand Birr maximum ceiling compensation award is inconsequential in redressing the victim's morals or mental distress. It seems that applying the provision as it is blurs the rationality of a compensation award, which is one of the challenges our courts face. So, the moral damage compensation issue requires due attention because the ceiling of Birr 1,000 for compensation for moral damage does not conform to justice and the purpose of the law of extra-contractual liability. The issue calls for a legal reform that takes into consideration current realities.

The Copyright and Neighbouring Rights Protection Proclamation can be taken as an exemplary law since it allows a 100,000 birr payment as moral damage compensation taking current developments into account.[108] One can imagine the mental distress of a woman who has lost a fetus and is infertile due to medical negligence, a person with a broken leg who is disabled permanently, or a person who lost two eyes due to an accident. While recognizing the seriousness of the damage and mental distress a copyright holder sustains due to the violation of their rights, it is equally significant to reiterate severity of the mental disruption victims of physical injury suffer. If the law undermines the latter and upholds the former forms of damage only, the ultimate goal of the law of compensation would be ignored and unfairness prevails.

Despite the above discussion, there is no agreement among courts in deciding the maximum amount of moral compensation to be awarded to the family members in the event of the death of the victim and when there is more than one person eligible to receive moral compensation. The issues that are bound to arise are whether each eligible family member is entitled to 1,000 Birr moral compensation separately or whether the 1,000 Birr moral compensation is apportioned to eligible family members.

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[107] Negatu Tesfaye (2004)/ (1996 Ethiopian Calendar). *Extra contractual Liability and Unjust Enrichment* (Amharic), Addis Ababa: Artistic Printing Press, p. 196.

[108] Proclamation No. 410/2004 Copyright and Neighboring Rights Protection Proclamation, as amended by Proclamation No. 872/2014 Copyright and Neighbouring Rights Protection (Amendment) Proclamation. This provision reads: "The amount of compensation for moral damage shall be determined based on the extent of the damage and not be less than Birr 100,000 (Birr one hundred thousand."

In *Awash Insurance S.C. vs. Ato Mohammed and W/ro Zahara*, the applicant (Awash Insurance S.C.) brought the case to the Federal Cassation bench. The applicant in the lower courts and the current respondent (Ato Mohammed and W/ro Zahara) individually petitioned for moral compensation following the death of their son in a fatal accident. The lower courts consistently awarded 1,000 Birr moral compensation for each applicant (2,000 Birr total). It is for this reason the applicant, Awash Insurance S.C., petitioned the Cassation, alleging that the lower courts made a fundamental error of law by granting a moral compensation exceeding 1,000 Birr. In this case, the Federal Cassation Bench's decision stressed that the maximum amount that can be awarded as moral compensation should not exceed 1000 Birr, irrespective of the number of the awardees.[109] This Cassation decision can be cited in similar extra-contractual liability cases, which in turn would bring uniformity in future decisions of the courts.

Another related issue that needs to be raised is whether courts are always obliged to award moral compensation. Court practice shows that courts are not obliged to always accept moral compensation claims. In *Feyissa Filha vs. Ato Yishak Loza, Wolayita Sodo University, and Ethiopian Insurance Company*,[110] the applicant (Ato Feyissa Filha) brought a case to court claiming both moral and material compensation since he sustained bodily injury after being hit by a car owned by Wolaita Sodo University. The court rejected the moral compensation claim stating the applicant suffered a temporary injury and is likely to recover soon. The court further stated that the applicant hardly suffered moral damage for the temporary physical injury. This decision of the court leads to the question of whether sustaining a permanent injury is a requirement to claim compensation.

5.2 The practice of material compensation assessment for personal injury

In the above case (Ato Feyissa Filha vs. Ato Yishak Loza, Wolayita Sodo University, and Ethiopian Insurance Company case), the applicant (Ato Feyissa Filha) stated that he sustained a physical injury on his head, left eye and hand. The plaintiff claimed that, due to the accident, he incurred Birr 965 for transportation, Birr 3,107 for the medication (treatment), Birr 11,940 as

[109] Awash Insurance S.C. vs. Ato Mohammed Aba and W/ro Zahara Abanur (Cassation File No. 69428, Federal Supreme Court Cassation Division Case Reports, Vol. 13, pp. 486-487).

[110] Feyissa Filha vs. Ato Yishak Loza, Wolaita Sodo University and Ethiopian Insurance Company (File No. 31148, Wolaita Sodo High Court decision made, 29/12/2007EC).

lost income for six months due to the injury he sustained, and Birr 239,760 compensation for alleged working capacity reduction by 30%.[111]

On the other hand, the first respondent (Ato Yishak Loza) denied his liability citing his acquittal from a criminal suit for the same causes of action. The second respondent, Wolaita Sodo University requested that Ethiopian Insurance Company be a party in the case since the alleged vehicle has insurance coverage. The Ethiopian Insurance Company, on its part, challenged the six months of lost income alleging that the applicant was hospitalized for three days only. It further stated that the applicant sustained no permanent disability, and no medical board has declared his working capacity has been reduced by 30%.

After examining the allegation and evidence produced, the court rejected the applicant's claim of having lost 30% of his working capacity since the Sodo Hospital's medical report did not show any permanent disability. Yet, the court confirmed that the applicant did not earn wages for three months and awarded Birr 5,400 (i.e., 30 days x 60 Birr/day x 3 months). Concerning the claims related to expenses for medical treatment, the court awarded Birr 1,203 since this was the only expense supported by valid evidence. The court ordered Birr 2,000 for other expenses such as transportation, food and traditional medication. As seen from the case, all costs and expenses that have a direct relationship with the physical injury were taken into account. The court also tried to apply the rule of equivalency to assess the extent of the damage. This is consistent with the aim of extra-contractual liability law that stipulates that in case a person sustains a material injury, the material damages due by the person legally declared to be liable shall be equal to the damage caused to the victim by the act giving rise to liability.[112]

It is important to note that, in a few circumstances, courts are authorized to deviate from the *rule of equivalence*. This could happen if the damage is due partly to the fault of the victim,[113] the damage was committed by a person who was not in a state to appreciate the wrongful nature of his/her conduct[114] or the damage expanded beyond what could reasonably be expected in

[111] The applicant stated that he is 18 years old now and could live up to 55 years. He computed the 239,760 Birr compensation using his current age, expected life time, his average daily income and working capacity reeducation (i.e., 30% x 12 months x 30 days x 37 years x 60 Birr/day).

[112] See the Civil Code, Article 2090.

[113] Id., Article 2098 and 2086(2).

[114] Id., Article 2099.

consequence of unforeseeable circumstances.[115] In *W/ro Adanech Qolcha vs. Ethiopian Electric Power Corporation, Areka District*,[116] the applicant (W/ro Adanech Qolcha) filed a suit following the death of her husband Ato Tendamo Chundara. Ato Tendamo died of electric shock as a result of a collision between the cable and the tree while he tried to cut a tree in his compound over which an electric cable passed.

The applicant alleged that the deceased (Ato Tendamo, who was 30 years old and is survived by two children) was trying to cut trees to avoid possible destruction to his property and the damage happened due to the respondent's fault. The applicant claimed compensation for lost income of Birr 300,000 stating that the deceased used to get a yearly income of Birr 20,000 from farming activities, --which he would have continued earning if he had at least lived 15 additional years. He also worked as a laborer at a company and was paid 30 Birr per day and 10,950 Birr per year making the income for 15 years 164,250 Birr. The plaintiff further alleged that she and her sons sustained moral injury as a result of her husband's death and should be compensated stating that she is in charge of taking care of the children. So, she claimed compensation of 17,000 Birr. She additionally claimed 17,590 Birr for funeral expenses she incurred. The total compensation the applicant claimed was 498,840 Birr.

The respondent rejected its responsibility for the death of the applicant's husband and the compensation claim because it is forbidden to construct a house or plant a tree under or near an operating electric cable (citing Article 47(2) of Council of Ministers Regulation No. 49/1991). It is the deceased's own fault to try to cut a tree over which a cable is passing. The district, while installing the electric transmission in the beginning had checked whether the cables were 9 meters above the ground and had cut trees near or below these transmission cables. The deceased planted the tree after the district installed the transmission cables.

The court, after examining the allegations and the evidence presented, concluded that the deceased was at fault for planting a tree under the electric cables after the installation was made and for cutting the tree knowing the probable occurrence of electric collision which could create fire. Hence, the court decided that Ethiopian Electric Power Corporation is not liable for the death of the applicant's husband and is not obliged to pay compensation. One

[115] Id., Article 2101.

[116] W/ro Adanech Qolcha vs. Ethiopian Electric Power Corporation Areka District, (File No. 29979, Wolayita Sodo, High Court decision made, 26/01/2008EC).

of the limitations seen in this case is that the court failed to clearly show the contribution of the applicant and respondent for the occurrence of the damage.

According to Article 2086 (2) of the Civil Code, persons declared legally liable shall only be relieved of their liability where the damage is due solely or partly to the fault of the victim. In this regard, in *Ethiopian Electric Power Corporation vs. Ato Woldu G/Selassie*, the Federal Cassation Bench has decided that courts should examine the contribution of a victim for the occurrence of the damage before determining the liability of the respondent party.[117] It is only when the victim has fully or at least partially contributed their part by their negligence or fault for the occurrence of damage that the respondent would be relieved from liability.

In similar cases in which Ethiopian Electric Power Corporation was a party, the Federal Cassation Bench emphasized that in determining whether there is fault and liability, courts should examine whether the victim is at fault and whether the necessary precautions were followed in installing electric transmission and channeling electric cables.[118] In these decisions, the Cassation Bench underlined that it is essential to determine whether the Corporation is fully or partially liable or not liable in order to assess the amount of compensation. Thus, a respondent shall be liable depending on the contribution of the other party towards causing the damage.

This shows that one of the purposes of the extra-contractual liability law is to ensure that the compensation awarded to the victim is adequate, and courts should assess the magnitude of the damage and award reasonable compensation to the victim of personal injury. These rules and exceptions of equivalence are applicable for both present as well as future damage, which is certain to occur, and it shall be made good without waiting for it to materialize. It should be noted that the rules and exceptions of equivalence can also be used for personal injuries.

[117] Ethiopian Electric Power Corporation vs. Ato Woldu G/Selassie (Cassation File No. 57904, Federal Supreme Court Cassation Division Case Reports, Vol. 11, pp. 486-487).

[118] Ethiopian Electric Power Corporation vs. Ato Woldemichael Shanko, (Cassation File No. 63231, Federal Supreme Court Cassation Division Case Reports, Vol. 13, pp. 483-485), and Meki District vs. Wro Bassa Nanama, Ato Banke Measso and W/ro Ayule Megerssa (Cassation File No. 106450, Federal Supreme Court Cassation Division Case Reports, Vol. 18, pp. 212- 215).

6. Factors Considered in Personal Injury Compensation Assessment

Ethiopia's extra-contractual liability law provides for a few *guiding principles* that have to be taken into consideration at the time of making a compensation assessment for personal injury. One of the guiding principles relates to a victim of personal injury who is insured or who receives a pension. In this case, the law stipulates that an insured person can claim compensation for the damage s/he has suffered on the same terms as though he had not been insured. For that matter, the insurer may not claim compensation on its own behalf from the person who, by his/her act, has brought the risk covered by the insurance contract unless the insurance contract clearly provides for the subrogation of the insurer to the victim's claim against the person liable.[119] Similarly, if a person who receives a pension sustains damage due to the acts of another person, a victim may claim compensation for the damage s/he has suffered on the same terms as though s/he had not received a pension.[120] The law also stipulates that the person paying the pension may not be allowed to subrogate the victim to claim compensation from the person who by his/her act has caused the pension to fall due.[121]

Courts are authorized to assess the extent of the damage and award fair compensation guided by the rule of equivalency. The most important issues in compensation assessment are defining the costs and expenses that could be considered in assessing compensation to a victim of personal injury. The Ethiopian extra-contractual liability legal regime does not stipulate which items (costs and expenses) are included and excluded from the compensation assessment. The Civil Code simply requires the offender to pay damages to a victim equivalent to the extent of the personal injury. In this sense, the essential aim of the extra-contractual liability legal regime of any nation is to compensate persons harmed by the wrongful conduct of others and put a claimant in the position s/he would have been in if the accident had never happened.[122] Hence, as the items (to be considered as expenses that arise from extra-contractual liability), which may be claimed by the victim person, could be many and diverse, courts should define those expenses that have direct and immediate consequence of the extra-contractual liability than the others.

[119] See Civil Code, Article 2093.
[120] Id., Article 2094 Civil Code.
[121] Ibid.
[122] Kodilinye, *supra* note 3, p. 1, and Harpwood, *supra* note 59, p. 419.

For instance, in *Ato Desita Kayam vs. Hawassa City Municipality and Ato Tomas Lamaro*,[123] the applicant alleged that the car belonging to the first respondent (Hawassa City Municipality) caused physical injury that reduced his working ability by 20%. Citing this, the applicant claimed the respondent to cover the expenses he incurred and the money he needed to recover from the injury. The respondents, on their part, stated that they are not liable for the damage since the incident occurred entirely due to the fault of the applicant. The court, after examining the allegation and evidence, awarded 39,800 Birr for his working ability reduction, 65,040 Birr for transport and accommodation, 3,000 Birr for nursing, and 1,000 Birr as moral compensation. One may argue that the 3,000 Birr compensation the court awarded for nursing has direct and immediate consequences for the extra-contractually wrongful act. The decision of the court is consistent with the essence of the law of extra-contractual liability.

Yet, sometimes it could be difficult to determine the direct and immediate consequences of the extra-contractual act. For instance, in *Ato Tigilu Koniche* (applicant) *vs. Ato Diress Kebede, Dinkineh Kebede and Wonde Abebe* (respondents), the applicant alleged that he was beaten by the respondents and sustained physical injury.[124] The relief the applicant sought was 1,914 Birr for medical treatment, 5,500 Birr for transport costs, 11,450 for rehabilitation, 17,500 Birr for lost income, 1,000 Birr as moral compensation and 4,000 Birr which he alleged that he lost during the attack. The respondents, without opposing the occurrence of the harm and extent of the harm, contested the amount of compensation the applicant sought. The court, after examining the evidence produced, ordered the defendants to pay 1,817 Birr to cover the victim's medical and transport expenses, 2,500 Birr for rehabilitation, 1,000 Birr as moral compensation, and 4,000 Birr the applicant lost during the attack. One may raise concern whether the 4,000 Birr has a direct relation with or a consequence of the extra-contractual wrongful act.

In another case, a court considered the expense that has a remote connection to the physical injury that is sustained. This is seen in *Ato Tamirat Menigiste and W/ro Hanna Firew* (applicants) *vs. Hawassa University* (respondent).[125] The applicants claimed that the respondent left the pool it dug for a research

[123] Ato Desita Kayam vs. Hawassa City municipality and Ato Tomas Lamaro, (File No. 19693, Hawassa City High Court,decision made, 19/05/2009EC).

[124] Ato Tigilu Koniche vs. Ato Diress Kebede, Dinkineh Kebebd and Wonde Abebe, (File No. 10413, Hawassa City First Instance Court decision made, 11/04/2009EC).

[125] Ato Tamirat Menigiste and W/ro Hanna Firew vs. Hawassa University, (File No. 19693, Hawassa City High Court, decision made, 19/05/2009EC).

purpose uncovered and without putting a sign that shows its depth. The applicants stated that they lost their 11 years son while he tried to swim in the pool assuming that it is not deep. The applicants alleged they had closed their business for more than three months due to the death of their son, and they also incurred funeral expenses and suffered material damage and the financial support their kid would have provided them had it not been for his death.

The respondent rejected the claim noting that the pool was dug in the University's compound and the deceased entered the compound illegally. Stating this, it asked the court to relieve it from liability. Yet, the court decided the respondent to pay 20,000 Birr for funeral expenses, 30, 000 Birr for the income the applicants lost due to the closure of their business for three months, and 25,200 Birr for lost support had it not been for the kid's untimely death, 52,800 Birr to cover the expenses they incurred while raising him.

The issue that is bound to arise is whether all items considered by the court have a direct and immediate consequence of the incident. One may say that the 20,000 Birr decided for funeral expenses, 30, 000 Birr for the lost income due to the closure of their business center, and 25,200 Birr to compensate for the lost support their kid would have provided them may be considered as the direct and immediate consequence of the extra-contractual wrong. Yet, it is logical to argue that the 52,800 Birr expense they invested for the upbringing of the child has a remote connection to count as the direct and immediate consequence of the extra-contractual wrongful act.

7. Assessment of Compensation for Physical Injury that Causes Disability or Death

7.1 Assessment of compensation for physical injury that does not cause disability

A victim may sustain personal injury which does not involve disability that can be quantified in percentage and does not inhibit the victim from his/her normal enjoyment of life. Although a victim does not sustain disability, the injury may expose him/her to various costs and expenses which can be borne for treatment and rehabilitation, such as medical expenses, nurse fees, travel expenses, lost wages, and prevention of gain.[126] In rare cases, items which may be claimed as medical expenses could be many and diverse. It is the main task of the court to distinguish costs and expenses that are associated with the damage from those costs and expenses that have remote or no relation. Courts must see the reasonableness and appropriateness of the expenses requested by

[126] Zang, *supra* note 30, p. 471.

the applicant. The victim may be awarded compensation for temporary loss of earnings. The cases below show how courts resolve issues of compensation assessment for physical injuries that do not involve disability.

In *Ato Michael Eglo vs. Ato Asamnew Tobe*,[127] the applicant, Ato Michael Eglo petitioned that the respondent intentionally pushed him into a machine, which resulted in the loss of his left-hand middle finger. As a result, he incurred 3000 Birr expenses for medication, transportation, food and other related services. The applicant further claimed that, due to the permanent injury he sustained and his inability to work, he claimed 1000 birr for the moral damage, 8580 Birr lost income from his inability to work for six months and 60,000 Birr as future damage due to his permanent personal injury (which was calculated 55 Birr per day assuming that he (aged 25 years) would live for 33 years.

The respondent alleged that the injury was a minor accident, which does not disable the applicant permanently and expose him to any future damage. He also noted that he covered the medical costs of the applicant and took care of him by taking him to his home. The court then decided that the respondent should pay 1000 Birr for moral compensation and 4000 Birr for actual compensation based on fairness and equity. The 4000 Birr compensation award for physical injury the applicant sustained in the absence of disability is consistent with the above cassation decision (see cassation File No. 42962).

Another case is between *Ato Turi Tunga* (applicant) *vs. Ato Tirbe Tgre* (respondent).[128] The applicant alleged that the respondent beat him with a rock and pickaxe so that he was found guilty of attempted murder and was serving his sentence. The applicant, stating these facts, requested the court to award 760 Birr (the money he allegedly paid for 38 individuals who took him to the hospital), 600 Birr (for three witnesses to cover their per diem and transportation expenses), and 1,200 Birr (for food and related expense), 9,000 Birr for lost income due to his inability to work for three months and 1,000 Birr moral compensation. The respondent replied that the claims raised by the applicant did not show actual losses he incurred, and the evidence is invalid.

The court rejected the 760 Birr compensation claim made by the applicant noting it is unusual for the community to ask for payment for helping a victim who sustained physical injury. Regarding the cost of witnesses, the court

[127] Ato Michael Eglo vs. Asamnew Tobe, (File No. 17084 Wolayita Sodo First Instance Court, decision made, 27/7/2007EC).

[128] Ato Turi Tunga vs. Tirbe Tgre, (File No. 19587, Arba Minch City First Instance Court, decision made, 03/03/2008 EC).

accepted the claim and awarded 300 Birr compensation. The court also awarded 1,000 Birr for food expenses and 900 Birr for moral injury. The court found the physical injury alleged by the plaintiff is a minor one; hence it decided the claim of the loss of income for six months is unacceptable.

7.2 Assessment of Compensation in Case of Disability

As stated above, a victim of physical injury, apart from pecuniary loss and pain and suffering, may lose some part of his/her body, which may also include loss of pleasure of life followed by loss of job and the occurrence of disability of various kinds. In this case, in addition to the loss of earnings and expenses for treatment and rehabilitation, the victim may sustain temporary or permanent disability for which the costs of disability life assistance equipment and disability indemnity are supposed to be paid.[129] In such a case, compensation is awarded in order to provide security and an easier lifestyle since the damage that involves loss of parts of the body, or disability, has no real monetary equivalence. If the victim has been employed at a fixed salary or wage, such loss of income can commonly be calculated precisely; but where s/he is self-employed, it could be estimated by reference to his/her past earnings.[130] The situation is more difficult if a victim is unemployed. The following cases show how courts assess compensation where victims sustain various disabilities.

In *Ato Samson Kura* (applicant) vs. *Gats Agro-Industry Private Limited partnership*, *Ato Eshetu Abebe and Niyala Insurance Company* (respondents),[131] the applicant stated that a car belonging to the first respondent caused physical injury to his left leg, which reduced his ability to work by fifty percent (50%). Due to the physical injury, the applicant claimed (1) 168,000 Birr compensation for the reduction of his ability to work by 50%, (2) 1000 Birr moral compensation, and (3) 70,000 Birr for medical and transport expenses. The respondents argued that the claimed lost income and expenses are exaggerated. The court, looking into the medical report, verified that the applicant's ability to work is reduced by twenty percent (20%) so it awarded 28,800 Birr for his workability reduction, using 1,200 Birr as his monthly income. The court also awarded 4,332 Birr and 2,000 Birr to cover his medical and transport expenses, respectively. The court further awarded 3,500 Birr for other expenses based on equity and 1,000 Birr moral

[129] Zang, *supra* note 30, p. 471.
[130] Kodilinye, *supra* note 3, p. 477.
[131] Ato Samson Kura vs. Gats Agro Industry Private Limited partnership, Ato Eshetu Abebe and Niyala Insurance Company, (File No. 19425, Hawassa City High Court, decision made on 11/04/2009EC).

compensation. It is not clear and logical why the court reduced the monthly income from 28,000 Birr to 1,200 Birr. Moreover, the item considered as 'other expenses' is unclear from the decision of the court.

In *Ato Anchuro Umma* (applicant) *vs. Ato Hanota Umma* (respondent), the applicant alleged that the respondent injured him by which he alleged that his working capacity was reduced by 40%.[132] The applicant claimed that he cannot undertake his farming activities because of the permanent disability he sustained. The relief he sought was 272,800 Birr for the income he would lose in the future[133] and 24,795 Birr for medical expenses he incurred. The respondent stated that the applicant's lost income is arbitrary, overstated and not based on expert opinion, and further argued that the applicant has not produced evidence that proves that he is a farmer.

The court confirmed, from a criminal judgment on the same case, that the plaintiff borrowed 9600 Birr and also leased his land for 19,895 Birr to cover his medical expenses. The court also verified, on the bases of a medical report from Arba Minch hospital, that the plaintiff lost 40% of his working capacity. The court further asked the kebele where the applicant resides to report his annual income, and the Kebele reported that his annual income is 51,100 Birr. Then, the court stated that there is a discrepancy in reporting the applicant's actual annual income between his declaration, the testimony of witnesses and the report from Kebele. Hence, the court found it difficult to compute the exact amount of damage the applicant sustained. Hence, it fixed the amount of compensation based on equity and awarded 18,000 Birr compensation to the plaintiff.[134] One may question the reasonableness of the 18,000 Birr compensation award with a verified 40% working capacity reduction. It is not clear as to why the court failed to use the average annual income a farmer in the vicinity can earn as a reference to assess compensation.

As it can be seen from the cases presented above and other cases,[135] courts largely award disability indemnity if the applicant proves the injury s/he

[132] Ato Anchuro Um'a V. Ato Hanota Uma, Arba Minch City First Instance Court, (File No. 21182, decision made, 22/3/2008 E C).

[133] He noted that he is 38 years and his annual income is 12,400 Birr.

[134] Ato Anchuro Um'a vs. Ato Hanota Uma, (File No. 21182, Arba Minch City First Instance Court, decision made, 22/3/2008 EC).

[135] See Ato Michael Eglo vs. Ato Asamnew Tobe, and Ato Turi Tunga vs. Ato Tirbe Tgre, supra note, 127 and 128 respectively. See also Tarekegn Qaba vs. Alemayehu Seyoum. In this case, the applicant (Tarekegn Qaba) alleged that the respondent attacked him and has caused to lose two teeth, for which the respondent was criminally convicted. Noting this, the applicant sought 2,000 Birr moral compensation and 9,301 Birr for

sustained is the kind of harm that reduces his/her ability to work (indicating the disability level in percentage) and if it is confirmed by the medical board. This shows that the loss of one tooth, for example, is not regarded as a disability and the victim will not be granted compensation apart from expenses the victim incurs for artificial teeth transplantation.

The Federal Cassation Bench has provided a guiding rule in connection with this. In *W/ro Mimmi Abebe vs. Ato Tamirat Balcha*, the applicant, W/ro Mimmi sued Ato Tamirat for the physical injury she sustained for which the respondent (Ato Tamirat) was sentenced for aggravated attempted homicide.[136] Although the applicant petitioned to be compensated for lost income due to the injury, the Wereda court rejected the claim due to lack of proof and awarded the applicant 1000 Birr moral compensation using the criminal sentencing as evidence. The applicant appealed to the North Shewa High Court, and this court reversed the decision of the Wereda court stating that the physical injury is evident and the victim does not need to show proof of loss of her special utility as long as the injury reduced her general utility to enjoy and live her life as she used to. The High Court assessed the compensation equitably since it is difficult to determine lost income (if any) in the absence of any evidence to this effect. It awarded the appellant 40,000 Birr as compensation. The victim aggrieved by this decision took her claim to the region's Supreme Court, which also dismissed the case affirming the decision of the High Court.

other costs and loss of his two teeth. The respondent alleged that the claims were not supported by relevant evidence. The court decided that the respondent is liable and ordered him to pay 500 Birr moral compensation, 250 birr to reimburse the lost income, 1,500 birr for artificial teeth transplantation and 850 Birr for medication and transportation. (See, File No. 00740, Wolayita Sodo, First Instance Court, decision made, 17/02/2009EC). One can also see Ato Dargu Lemma vs. Ato Tilahun Sorso. The applicant (Ato Dargu Lemma) petitioned that the respondent hit him and became the cause for loss of his two front teeth. The respondent was criminally convicted for it. Hence, the applicant claimed 1,000 Birr moral compensation and 17,004 Birr for his physical injury including medical expense and (7,000 Birr) for artificial teeth transplanted. The respondent argued that the claims are not supported by relevant evidence and the applicant was the cause of the injury. The court decided that the respondent should pay 1,500 Birr for a dental work, 300 Birr for moral injury, 212 Birr for medication, 80 Birr for transportation and 300 Birr for the applicant's loss of income for fifteen days. (See, File No. 00445, Wolayita Sodo First Instance Court, decision made on 17/03/2008 EC).

[136] Federal Supreme Court Cassation Decision (2018) Vol. 23: W/ro Mimi Abebe vs. Ato Tamirat Balcha (File No. 152417).

The victim further took the case to the Federal Cassation Bench, which confirmed the occurrence of the fundamental error of law in the decision of the lower courts. The Cassation Bench stated that the assessment of compensation based on equity should not be calculated arbitrarily. The Cassation Bench noted that the applicant sustained a 40% working capacity reduction is verified. On the other hand, the Cassation Bench noted that Art 2102 which instructs compensation to be determined based on equity does not give sufficient details regarding the facts need to be taken into account.

The Cassation Bench noted that the 40% permanent work-capacity reduction should be used as a reference in the compensation. It also stated that courts should take into account factors such as reduction of general utility, current economic issues, inflation rates, and future damage. Noting all these facts, the Cassation Bench reversed the former decision and awarded 200,000 Birr compensation. This decision is a breakthrough in updating the interpretation of Art 2102 of the Civil Code. The Cassation Bench stated the elements that need to be considered when the courts adjudicate compensation claim that is difficult to assess. This cassation decision, to some extent, clarifies the vague provision.

7.3 Assessment of Compensation in Case of Fatal Accident (Death)

In case of a fatal accident, a spouse of a victim, his ascendants or descendants can claim compensation. Yet, they need to show the material damage they have sustained as a result of the fatal accident.[137] Variation exists in the decisions of courts concerning the quantification of the material damage that claimants suffered. In *W/ro Mulu Brihan, Makida Adane, Tsiyon Adane, and Tsegaye Adane* (applicants) *vs. Wubet Dry Garbage Cleaner Association and Ato Abebe Daro* (respondents),[138] the applicants stated that they incurred material damage due to the death of Ato Adane, who was the husband of W/ro Mulu and the father of Makida Adane, Tsiyon Adane and Tsegaye Adane, (who were 8, 19, 20 years of age respectively). The applicants claimed that they had lost the financial support the deceased would have provided them had he been alive. They pleaded to the court claiming the compensation they have lost due to the death of their father.

The respondent stated that the fatal accident occurred due to the fault of the deceased and argued that they should not be held liable. The court, after

[137] See the Civil Code Article 2095(1).

[138] W/ro Mulu Brihan, Makida Adane, Tsiyon Adane and Tsegaye Adane vs. Wubet dry garbage cleaner association And Ato Abebe Daro, (File No. 20967, Hawassa City High Court, decision made on 27/07/2008EC).

examining the claims and the evidence, decided that the respondents are responsible for the material damage. Yet, the court rejected the compensation claim of W/ro Mulu (deceased's wife) noting that she has her own means of income and will get half of the deceased's pension. For the 8-year-old Makida Adane, the court ordered payment of one-third of the deceased's wage until she attains the age of 18 years (42,000 Birr). Regarding Tsiyon Adane and Tsegaye Adane, the court gave a judgment that each should be awarded a compensation of one-third of the deceased's wage until they finish their higher education. With this, the court awarded 14,400 for Tsiyon Adane and 9,600 Birr for Tsegaye Adane. The court also awarded 25,000 for the reimbursement of funeral expenses and 1,000 Birr for moral compensation.

In another case, *W/ro Tadelech Nega vs. Ato Zefne Zaba*, the court awarded compensation presuming that the deceased would have supported the claimants throughout his life had he been alive.[139] In this case, the applicant (W/ro Tadelech Nega) stated that the respondent (Ato Zefne Zaba) was found guilty of murdering her husband. The deceased (35 years old) had two children who were under the age of ten. The applicant stated that the deceased would have maintained his children with 500 Birr until he attains 60 years. The applicant alleged that she and her children lost 200,000 Birr in material damage which they claimed in the form of a maintenance allowance. She also claimed 15,000 Birr for moral injury and 14,500 Birr for the reimbursement of funeral expenses.

The respondent argued that other individuals were also sued in the criminal proceeding and it is inappropriate to claim compensation from him only. The respondent further stated that no evidence was produced to support the applicant's claim and the evidence produced is fabricated. He also noted that the 15,000 Birr moral compensation claim also shows her intention to unlawfully enrich from it.

The court decided that the respondent pay 300 Birr monthly maintenance for the two children of the deceased for the coming 25 years (90,000 Birr). The court also awarded 5,000 and 1,000 Birr for funeral expenses and moral injury compensation, respectively. Yet, the court rejected the 50,000 Birr compensation which was claimed by the deceased's spouse on the ground that the law does not recognize the payment of maintenance for a spouse. Article 2095(1) of the Civil Code provides that "[i]n the case of a fatal accident, the spouse of the victim, his ascendants and his descendants may claim

[139] W/ro Tadelech Nega vs. Ato Zefne Zaba, Wolayita Sodo, High Court, File No. 31205 (decision made, 18/11/2008EC).

compensation on their behalf for the material damage they have suffered as a result of his death".

The Federal Cassation bench has noted this point in the case between *Ethiopian Electric Power Corporation North West Region vs. W/ro Dinkua Amene*. It highlighted that being one of the next of kin of a deceased of a fatal accident does not certainly entitle the claimant to get maintenance in case of a fatal accident.[140] The claimants need to be in need and not in a state of earning their own earnings by their work.[141] The Civil Code recognizes payment of compensation to the deceased spouse in the form of maintenance so long as s/he is needy and is not in a state of earning livelihood by her/his own means.

Another related issue that needs due attention is the form of compensation payment. In most cases, courts order lump sum payments. However, in *Ato Dubla Jifa and W/ro Ayete Habiso vs. Hawassa City Municipality*,[142] the court awarded compensation in the form of an allowance. The applicants, Ato Dubla Jifa and W/ro Ayete Habiso --45 and 40 years old, respectively-- petitioned against the Hawassa City Municipality claiming compensation due to the death of their daughter in a fatal accident. The applicants claimed that they lost the financial support their daughter would give them had she been alive. They claimed that the deceased was 20 years old and a second-year university student. They alleged that had it not been for her untimely death, she would have supported them for the rest of their lives. The respondent alleged that the fatal accident occurred due to the negligence of the deceased.

The court, after examining evidence produced and the circumstances of the case confirmed that the respondent is liable for the damage. It awarded 90,000 Birr for W/ro Ayete Habiso and 57,600 Birr for Ato Dubla Jifa. However, the court decided that the payment is not made in a lump sum. The court ordered the respondent to deposit the money either in the bank or another financial institution so that the applicants take 300 Birr from the deposited compensation monthly in the form of maintenance until they each reach the age of 65. The issue that is bound to arise is the ground for the threshold of 65

[140] Ethiopian Electric Power Corporation North West Region vs. W/ro Dinkua Amene (File No. 30442, Federal Supreme Court Cassation Decision, Case Reports, Vol. 5, pp. 149-152).

[141] Ibid.

[142] Ato Dubla Jifa and W/ro Ayete Habiso vs. Hawassa City Municipality, Hawassa City High Court, File No. 18332 (decision made, 27/07/2009EC).

years of age which presumably seems to be based on the average life expectancy in Ethiopia during the year of the judicial decision.

Recognizing the existence of variation among courts in the form of payment they order, the Cassation has rendered its decision on the possibility of an allowance payment. As per Article 2154 of the Civil Code, courts are given the discretion to order the damage to be made good by means of an allowance where the circumstances of the case justify such form of payment instead of maintenance. Accordingly, in *Ato Ermiyas Hailu vs. Ato Birhanu Damtew* the Cassation stated that courts can order payment of compensation in the form of an allowance payable than a lump sum if the court is convinced that there is sufficient justification for it.[143]

8. Concluding Remarks

The law of extra-contractual liability protects personal and property interests from being harmed by other persons. If the act of a person causes harm to another without legal justification or excuse, the law intervenes to award compensation or other appropriate remedies. Yet, the claimant is required to prove the occurrence of extra-contractual wrong and provide admissible evidence that shows the extent of the loss, and such fault is committed by the offender. Yet, the assessment of compensation is the most difficult part of the extra-contractual liability law regime where the damage relates to physical injury that involves pecuniary and non-pecuniary losses which include pain, suffering and loss of amenities or debilities. Assessing the extent of damage and awarding compensation are arbitrary concerning personal injuries which are followed by loss of job, parts of the body, disability of various kinds and so on. Thus, there is lack of uniformity in the decisions of courts for certain types of injuries.

In Ethiopia, the Civil Code governs liability that arises from extra-contractual act and contains the grounds based on which compensation claims are instituted. As far as the assessment of compensation is concerned, the Civil Code stipulates the *rule of equivalency*. It seems that the rule of equivalency is applicable for all kinds of extra-contractual claims, be it for personal damage or property loss. However, the Civil Code lacks detailed rules on how compensation is assessed, and which kinds of pecuniary losses are included in and excluded from compensation assessment equations, as a result of which courts are facing difficulties in making extra-contractual liability assessments.

[143] Ato Ermiyas Hailu vs. Ato Birhanu Damtew (File No. 67225, Federal Supreme Court Cassation Decision, Case Reports, Vol. 13, pp. 479-483).

The analysis of the cases under the study area proves that there is substantial evidence that highlights the difficulties involved in compensation assessment, particularly for personal injuries. At the same time, there are variations on several levels of court decisions in determining the extent of damage the claimant sustains and its corresponding compensation. The absence of detailed provisions in the Civil Code on this issue (that can be used by courts) contributes to such variation. The Federal Cassation Division has been and is trying to play its part to bring clarity and ensure uniformity among courts in assessing compensation for personal injury, a pursuit that is expected to continue.

The rule that sets a 1,000 Birr maximum moral compensation renders the law of extra-contractual liability significantly unfair in the current context due to the steadily declining purchasing power of the Birr. The unfairness of the ceiling is associated with the period the Civil code was enacted (1960) and the significant decrease in the purchasing capacity of 1,000 Birr throughout the past six decades. With regard to the assessment of compensation for bodily injury, factors including the age, employment record, health condition, financial position, and the prospect of a victim to earn income should be used as elements of reference in assessing the extent of payable compensation.

The discussion and analysis in the preceding sections indicate the need to adopt short and long-term solutions to reduce the inconsistencies observed in the decisions of courts and the gaps in the predictability of court decisions of compensation assessment owing to extra-contractual liability. As a short-term solution, the Federal Supreme Court (as the case may, state Supreme Courts) should issue compensation assessment guidelines in tandem with the general rules in the Civil Code as seen in other laws, such as family and penal laws for which child maintenance and sentencing directives are issued, respectively. These directives aim to bring consistency, predictability and uniformity in the court decisions while applying these laws. The ultimate solution requires the enactment of a detailed law that embodies clear and adequate provisions regarding compensation assessment modalities. The Copyright and Neighbouring Rights Protection law and its provisions on the award of moral compensation can be used as a model to decide the maximum ceiling so as to achieve the fundamental purpose of a compensation award. These measures would indeed help ensure consistency and predictability in court decisions thereby promoting fairness and justice. ■

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Concurrence of Crimes under Ethiopian Law: General Principles *vis-à-vis* Tax Laws

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Abstract

One or successive act(s) may lead to multiple criminality. According to the principle of unity of guilt and penalty, however, one provision punishes the combination of acts flowing from a single criminal guilt. This principle applies to crimes in Ethiopia's Criminal Code and in special penal legislations, unless otherwise provided. This article examines the application of general criminal law provisions to special penal legislations, using tax crimes as illustration. The author argues that the tax legislations do not have, and do not need, special rules on concurrence of crimes. Except for acts committed in different tax periods with renewed criminal guilt, tax evasion is the major offence and prosecution/ conviction for other predicate offences should be considered only where the evidence is deficient to prove tax evasion. The author also argues that enacting penal law is the power of the Federal Government and regional states may penalize only matters not covered by the federal penal law. This, as a rule, precludes concurrent criminal liability for a single act based on federal and state laws. However, in the context of separate federal and state taxation powers, a single act may simultaneously violate federal and state tax laws.

Key terms:

Concurrence of crimes · Unity of guilt and penalty · Concurrence of tax crimes

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1. Introduction

Concurrent crimes may follow from either a single or successive act(s) or omission(s).[1] The Criminal Code provides three scenarios for concurrent crimes against an accused. *The first* setting is where an offender commits two or more successive similar or different crimes. The *second* scenario is where two or more legal provisions are violated or two or more harms are caused with a single act/omission. The third context relates to cases where similar harm is caused to multiple victims with a single act/omission violating one legal provision.[2]

However, successive acts flowing from the same criminal guilt may violate a single penal provision applicable to the combination of acts.[3] Graven considered this as "imperfect or apparent" concurrence. Although the combination of acts seems to violate several provisions, actually one legal provision applies to it.[4] We call this the principle of "unity of guilt and penalty."[5] According to Article 3 of the Criminal Code, such principles of the Criminal Code (including the provisions on concurrence) apply to special penal legislations unless otherwise provided.

The concept of dual sovereignty in federal systems also presents a subject of discussion about concurrence of crimes. In the USA, for example, simultaneous liability for a single criminal act based on federal and state laws

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[1] Andrew Ashworth (2010). *Sentencing and Criminal Justice* (5th ed., Cambridge University Press), p. 260.

[2] Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, Article 60(a)-(c).

[3] Elias N. Stebek (2022). *Principles of Ethiopian Criminal Law* (Rev. Ed.,), p. 187.

[4] Philippe Graven (1965). *An Introduction to Ethiopian Penal Law* (Haile Selassie I University), p. 163.

[5] Criminal Code, *supra* note 2, Article 61.

is one reason for long imprisonment for one crime.[6] In Ethiopia, it is the power the Federal Government to enact penal law, and states may penalize matters not covered by the federal penal code.[7] However, since the Federal and regional state governments have separate powers of taxation,[8] federal and state tax legislations may apply concurrently to punish a single act that constitutes a tax offence under both laws.

This article examines general and special provisions about concurrence of crimes. The next section highlights two cases pertinent to concurrence of tax crimes, respectively from the Federal and Tigray Supreme Court Cassation Divisions. The third and fourth sections respectively present the general provisions regulating concurrence of crimes and issues about concurrence of crimes and federalism. Section five examines concurrence of crimes in special penal laws using tax crimes as illustration, followed by a conclusion.

2. Background: Two Cases on the Concurrence of Tax Crimes

The first case is *Yirgalem v ERCA Prosecutor*.[9] The petitioner was charged in the Federal First Instance Court with five counts. First was tax evasion under article 96 of Income Tax Proclamation No. 286/2002.[10] Second was conducting transaction without a Value Added Tax (VAT) invoice under Article 50(b)(1) of VAT Proclamation No. 285/2002.[11] Third was use of unauthorized invoice under Article 50(c) of VAT Proc. No. 285/2002. Fourth was making misleading statements under article 97(3)(b) of Income Tax Proc. No. 286/2002, and fifth tax evasion under Article 49 of VAT Proc. No. 285/2002.

After hearing prosecution and defense evidence, the Court acquitted him of the fifth charge citing that it is related with the second charge, convicted him of the other four counts and sentenced him to seven years and eight months imprisonment and fine of ninety five thousand Birr (by summing up the

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[6] Douglas Husak (2008). *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press), p. 47.

[7] Constitution of the Federal Democratic Republic of Ethiopia, Proc. No. 1/1995, Article 55(5).

[8] Id., article 96 and 97.

[9] *Yirgalem Tsegay W/Slassie v Ethiopian Revenues and Customs Authority Public Prosecutor* (Federal Supreme Court Cassation Division, File No. 95326, Meskerem 26, 2007 E.C., Unpublished).

[10] Income Tax Proclamation No. 286/2002 (now repealed).

[11] Value Added Tax Proclamation No. 285/2002 (as Amended with Proclamation No. 609/2008), Article 50(b)(1).

sentence it determined for each count). On appeal by the petitioner, the Federal High Court confirmed the decision. In his petition to the Federal Supreme Court Cassation Division he demanded the merger of the second and third charges into one, because, he claimed, they arose from single criminal intention and the facts in both charges were the same.

The Cassation Division decided against him. Based on the record of the lower courts' decisions, the Cassation Division's decision states that the crime in the second charge was conducting transaction using an ordinary invoice while the petitioner should use a VAT invoice whereas the third charge was that he used an unauthorized invoice for the transaction. It underlined the inapplicability of the principle of unity of guilt and penalty to the case. According to the Cassation Bench's decision, although criminal acts committed with a single intention are punishable as one crime as per article 60 and 61 of the Criminal Code, there are different penal provisions, due to their special nature and the purpose the lawmaker aspires to achieve, specially provided to be punishable independently.

For the Cassation Division, it is understandable from the letter and spirit of the provisions in the income tax, VAT and customs laws that acts criminalized in these laws are designed to stand as independent offences. It concluded that the penal provisions stated in the second and third charges against the petitioner have provided for material elements of the respective crimes and penalty separately. The decision stated that it has also been proved that the petitioner conducted a transaction without a VAT invoice and used an unauthorized invoice. Hence, they can be tried independently and it is impossible to say the acts arose from a single criminal intention. Therefore, in consideration to the objective of tax reforms that the lawmaker intends to introduce, applying these penal provisions concurrently is proper. Finally, it confirmed the total punishment.

The second case is *TRDA Prosecutor v Tsrity and Kifle*.[12] The respondents are husband and wife and the acts they were charged for were committed in a business center registered in the first respondent's name. The present petitioner charged the respondents with two counts each. The first count was failure to use sales register machine under Article 50(d)(2) of the VAT Proc.

[12] *Tigray State Revenue Development Authority Prosecutor v W/ro Tsrity Tekhlehaymanot and Kifle Birhane*, File No. 61264, date decided 18/4/2006 E.C., (Unpublished).

No. 285/2002 (as amended).[13] On 16 September 2005 E.C., the first respondent sold commodities worth 6,800 Birr. Similarly, on 08 September 2005 E.C., the second respondent sold commodities worth 630,010.25 Birr. The crime was that they used ordinary invoice while they should have used an invoice generated from sales register machine.

The second count was that the respondents, with the acts stated in the first count, committed the same crime under Article 97(A)(2) of Tigray State Income Tax Proc. No. 68/95 (as amended). Having examined prosecution evidences, the trial court merged the counts into one. Tigray State Supreme Court Appellate Division confirmed the decision of the trial court that merged the two counts into one. The petitioner in its petition to Tigray Supreme Court Cassation Division argued that the acts committed by each defendant establishes concurrent crimes according to Article 60(b) of the Criminal Code because they violated the VAT Proclamation, a federal tax law and Tigray State income tax law simultaneously.

The defendants argued that both provisions deal with the use of sales register machine and an incidence of failure to use a single sales register machine cannot establish concurrent crimes. They added that the state law is a replica of the federal law and that mere criminalization of an act in the two proclamations does not establish concurrent crimes. They further argued that the lawmaker does not intend to establish concurrent crimes under such context and they "regretted" that if it were in Addis Ababa, where only federal tax laws apply, they could not face concurrent charges for a single act.

The Court decided against them. It compared the case with the criminalization of a single act of sexual assault committed against a relative as rape under Article 620 of the Criminal Code and indecent behavior between relatives under Article 655. The Court added that a single act could be criminalized in both proclamations stated in the charges in consideration to the purposes of the proclamations and according to the principle provided in Article 60(b) of the Criminal Code. The Court also stated that the VAT Proclamation deals with crimes committed with respect to VAT collection and it has no connection with using or not using sales register machine for state tax purposes. With respect to the second count, the Court said, the provision intends to prevent tax evasion by failure to use sales register machine and an incidence of failure to use sales register machine may simultaneously violate

[13] An issue whether Tigray State Revenue Development Authority has the power to prosecute based on the VAT Proclamation, a federal tax law, was raised and the courts answered to the affirmative.

federal and state tax laws. These cases require an inquiry into concurrence of crimes in general and the concurrence of crimes in special penal legislations in particular.

3. General Criminal Law Provisions Governing Concurrence of Crimes

3.1 Criminal concurrence: material and notional concurrence, and plurality of victims

Literally, "concurrent" means "existing or happening at the same time."[14] However, concurrent crimes may arise either from several criminal acts committed in different times consecutively or intermittently, or from one criminal act or omission.[15] While those who commit several criminal acts are persistent offenders, others may face multiple prosecutions for a single incidence that violates several penal provisions.[16] In this connection, it is important to note the difference between recidivists and those who face multiple charges for multiple criminal acts in their first appearance before court.

While both are habitual offenders, the former are those who are found committing new crimes after their punishment whereas the latter are those who have been committing criminal acts repetitively before being identified and later faced accumulated charges.[17] The Criminal Code uses the term "concurrent" for both crimes arising from a single act or combination of acts and from several acts.[18] Concurrence of crimes, therefore, means presentation of several counts of criminal charges against the accused in one case filed to a court, not necessarily multiple offences arising from a single act or combination of acts.[19]

The wider definition given to criminal concurrence leads to typology of concurrent crimes. While the concurrence of crimes resulting from consecutive acts/omissions is called material concurrence or concurrence of offences, the concurrence of crimes resulting from a single act or combination of acts violating different penal provisions is called notional concurrence or

[14] A. S. Hornby, *Oxford Advanced Learner's Dictionary* (Oxford University Press, 8th Ed., 2010), p. 300.
[15] Ashworth, *supra* note 1, p. 260.
[16] Ibid
[17] Ibid
[18] Criminal Code, *supra* note 2, Article 60
[19] Elias, *supra* note 3, pp. 188-189.

concurrence of provisions.[20] However, perfect categorization is impossible. In this regard, Ashworth noted that while the task of search for more generally applicable principles should not be stifled by the need for circumstance specific considerations, it is more "a pragmatic device for limiting overall sentences rather than a reflection of a sharp category distinction."[21]

The Criminal Code provides three scenarios for the concurrence of crimes. These are: (1) *material concurrence*, i.e., concurrence of offences (2) *notional concurrence*, i.e, concurrence of provisions or harms, and (3) multiplicity of victims. As provided in Article 60(a) of the Criminal Code, material concurrence occurs when a person "successively commits two or more similar or different crimes, whatever their nature". The term "successively" has no implication on specific proximity or gap in time. It indicates the repetition of acts constituting separate crimes for each other.[22] The repetition may be between "weeks, months or even years".[23] The repetition of the acts may also be within a short time, but with a renewed intention.[24]

An illustration for this can be *Blockburger v United States*.[25] In this case, the US Supreme Court confirmed concurrent convictions for two consecutive sales of drug to the same purchaser within a short time. It rejected the appellant's argument that the two sales "constitute a single continuing offence" based on the ground that there was "no substantial interval of time between the delivery of the drug in the first transaction and the payment for the second quantity sold". It said:

> The sales … although made to the same person, were distinct and separate sales made at different times. … shortly after delivery of the drug which was the subject of the first sale, the purchaser paid for an additional quantity, which was delivered the next day. But the first sale had been consummated, and the payment for the additional drug, however closely following, was the initiation of a separate and distinct sale …. The next sale was not the result of the original impulse, but of a fresh one –that is to say, of a new bargain.

[20] Id., pp. 191-193; Graven, *supra* note 4, p. 163.
[21] Ashworth, *supra* note 1, pp. 263-264 & 266.
[22] Id., p. 256.
[23] Id., p. 260.
[24] Criminal Code, *supra* note 2, Article 62.
[25] 284 U.S. 299 (1932)

Materially concurrent crimes may be either independent, when neither act is committed as means of achieving the other (e.g., if a person commits rape and robbery), or related, when either act is committed as a means to achieve the other.[26] Notional concurrence occurs where a person with a single criminal act simultaneously violates several penal provisions or results in several material harms provided in Article 60(b) of the Criminal Code. For example, in the case of concurrence of provisions, a married man who rapes his relative in a public place violates four provisions of the Criminal Code, i.e., article 620 (rape), Article 655 (incest), Article 652 (adultery) and article 639 (public indecency).[27]

Elias observes three scenarios for the case of concurrence of results. First is "concurrence of intentional crimes" or concurrence of direct and indirect intentions causing two separate harms, provide in article 66(1)(a) of the Criminal Code. Second is "concurrence of intentional and negligent offences" provided in Article 66(1)(b). Third is "concurrence of negligent offences" provided in Article 66(1)(c).[28] The several material results (harms) caused by a single act flowing from a single criminal guilt violate several penal provisions and affect plural victims.[29]

Multiplicity of victims occurs where a person with a single act flowing from the same criminal guilt causes similar harm on several victims as provided in Article 60(c). There was no similar provision in the 1957 Penal Code. It was incorporated to remedy Graven's criticism to the 1957 Penal Code's failure to provide for the concurrence of crimes based on the multiplicity of victims.[30] For Elias, however, the new provision brings a new problem, not a solution.

To show the sentencing problem caused in the application of Article 60(c), Elias cites results of a class assignment submitted by one of his students in a hypothetical case.[31] Ten randomly selected judges were asked to determine punishment for a hypothetical case if a person "convicted under Article 670 for having robbed 1,000 Birr that belongs to 10 persons" without taking any aggravating or extenuating circumstances; and whether it makes a difference "if the money belonged to 50 [individuals] who had kept their saving in a box"

[26] Criminal Code, *supra* note 2, Article 63; Graven, *supra* note 4, pp. 161-162.
[27] Graven, *supra* note 4, p. 162; Ashworth, *supra* note 1, p. 257. See also Criminal Code, *supra* note 2, Article 660.
[28] Graven, *supra* note 4, p.p. 162-163.
[29] Id., p. 173.
[30] Id., pp. 165-166; Explanatory Notes of the 2004 Federal Democratic Republic of Ethiopia Criminal Code, p. 37. See explanation on Article 60(c).
[31] Woinshet Kebede (2006), cited in Elias, *supra* note 3, p. 204.

or to one person only. Their verdict varied between 1 to 4 years of rigorous imprisonment in the case of one victim, and between 1 to 15 years in cases of 10 and 50 victims. Elias argues that Article 60(c) of the Criminal Code has overextended the notion of concurrence, because plurality of victims under such settings may merely justify aggravation of a sentence (where appropriate).[32]

Andenaes, commenting on Norway's criminal law, proposes that the problem of plurality of victims can be remedied by distinguishing between concurrence of victims of violations of personal rights and victims of violations property rights. He said, in violations of personal rights as "murder, assault and defamation", "it will always be assumed that there are as many offences as there are victims". Whereas in case of violation of property rights as "theft and destruction of objects which belong to a number of people … [t]he offence is no more serious … than if they belong to only one."[33] Elias argues in support of a similar interpretation in the Ethiopian case, and states:

> A bomb that causes the death of five victims entails *multiple material results*, i.e. the death of five persons, whereby robbery of Birr 1,000 belonging to five persons has the *same material result*, i.e. violence (or intimidation) accompanied by the abstraction of Birr 1,000 that belongs to another person. While the five victims of bomb attack are subjects of distinct personality, a certain amount of money (e.g. Birr 1,000) represents an amount of value (as medium of exchange, store of value and symbol of value) which can be perceived as a single object of forceful abstraction irrespective of the number of its owners. Thus, when the same rule applies to offences against property which, unknown to the offender, happens to belong to two or more persons, aggravating punishment on the basis of the number of rights would be unreasonable.[34]

While the argument to distinguish between personal and property rights is sound, it does not seem to have gained acceptance yet. For example, Article 543(1) of the Criminal Code provides for punishment of "simple imprisonment from six month[s] to three years, or … fine from two thousand to four thousand Birr" for negligent homicide. Article 543(2) aggravates the punishment to "simple imprisonment from one year to five years and fine from three thousand to six thousand Birr" where the perpetrator "has a professional

[32] Elias, *supra* note 3, pp. 202, 204, 208.
[33] J. Andenaes (1965) quoted in Elias, *supra* note 3, p. 206.
[34] Elias, *supra* note 3, pp. 206-207, (emphasis in the original).

or other duty to protect the life, health or safety of another" as doctors and drivers. However, Article 543(3) comes with aggravation based on the plurality of victims. It aggravates the punishment to "rigorous imprisonment from five year[s] to fifteen years and fine from ten thousand to fifteen thousand Birr where the criminal has negligently caused the death of two or more persons".

More importantly, interpreting Article 543(3) by analogy, the Cassation Division of the Federal Supreme Court decides that negligent bodily injury of multiple victims with a single negligent criminal act should not lead to multiple prosecution and conviction. The multiplicity of the victims should rather be a ground for aggravation of punishment.[35] This shows that the application of the provisions for concurrence of crimes due to plurality of victims is an issue not yet settled. In other words, while the Cassation Division rules that an accused does not face concurrent negligent homicide charges for the death of several victims due to the same negligent act, how it will handle other cases of plurality of victims is yet to be seen.

3.2 Unity of guilt and penalty vis-à-vis the renewal of criminal guilt

Provisions for material concurrence notwithstanding, according to the principle of *unity of guilt and penalty* successive or repeated criminal acts flowing from a single criminal guilt are punishable as one crime. The Criminal Code has three provisions in this regard embodied under Sub-Articles 1, 2 and 3 of Article 61.

Unity of guilt and penalty under Art. 61(1)

Article 61(1) provides that a single "criminal act or a combination of criminal acts" flowing from single criminal guilt and violating "the same legally protected right", "cannot be punished under two or more concurrent provisions of the same nature if one legal provision fully covers the criminal acts". This provision has four elements. The three are that the act or combination of acts should be: (a) committed only once; (b) flowing from one criminal intention or negligence; and (c) committed against one protected right. For example, if a guard who steals items from an employer leaves his/her job and gets another employer from whom s/he also steals, s/he is liable for "two materially concurrent offences".[36] Under such cases, there is repetition of acts, and the violation of A's and B's rights and the repetition of the acts show renewed intention.

[35] *Addissu Gemechu v Amhara State Prosecutor*, Federal Supreme Court Cassation Decisions, Vol. 21, pp. 345-353

[36] Elias, *supra* note 3, p. 196.

The fourth element is determining the law applicable to the criminal act or combination of criminal acts, which carries exceptions to concurrence of offences and concurrence of provisions. In the case of successive acts the combination of which results in another greater offence, the perpetrator is liable only for the greater offence not for the successive acts separately. This is called imperfect/apparent concurrence, because while it apparently seems several provisions are violated, in reality only one penal provision is violated.[37] For example, robbery (Article 670) combines the acts of "coercion (Article 582) and theft (article 665)".[38] In like cases, it is imperative to search for the penal provision that prevails on the combined effect of the acts.[39]

Similarly, in connection to notional concurrence of provisions (Article 60(b)), a single act cannot be punished with two or more provisions of the same nature, protecting similar interests or designed to achieve similar specific objectives. Penal provisions that punish a single criminal act concurrently should have separate interests to protect independent of each other. For example, article 717(2) of the Criminal Code (attack on another's credit) prohibits the concurrent application of article 613(3) (defamation). In like cases where a given act is penalized by a general provision and another more specific provision of similar nature, the latter law prevails because it specially regulates the action.[40]

Sometimes, courts may find the more specific legal provision indefinable as in the case of *Priest Getachew v Prosecutor*.[41]. In this case, the petitioner caused the death of a victim by making her to smell the smoke of various foliage and using hot metal on her face as traditional medication for evil-eye (or *buda*). He was prosecuted and convicted for negligent homicide under article 543(1) and causing injury due to harmful traditional practices under Article 567 of the Criminal Code. The Cassation Division decided that while his conviction under article 567 suffices, his concurrent conviction under Article 543(1) was improper.

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[37] Graven, *supra* note 4, p. 163; F. M. Palombino (2016). "Cumulation of offences and purposes of sentencing in international criminal law: A troublesome inheritance of the Second World War", *International Comparative Jurisprudence*, Vol. 2, p. 89.

[38] Elias, *supra* note 3, p. 196.

[39] Palombino, *supra* note 37, p. 89. See also Criminal Code, *supra* note 2, Article 584.

[40] Palombino, *supra* note 37, pp. 89-90.

[41] *Priest Getachew Teshome v prosecutor,* Federal Supreme Court Cassation Decisions, Vol. 10, pp. 200-202

The petitioner's concurrent prosecution and conviction was inappropriate. However, the Cassation Division should have carefully interpreted Articles 567 and 543(1). It is to be noted that Article 567 does not set a punishment. It refers to either Article 561 or 562. These provisions respectively deal with harmful traditional practices that endanger the life of a pregnant woman or a child, or that cause bodily injury.

Article 561 has two sub-provisions. Article 561(1) provides penalty for causing "the death of a pregnant or a delivering woman or that of a newly born child" due to harmful traditional practices. Article 561(2) provides, "Where the death was caused by negligence, the relevant provision of this Code (Art. 543) shall apply." Based on the second sub-provision, the Cassation Division convicted the petitioner under article 567 and sentenced him under article 543(1).

In determining the applicable law, understanding the principle of lesser-included offence is also important. According to this principle, "when all the legal requirements for a lesser offence are met in the commission of a more serious one, a conviction on the more serious count fully encompasses the criminality of the conduct".[42] The purpose in the lesser-included offense principle is enabling the judicator to relate the conviction more closely with the criminal act committed.[43] This resolves the doctrinal and practical conflict between double jeopardy claims and concurrence of crimes. It solves the issue whether "one charged offense is subsumed by another charged offense for purposes of double jeopardy or merger (i.e., whether the defendant can be convicted and punished for both offenses)".[44]

There are three theories in determining whether there is a lesser offence. The first is the strict statutory interpretation approach which uses the elements test to determine the lesser-included offence issue.[45] According to this approach, an offence is considered as *a lesser-included offence* if all elements of the lesser offense are contained in the greater offense, hence "impossible to commit the greater offense without first having committed the lesser".[46] The second theory is the cognate theory, which in its turn has two approaches:

[42] Palombino, *supra* note 37, p. 91.

[43] C. R. Blair (1984). "Constitutional Limitations on the Lesser Included Offense Doctrine", 21 *American Criminal Law Review* 445, p. 449.

[44] S. A. Evig (November 2018). "Convict My Client of Something Else! Lesser Included Offences after Reyna-Abarca" *Colorado Lawyer* 38, p. 39

[45] The Judge Advocate General's School, US Army (Winter 2011), *Criminal Law Desk Book: Crimes and Defenses*, (Vol. II), p. A-10.

[46] Blair, *supra* note 43, p. 447.

the pleading approach and the evidence approach. According to the pleading approach "the court looks to the facts alleged in the accusatory pleading" not "the statutory elements of the offense" whereas according to the evidence approach "the court looks at the evidence actually adduced in the case" not "the statutory elements or the language of the accusatory pleading".[47] The third approach is what is adopted in the US Model Penal Code whereby an offence is said to be lesser-included if "it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission".[48]

In Ethiopia, in addition to the phrase "if one legal provision fully covers the criminal acts" in Article 61(1) of the Criminal Code, relevant provisions of the Criminal Procedure Code seem to show a mixed approach that can accommodate the cognate-evidence approach and the US Model Penal Code approach. While the public prosecutor is entrusted with the power to identify the crime for which the accused is to be charged, alternative counts are possible and courts can convict a person for a lesser offence not charged if prosecution evidence proves a lesser crime.[49]

Palombino's argument for the criterion of consumption in the application of the lesser-included offence principle is relevant here. According to his argument, the application of the lesser-included offence should not be limited to cases where one offence includes the elements of the other– called *unilateral specialty*.[50] He argues, even in the cases where "each of the two crimes simultaneously appears both general and special in respect of the other"– called *bilateral* or *reciprocal specialty*, the relative gravity of the crimes should be ascertained and the crime with severe gravity consumes the lesser one.[51]

There are two parameters for this. The first is penalty, according to which "the offence, which carries the graver penalty, consumes the other".[52] In cases where the gravity in penalty cannot serve the purpose, e.g., as in international criminal law that does not embody range of punishments, the degree of gravity between crimes should be determined based on the "comparative gravity of

[47] Id., 449
[48] [US] Model Penal Code, quoted in Blair, *supra* note 43, p. 450.
[49] Criminal Procedure, *supra* note 2, Article 113.
[50] Palombino, *supra* note 37, p. 91 (emphasis original).
[51] Ibid (emphasis original)
[52] Ibid

the different contextual elements of crimes".[53] Taking the example of the crimes of genocide, crime against humanity and war crime – all having murder as common denominator, he argued that genocide is graver than crime against humanity and crime against humanity is graver than war crime.[54] While his argument cannot be used for the total abolition of the concept of notional concurrence of offences when several penal provisions are violated by a single criminal act, it is relevant to avoid prosecution and conviction for a single criminal act or omission based on penal provisions with similar nature and without distinct purpose.

Unity of guilt and penalty under Art. 61(2)

The second provision on unity of guilt and penalty is Article 61(2). It provides for two circumstances where successive or repeated acts flowing from a single criminal guilt and violating the same protected right will not be punished for concurrent crimes. One is where the acts are repeated to achieve the same purpose. For example, a store keeper who repeatedly and at different occasions steals objects from the employer will not be liable for concurrent thefts because the repeated acts are united under the intention to obtain undue enrichment at the expense of the employer's property right.[55] The other is where habitual action is a requirement to constitute the commission of an ordinary crime or aggravated crime. Such offences are offences of inherently continuous nature, having duration, and not offenses consisting of isolated acts. Example for this can be habitual exploitation of the prostitution or immorality of another person for pecuniary gain provided in article 634 of the Criminal Code.

Unity of guilt and penalty under Art. 61(3)

The third provision about the principle of unity of guilt and penalty is Article 61(3) of the Criminal Code. Three instances have been mentioned as illustration for "non-punishable acts of execution" repeatedly committed to give effect to the main offence.[56] These are crimes against property, counterfeiting currency and forgery of document. For example, a person who forges a document (Article 375 of the Criminal Code) cannot be punished (under Article 378) for the subsequent acts of using the document. Similarly, a person who counterfeited a currency (Article 356) cannot be punished for uttering under Article 361. While Article 61(3) mentions illustrative instances, cases of similar nature may be discovered on case-by-case basis.

[53] Ibid
[54] Id., pp. 91-92
[55] Elias, *supra* note 3, p. 196.
[56] Graven, *supra* note 4, p. 170.

Renewal of guilt and penalty

It is, however to be noted that repeated acts with renewed guilt are punishable as provided in Article 62. Yet, differentiating between acts repeated under unitary guilt *vis-à-vis* acts repeated under a renewed criminal guilt is not an easy task. Particularly, differing ancillary or subordinate acts according to Article 61(3) and renewed guilt according to Article 62 requires careful examination of the material and mental elements of crimes.

3.3 Sentencing in concurrent crimes: concurrent and consecutive sentencing

Concurrence of crimes is one of the grounds for aggravation of punishment. However, when the punishment involves imprisonment, there is a difference between concurrent sentencing and consecutive sentencing in the implementation of multiple sentences. While crimes committed concurrently should receive concurrent sentencing, series of offences should be regarded as manifestation of the perpetrator's grave criminality justifying severe penalty than single incidence offences.[57] Based on their theory of punishment, jurisdictions vary in applying multiple sentencing. In jurisdictions that pursue retributive and deterrent theories, multiple sentences are enforced cumulatively or successively "one after the other". In jurisdictions that adhere to reformatory and rehabilitative theories, multiple sentences are enforced concurrently by merging the punishment for the less serious crime with that of the serious one.[58]

Adding up the sentences for each conviction in consecutive sentencing may lead to unjustly lengthy imprisonment, and unreasonably places "thefts alongside rape, or burglaries alongside robbery, in terms of length of custody".[59] To avoid this, there are countries who adopt mechanisms that balance the arithmetic additions of the sentences and the absorption of the lesser offences into the serious offence. To this effect, they impose consecutive sentences with a cap at certain maximum of years.[60] For example, in the Netherlands there is joint sentencing where the maximum sentence for multiple offences can be "one third higher than the highest statutory maximum for one of the offences committed".[61]

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[57] Ashworth, *supra* note 1, pp. 265-266.

[58] C. Vega *et al*, (May 2012). *Cruel and Unusual: U.S. Sentencing Practices in a Global Context* (University of San Francisco School of Law), p. 36.

[59] Ashworth, *supra* note 1, p. 270.

[60] Vega *et al*., *supra* note 58, p. 40.

[61] P. J. P. Tak (1995), quoted in Elias, *supra* note 3, p. 388.

Multiple punishment of a single act on several penal legislations may be seen as disregard to the possibility of offenders' rehabilitation. Palombino argues that this develops from the experience of the Nuremberg Tribunal that was established to try the Nazi crimes after the end of the WWII. He further states the need to incapacitate the perpetuators in the Nazi crimes and the low level of development in the protection of human rights at the international level contributed to this.[62] However, rehabilitative penitentiary systems have got international acceptance,[63] and Palombino argues that the accumulation of sentences due to concurrence of crimes in international law should be revised.[64] Similarly, penitentiary systems in national legal systems should focus on the reform and rehabilitation of the convict.

In Ethiopia, while deterrence is one of the aims of the Criminal Code, the primary aim of punishment is the rehabilitation of the offender. Hence, punishments need to consider the individual circumstances of offenders.[65] To achieve the reformatory and rehabilitative objectives of punishment, prosecution, conviction and sentencing for multiple crimes require careful scrutiny. The Criminal Code has stipulated sentencing rules for concurrent crimes. In the case of material concurrence, the principle is that the penalty for each offence is calculated and added including for cases where imprisonment and fine are imposed jointly. For the purpose of adding sentences two years of simple imprisonment is considered equal to one year of rigorous imprisonment.[66]

However, there are exceptions for this. First, if either capital punishment or imprisonment for life is imposed on any of the concurrent crimes, this overrides any other imprisonment.[67] Second, if the maximum of three years (five years if aggravated) for simple imprisonment is imposed on any of the concurrent crimes, no other simple imprisonment can be imposed.[68] Third, if the maximum 25 years for rigorous imprisonment is imposed on any of the concurrent crimes, no additional rigorous imprisonment can be imposed.[69] Fourth, if confiscation of property is imposed on any of the concurrent crimes, this overrides any fine.[70]

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[62] Palombino, supra note 37, p. 90.
[63] International Covenant on Civil and Political Rights (ICCPR), Article 10(3).
[64] Palombino, *supra* note 37, p. 90.
[65] Criminal Code, *supra* note 2, Article 1, 87 & 88
[66] Id., Article 184(1)(b), (c) & (d).
[67] Id., Article 184(1)(a).
[68] Id., Article 184(1)(a) and Article 106.
[69] Id., Article 184(1)(a) and Article 108.
[70] Id., Article 184(1)(e).

Fifth, unless the perpetrator acts with the motive of gain, the total fine cannot exceed the maximum fine of ten thousand ETB for natural persons and five hundred thousand ETB for legal persons.[71] The maximum of ten thousand ETB for natural persons can be exceeded when especial higher penalty is provided.[72] For example, in offences against the State punishable with rigorous imprisonment (Articles 238 to 258) and in case of grave economic crimes, a maximum fine of one hundred thousand ETB can be imposed in addition to other penalties provided where the offender was a person exercising or authorized for power of leadership, or acted under a motive for personal gain.[73] In like cases, the one hundred thousand ETB becomes the overriding maximum.

In notional concurrence, Article 187 provides for different modalities of sentencing. In case of "simultaneous notional concurrence",[74] where the offender's single act violates several penal provisions, the principle is that the maximum penalty to be imposed cannot exceed the highest statutory penalty for the severe crime.[75] It is only in exceptional cases where "the criminal's deliberate and calculated disregard for the law or the clear manifestation of the criminal's bad character so justifies aggravation", that the penalty can be aggravated similar to the cases of material concurrence.[76]

The circumstances that show the perpetrator's deliberate disregard to the law or criminal character to justify aggravation are to be developed through judicial interpretation. In cases of "combined notional concurrence",[77] where the offender's single act causes several consequences of different types of harm, the Criminal Code provides for two modalities of determining the penalty. Where, at least, one of the concurrent crimes is intentional or where the offender has intentionally committed crimes against public safety or public interest, the penalty is aggravated as in the case of material concurrence.[78] When notional concurrence results from negligence, the maximum penalty cannot exceed the statutory maximum penalty for the most serious crime.[79]

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[71] Id., Article 184(1)(a) and Article 92.
[72] Elias, *supra* note 3, p. 382.
[73] Criminal Code, *supra* note 2, Article 259(1) and Article 344(1).
[74] Elias, *supra* note 3, p. 383.
[75] Criminal Code, *supra* note 2, Article 187(1), second paragraph.
[76] Id., Article 187(1), first paragraph
[77] Elias, *supra* note 3, p. 383.
[78] Criminal Code, *supra* note 2, Article 66(1)(a) & (b), 66(2) and 187(2)(a) & (c).
[79] Id., Article 66(1)(c) and 187(2)(b).

4. Concurrence of Crimes, Prohibition of Double Jeopardy and Federalism

4.1 The principle of double jeopardy and criminalizing identical crimes in different laws

The principle of prohibition of double jeopardy prohibits second trial/punishment against a person for the same act for which s/he has been tried and either convicted or acquitted.[80] From the judicial dimension of trial, conviction and sentencing there may be no conflict between the prohibition of double jeopardy and the rules of concurrence of crimes. A controversy arises if the prohibition against double jeopardy should prohibit the legislator from creating identical crimes differing only in name thereby punishing the same act more than once. For example, US Supreme Court Justice Marshall's dissenting opinion in *Missouri v Hunter*[81] illustrates this point:

> If the prohibition against being 'twice put in jeopardy' for 'the same offence' is to have any real meaning, a State cannot be allowed to convict a defendant two, three, or more times simply by enacting separate statutory provisions defining nominally distinct crimes. If the Double Jeopardy Clause imposed no restrictions on a legislature's power to authorize multiple punishment, there would be no limit to the number of convictions that a State could obtain on the basis of the same act, state of mind, and result. A State would be free to create substantively identical crimes differing only in name …

In Ethiopia, to the best of this author's knowledge, there are no similar court cases where the application of the principle of prohibition of double jeopardy to prohibit the criminalization of the same act in several legislations has been entertained. However, the problem of over-criminalization, one of its manifestations being the criminalization of one act with several laws,[82] may lead to similar cases. How courts will handle such like cases is yet to be seen.

4.2 The principle of unity of guilt and penalty in the context of federalism

One of the principles of modern federalism is the division of authority between the central and state governments where each level of government "is sovereign in at least one policy realm" and each citizen is governed directly

[80] Constitution, *supra* note 7, Article 23; Criminal Code, *supra* note 2, Article 2(5).
[81] 459 U.S. 359 (1983).
[82] Simeneh Kiros Assefa and Cherinet Hordofa Wetere (2017). "'Over-criminalisation': A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia" 29 *J. Ethiopian L*.

by "at least two authorities."[83] This creates possibility for the overlap of federal and state governing power over a single issue or incidence. In USA, for example, one reason for long imprisonment for a single crime is successive prosecution for a single criminal act based on both federal and state laws. The dual sovereignty doctrine allows both the federal and state governments to simultaneously charge a single act and the principle of prohibition of double jeopardy does not prohibit this[84] for "cases where the act sought to be punished is one over which both sovereignties have jurisdiction."[85]

The dual sovereignty doctrine has been taking root since 1820, [86] and it was expressly declared by the Supreme Court in 1850 (*Moore v. Illinois)*. Moore did not actually face concurrent charges under both federal and state laws for the same act. Rather, Moore challenged conviction under Illinois State law that outlawed "harboring fugitive slaves". The ground for Moore's objection was "that the federal Fugitive Slave Act preempted the Illinois statute such that he could not be prosecuted under state law". Moore also "raised the related objection that if the Court ruled the Illinois statute valid then he impermissibly could be subject to multiple prosecutions for the same offense".[87] Dismissing Moore's argument, the Court opined:

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[83] Jenna Bednar (2009). *The Robust Federation: Principles of Design* (Cambridge University Press), pp. 18-19. According to the traditional understanding of federalism, "[t]he federal authorities may represent the Governments solely, and their acts may be obligatory only on the Governments as such". They could not regulate individual citizens. See John Stuart Mill (1861), *Representative Government* (Kitchener: Batoche Books, 2001), p. 189.

[84] Douglas Husak, *supra* note 6, p. 47.

[85] *S. Ry. Co. v. R.R. Comm'n of Ind.*, cited in Anthony J. Colangelo (2009), "Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory", *Washington University Law Review*, Vol. 86, No. 4, p. 838. The same applies to multiple prosecutions in several independent nation-states for the same act. Because, there is no rule in public international law that prohibits double jeopardy as between sovereign nation-states. Id., pp. 805-835. For example, Article 14(7) of the ICCPR limits the protection against double jeopardy to a single nation-state. It provides: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted *in accordance with the law and penal procedure of each country*" (emphasis added).

[86] Colangelo, Id., pp. 782-85.

[87] Id., p. 787.

> An offence, in its legal signification, means the transgression of a law. … Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. … That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other.[88]

The Court upheld the doctrine when it faced cases of actual multiple prosecutions. In *United States v. Lanza*, in 1922, upholding federal prosecution after conviction in a state court for the same act, the Court opined: "Each State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a State become laws of that State."[89]

In *Bartkus v Illinois*,[90] in 1959, the Court ruled that "offenses against different sovereigns are not the 'same offense' for double jeopardy purposes" thereby allowing state departments to prosecute a person who had already faced federal prosecution for the same act. Similarly, in *Abbate v United States*,[91] in 1959, it upheld its precedent of allowing federal prosecution departments to prosecute a person who had been prosecuted by state authorities for the same act. The Court also applied the doctrine to uphold successive prosecution under laws of several states for the same act.[92] Recently, in 2019, the Court upheld the doctrine when it dismissed the defendant's argument in *Gamble v. United States* that he should not face successive prosecution by state and federal governments for the same act.[93]

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[88] Cited in Colangelo, *supra* note 85, p. 787.
[89] Cited in *id*., p. 788.
[90] Cited in Vega et., al., *supra* note 58, p. 62.
[91] Cited in *id*.,, p. 62.
[92] *Heath v. Alabama*, Quoted in Colangelo, *supra* note 85, p. 788. This precedent precludes defendant's opportunity for forum shopping. For example, in this case "the defendant pleaded guilty in the first case to avoid the death penalty but was sentenced to death in the second."
[93] "Fifth Amendment — Double Jeopardy Clause — Separate Sovereigns Doctrine — Gamble v. United States", *Harvard Law Review*, Vol. 133 (2019), pp. 312-321.

In Ethiopia, the power to enact penal law is given to the federal government and sates may enact penal law only on matters not covered by the federal law.[94] While the Constitution aims to establish countrywide penal law, it empowers states to criminalize special statewide issues. Because of this, a single act may not violate both federal and state penal laws simultaneously, except in tax laws that we will see below.

5. Concurrence of Crimes in Special Legislation: The Case of Tax Crimes

5.1 Some points on special economic and fiscal penal legislations

The Criminal Code acknowledges enactment of special penal legislations.[95] However, this has led to the proliferation of laws that do not only penalize new offences, but that rather impose severe penalties on acts already criminalized in the Criminal Code.[96] With regard to tax crimes, the Criminal Code provides that punishments for crimes committed in breach of special legislations enacted by federal or state government organs to protect the economic and fiscal interests of the State and duly published in federal or state legal gazettes are determined in accordance with the principles provided in the same Code.[97]

If special legislations, whether enacted by federal or state governments, provide for punishable acts, they are required to refer to specific provisions of the Criminal Code. In default of specific reference, the punishment will be simple imprisonment or fine.[98] In case of economic crimes of exceptional gravity, the fine may be a maximum of one hundred thousand Birr in addition to forfeiture of the gain derived from the crime.[99] It is to be noted that there are federal and state tax legislations with penal provisions.

[94] Constitution, *supra* note 7, Article 55(5).
[95] Criminal Code, *supra* note 2, Article 3.
[96] Simeneh and Cherinet, *supra* note 82. Compare the penalty for tax evasion in Proc. No. 983/2016, Article 125 with the penalty in the Criminal Code, Article 349 and 351. Compare also the penalty for contraband in Proc. No. 859/2014, Article 168 with the penalty in the Criminal Code, Article 352.
[97] Criminal Code, *supra* note 2, Article 343(1).
[98] Id., Article 344(1)
[99] Id., Article 344(2)

5.2 The Application of the General Principles in the Criminal Code for Tax Crimes

5.2.1 Overview of concurrence in tax cases

According to Article 3 of the Criminal Code, "the general principles embodied in [the] Code are applicable to [other penal] regulations and laws except as otherwise expressly provided therein."[100] Thus, the general provisions in the Criminal Code such as those regulating concurrence of crimes apply to special penal legislations including tax legislations, save special provisions in the special laws. In this regard, one wonders whether the relevant tax laws have special provisions governing concurrence of crimes.

Examination of the existing tax laws reveals that any violation of the penal provisions in the tax laws is considered a violation against the criminal law of Ethiopia and the Criminal Procedure applies to the prosecution and trial thereof.[101] This does not imply any rule governing the concurrence of tax offences different from what the Criminal Code provides. Most importantly, Article 116(1) of the Criminal Procedure allows presentation of concurrent charges against an accused. Therefore, the general principles of criminal law and procedure governing criminal concurrence apply to tax offences. Nor does the law relating to customs embody special provision/s about the concurrence of crimes.[102]

The Federal Tax Administration Proclamation provides that if an act criminalized in the proclamation is committed in violation of several tax laws, the perpetrator is concurrently punished as if the act is committed in violation of each tax law.[103] That is, the proclamation applies to all tax laws (i.e., income tax, VAT, excise tax, stamp duty and turnover tax proclamations). Therefore, a single act or combination acts may violate two or more of these tax laws and hence this causes concurrent criminal liability under the Tax Administration Proclamation.[104] This does not provide special rule for the concurrence of tax crimes, but endorses Article 60(b) of the Criminal Code that deals with

[100] Id., Article 3

[101] Proc. No. 983/2016, *supra* note 96, Article 116(1).

[102] The only especial provision added was that all customs crimes can be tried *in absentia*. See Customs Proc. No. 622/2009, Article 106(1) (now repealed). Since Article 161(2)(b) of the Criminal Procedure provides for economic crimes punishable with rigorous imprisonment or fine exceeding five thousand [Birr] to be tried *in absentia*, this provision was superfluous and is now repealed. See Proc. No. 859/2014, *supra* note 96, Article 181(1).

[103] Proc. No. 983/2016, *supra* note 96, Article 116(2).

[104] Id., Article 2(36)

notional concurrence. The absence of special provisions governing the concurrence of tax crimes means that the general principles in the Criminal Code govern concurrence of tax crimes.

The following two examples illustrate the concurrence of tax crimes provided in Article 116(2) of the Federal Tax Administration Proclamations. If, for example, an employee of a VAT registered private limited company conducts a transaction without using the sales register machine[105] to issue an invoice, the company is liable for concurrent crimes in violation of the duty to use sales register machine, one for the income tax and the other for the VAT proclamations.[106] In another illustration, if a VAT registered taxpayer was, before using sales register machine, allowed by the tax authority to print and use 10 invoice pads,[107] and if the tax authority discovers that 10 more unauthorized invoice pads with similar consecutive numbers were printed and partly used, the taxpayer will be liable for concurrent crimes of income tax evasion and VAT evasion under Article 125(1) of the Tax Administration Proclamation. To ensure taxpayers' compliance, the Tax Administration Proclamation provides for both administrative and criminal liability which may apply concurrently.[108]

As tax evasion is the major crime relating to taxes, other crimes are considered if the acts do not ultimately lead to tax evasion or in cases where prosecution evidence is deficient to prove tax evasion. The Cassation Division has decided that a person is liable to tax evasion if the accused intentionally removes property or commits similar illegal acts to hinder the tax authority's move to attach and sale the taxpayer's property for tax collection.[109] It based its decision on a wider interpretation of Article 11 of the ICCPR that "[no] one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation." In this decision, the Cassation Divisions equates the

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[105] Sales register machines are used in lieu of invoice pads upon authentication and registration by the concerned tax center. See Proc. No. 983/2016, *supra* note 96, Article 20(3)(a) and Obligatory Use of Sales Register Machines Council of Ministers Reg. No. 139/2007, Article 2(1) & (2), 5(1)(a) and 16.

[106] Proc. No. 983/2016, *supra* note 96, Article 131(1)(b) and 132.

[107] Invoices are required to have consecutive numbers. See Ethiopian Revenues and Customs Authority Invoice Publication Licensing, Possession, Use and Disposal Directive No. 110/2008, Article 7(2)(c).

[108] Proc. No. 983/2016, *supra* note 96, Article 100-132.

[109] *G. Agri Pack PLC and Getahun Asfaw v Ethiopian Revenues and Customs Authority Hawassa Branch Prosecutor (*File No. 84623, Sene 04, 2005 E.C), Federal Supreme Court Cassation Decisions, Vol. 15, pp. 261-267.

duty to pay tax with contractual duties while it is a legal duty the violation of which is criminally punishable. Although it finds it as crime of tax evasion, it limits its analysis to evasion of payment with inadequate attention to the criminality of evasion of assessment.

5.2.2 Evasion of tax assessment and evasion of tax payment: US experience

Reference to US experience will help to understand the elements of tax evasion. Section 7201 of the Internal Revenue Code provides, "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony ...."[110] This has been interpreted to have created two types of tax evasion: (1) "the willful attempt to evade or defeat the assessment of a tax" –called evasion of assessment–, and (2) "the willful attempt to evade or defeat the payment of a tax" – called evasion of payment.[111] The US Court of Appeals 9th Circuit, in *United States v Mal*,[112] has illustrated the difference between these types of evasion. It said that "if a defendant transfers assets to prevent the IRS from determining his true tax liability, he has attempted to evade assessment; if he does so after a tax liability has become due …, he has attempted to evade payment."[113]

Evasion of assessment can be established by different affirmative acts committed to understate the taxpayer's income or overstate the taxpayer's deductible costs and expenses by which the government will be unable to discover the taxpayers' true taxable income and determine the due tax properly. These acts include filing false tax return, false and fraudulent statements to the tax department and its officers, keeping double books of account, making false invoices, destroying records, and concealing sources of income and bank accounts.

Shifting corporate income to principal shareholders under the "guise of commissions or salaries out of proportion to the value of service rendered to the corporate taxpayer", "[d]oing business in diverse names and keeping large sums of cash in safe deposit boxes in numerous banks" are also examples.[114] These acts manifest the perpetrator's intentional and willful move to evade a known legal duty to pay tax. The very essence of evasion of assessment is that

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[110] IRC § 7201, quoted in Internal Revenue Service Criminal Tax Division (2009), *Tax Crimes Handbook*, p. 2.

[111] Tax Crimes Handbook, Ibid, citations omitted.

[112] Cited in Tax Crimes Handbook, *supra* note 110, p. 2

[113] Ibid

[114] Id., pp. 2-6.

the acts committed are aimed at misleading the tax department and its officers not to be able to assess the correct tax the taxpayer has to pay. Evasion of assessment, therefore, unduly increases deductible costs and expenses and/or decreases the taxable income.

Evasion of payment, on the other hand, is committed after the amount of tax owing is known, either by the taxpayer's declaration or the tax department's assessment. Evasion of payment may be committed by acts that aim for the concealment of money or assets from which the tax would be paid in order for the government to be unable to collect the tax.[115] This, among others, includes "using bank accounts of family members and coworkers", extensive use of cash expenditures using others' credit cards, "placing assets in the names of third parties" and fraudulent bankruptcy petition.[116] The specific acts committed to evade tax may constitute a tax crime of themselves.

For example, failure to file a tax return and failure to keep books of account, filing a false or fraudulent tax return, using fraudulent documents and intervening with the administration of internal revenue laws are crimes.[117] However, if the commission of these acts is combined with tax deficiency leading to the crime of tax evasion, these are included in the major crime of tax evasion and the perpetrator will not be liable concurrently for tax evasion and the specific acts the combination of which establishes tax evasion.[118] Because, while the Congress provides criminal penalties for various tax offences it is believed that it "did not intend to pyramid penalties and authorize a separate penalty for a lesser included offense, which arose out of the same transaction and which would be established by proof of guilt of the greater offense of attempting to evade income tax".[119]

[115] Id., p. 2.
[116] Id., p. 14.
[117] IRC § 7203, § 7206, § 7207 and § 7212 cited in Tax Crimes Handbook, *supra* note 110, pp. 38, 62, 88 and 92.
[118] Tax Crimes Handbook, *supra* note 110, pp. 19 & 78-79.
[119] Id., p. 78-79.

5.2.3 The relationship between tax evasion and the other predicate tax crimes

In Ethiopia, the Federal Tax Administration Proclamation provides for various tax crimes.[120] All of the crimes except disobedience to tax collection orders and crimes against the Tax Appeal Commission that may be committed by third parties (not necessarily intending to evade tax) are committed with tax evasion as their objective. Therefore, unless the perpetrator commits separate tax crimes that fall under Article 60(a) with renewed criminal guilt as per Article 62 of the Criminal Code or violates several tax laws simultaneously (in a manner that satisfies the requirements of Article 60(b)), the same act cannot be punished both for tax evasion and other lesser-included offence(s), or under two other penal provisions. The same act cannot thus violate different penal provisions of the same tax proclamation.

The acts of a taxpayer (or another person working for the taxpayer) such as conducting transactions without invoices and using fraudulent invoices and documents or any fraudulent acts aimed at understating income and/or overstating costs and expenses are all preparations to tax evasion. The act of presenting false or misleading financial statements is the perpetrator's last act to evade tax where s/he combines all criminal acts committed in the tax period and presents a false financial statement accompanied by explanations and all the fraudulent transactions, invoices and documents. Unless it is discovered, the process will result in tax evasion.

As provided in Article 26 of the Criminal Code, in principle, preparatory acts towards the commission of a crime are not punishable. However, the lawmaker has criminalized the preparatory acts for tax evasion in line with the principle provided in Article 26(b) of the same Code because of the special interest in protecting public revenue. Therefore, concurrently punishing a perpetrator for tax evasion, presentation of misleading statements to the tax authority and using fraudulent invoices for the same act or combination of acts amounts to sentencing a convict for homicide as well as attempt and preparation to kill the same victim.

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[120] These crimes include tax evasion, Taxpayer Identification Number offences, misleading statements, using fraudulent documents and invoices, conducting transactions without invoices, claiming illegal or undue refund, VAT offences, TOT offences, disobedience to tax collection orders, obstruction to tax administration, unauthorized tax collection, aiding or instigating tax offences, crimes against the Tax Appeal Commission, crimes committed by tax agents, offences against the duty to use sales register machines, and crimes by companies; see Proc. No. 983/2016, *supra* note 96, Article 117-132

There can indeed be a number of instances for a perpetrator to be prosecuted for predicate tax offences than tax evasion. For example, a taxpayer who is found conducting a transaction without using a sales register machine or issuing an invoice on a single transaction may be held liable for failure to use sales register machine or issue an invoice if the tax department does not have suspicion and/or evidence of other offences that the same taxpayer committed before or after, the combination of which may constitute tax evasion. Similarly, a taxpayer may present falsified documents to the tax department's tax auditors in due course of their audit work to substantiate costs and expenses that the taxpayer declared without having incurred them in reality. If the tax auditors discover that the documents are falsified and reject them, the taxpayer may face prosecution for presenting false or misleading information to the tax department.

These separate acts may have behind them other similar acts that if taken together may constitute tax evasion thereby necessitating further investigation before prosecuting the taxpayer for the predicate offences. In other words, before instituting a charge for acts of preparation or attempt to evade tax, the crime investigation and prosecutions departments need to conduct due investigation whether these separate acts in combination with other similar acts have caused tax deficiency.[121] Another important point is that even in cases where prosecution evidence does not prove tax evasion and the

[121] Sometimes, the need to take time to investigate whether acts that constitute simple crimes of themselves would cause (or have caused) serious crimes may contradict with the speedy disposal of cases. For example, in February 22, 2002 E.C Hagos Woldemichael attacked Gidey Gebreyesus with stones on his head and leg. The next day, the prosecutor of Tigray State Atsbi *Wereda* Justice Department charged Hagos for the crime of "Common Willful Injury" under Article 556(2)(a) of the Criminal Code. The accused confessed the injury, was convicted and fined with 500 ETB. However, on March 30, 2002 E.C. the victim died due to the injury on his head. Following the victim's death, the same Justice Department charged the accused for homicide under Article 540 of the Criminal Code. Atsbi *Wereda* Court convicted the accused and sentenced him for homicide. On appeal, Eastern Tigray Zone High Court confirmed the conviction and sentence. However, Tigray State Supreme Court Cassation Division reversed the conviction and sentence as double jeopardy and the Federal Supreme Court Cassation Division also confirmed the decision of the State Supreme Court. This case shows that the *Wereda* Justice Department rushed for the speedy disposal of the case and charged the accused for simple bodily injury without waiting to see whether the injury heals or causes another serious consequence. See *Hagos Woldemichael v Tigray State Atsi Wereda Prosecutor,* Federal Supreme Court Cassation Decisions, Vol. 13, pp. 308-312.

perpetrator has to be convicted for lesser offence(s), the facts of the case should be carefully examined in relation to the proper penal provision.

Similarly, the customs proclamation states different crimes.[122] These penal provisions aim to ensure compliance to the customs rules. This does not, however, mean that more than one penal provisions shall apply to the same offence. As each provision has its own elements, some of the acts specified as crime may also be committed as a means to achieve other customs offence. For example, the crime of obstructing customs control provided under Article 166 may be included in the crime of aggravated contraband as provided in Article 168(3) where a perpetrator forcibly disobeys customs orders while illegally importing or exporting goods. Therefore, careful examination of the facts and evidence is imperative to distinguish the specific penal provision applicable to a case.

In *Yirgalem v ERCA Prosecutor*[123] (highlighted in Section 2 above), the Cassation Division concluded that the general Criminal Code principles governing concurrence of crimes do not apply to tax and customs crimes. Its first reasoning was that both the penal provisions mentioned in the second (conducting transaction without VAT invoice) and third (use of unauthorized invoice in violation) charges have provided for the material elements of the respective crimes and for a penalty separately. Based on this, the Cassation Division found it impossible to conclude that the petitioner acted with a single criminal guilt.

However, whether acts committed flow from a single or renewed criminal guilt is determined by looking at what the accused committed based on the available evidence, not by examining the provisions of the law. In this case, there is no evidence to prove that the petitioner committed successive acts. The petitioner was punished concurrently for a single act of using an ordinary invoice in place of a VAT invoice. The Cassation Division's second reasoning was that the letter and spirit of the provisions in the income tax, VAT and customs proclamations and the tax reform the lawmaker intended to introduce reveal that the penal provisions in these laws are intended to apply concurrently.

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[122] These crimes include obstruction of customs control, falsification and counterfeiting of documents and symbols, contraband, customs fraud, opening or removal of customs parcels and marks, crimes against the duties of carrier and unauthorized use of customs electronic information exchange systems. See Proc. No. 859/2014, *supra* note 96, Article 166-172

[123] *Supra* note 9.

According to the Cassation Division's understanding, the tax legislations have special rules governing concurrence of crimes, which is not the case. The absence of special rules that govern the concurrence of crimes in the tax legislations is not a problem. The general Criminal Code principles suffice for that. A related issue is that according to the provision in Article 3 of Criminal Code, tax and other legislations may provide for special rules that regulate concurrence of crimes. However, no reasonable person expects for the legislature to provide for a single act or combination of acts to be punishable under tax evasion and other predicate offences concurrently.

5.3 Tax periods and renewal of criminal guilt in tax crimes

The issue of renewal of criminal guilt in tax crimes evokes the question whether acts committed by a taxpayer in different tax periods are separate acts committed with renewed criminal guilt as per Article 62 of the Criminal Code for the purpose of criminal concurrence. This author argues that repeated acts committed within a tax period may be combined in one crime of tax evasion, if they cause a tax deficiency. However, repetitive similar or different acts of violation against the duties of taxpayers in different tax periods are committed with renewed criminal guilt and should lead to multiple prosecution and conviction. In other words, the act of tax evasion is attached to a specific tax period. As income tax evasion is committed against the duty to pay income tax for a specific tax year, multiple charges of evasion for each tax year is sound.

For example, there is similar experience in USA.[124] One way to correct perpetrators who evade taxes persistently for as many tax periods as they are not discovered is making them face multiple criminal liabilities. However, concurrent prosecution/conviction for tax crimes committed in different tax periods is not the practice of in Ethiopia.[125] Those who deserve multiple prosecution and conviction, and accumulated penalties for multiple tax crimes they committed in different tax periods should face it. Or else, it becomes unjust to punish equally those who persist evading taxes for consecutive tax

[124] United *States v. Hook 781 F.2d 1166* (6th Cir. 1986); *United States v. Shorter 809 F.2d 54* (D.C. Cir. 1987).

[125] From the author's experience as a public prosecutor and as a judge, the practice is that tax auditors in the tax authority (either at normal business or under jeopardy assessment upon suspicion for tax evasion) audit a taxpayer's tax file for consecutive tax periods and present their audit reports in one audit report showing tax differences in each tax period, if found. Then, prosecutors present a single count criminal charge of tax evasion as if the audit report contained the reports of a single tax period.

periods and those who did it for a single tax period. One mechanism to avoid accumulation of penalties may be initiating for tax departments to conduct their tax audit for each tax period timely, i.e., without necessarily awaiting until limitation period approaches.[126] This would avail remedies against taxpayers who break their duty and can possibly correct them on time.

5.4 Concurrence of crimes based on federal and state tax laws

As the Federal and state governments have their own sphere of taxation power,[127] it is likely for a single act or combination of act(s) to violate federal and state tax laws simultaneously. This can possibly lead to the concurrence of federal and state tax laws and punish the same criminal act according to the principle of notional concurrence of provisions provided in Article 60(b) of the Criminal Code. In effect, whether an individual is charged under the special penal provisions in the federal or state tax legislations or by reference to the Criminal Code does not make a difference as to conviction. It only makes a difference where there are severe penalties in the special tax legislations than the Criminal Code.

As noted earlier, Tigray State Supreme Court Cassation Division in *TRDA Prosecutor v Tsrity and Kifle*[128] convicted each of the respondents concurrently based on federal and state tax legislations for the same act. One may not criticize the decision from the perspective of the general principle that a single criminal act may simultaneously violate both federal and state tax laws leading to notional concurrence of crimes. In this perspective, a person who pays income tax to a state tax department and VAT to the federal tax department may face concurrent criminal liability, one for the state income tax and the second for the VAT, for failure to use sales register machine in a single transaction.

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[126] The tax authority may amend taxpayers' tax declarations within five years, or at any time in cases of suspicion of fraud. See, Proc. No. 983/2016, *supra* note 96, Article 28(2); Proc. No. 286/2002, *supra* note 10, Article 71 and Proc. No. 285/2002, *supra* note 11, Article 29(1). In some cases with suspicion for fraud, it was also common to see tax audit reports carrying taxes determined for seven years or above. Legally speaking, this may not seem to have a problem. However, in like cases the taxpayer may face accumulated sentences but the tax departments may not be able to determine and collect the taxes properly, including interests and administrative penalties for delay in the payment of tax, after the taxpayers have possibly did everything to disable assessment or collection.

[127] Constitution, *supra* note 7, Article 96 and 97.

[128] *Supra* note 12.

This happens if the perpetrator violates an expressly provided duty embodied in the federal and state tax laws, for example, if both federal and state tax laws require the use of sales register machine. At the time of the alleged acts (Meskerem 2005 E.C., September 2012), there was no law in Tigray State that required taxpayers to use sales register machine.[129] At the federal level, the duty to use sales register machine was introduced with a regulation by the Council of Ministers[130] in 1999 E.C. (2007), and this federal regulation did not apply to state taxpayers. According to the facts of the case, the respondents were not accused of using illicit/counterfeit invoices for the transactions. The petitioner did not argue that they did. Hence, we presume that they used an invoice authorized by the state tax department.[131] Therefore, they faced conviction for failure to use sales register machine for state income tax purposes while they did not have a legal duty to use sales register machine. Yet, this issue was not raised by the respondents nor the courts.

The crime of failure to use sales register machines in the state income tax law was introduced in Hamle 2002 E.C. (July 2010) with an amendment[132] to go parallel with amendments in the federal income tax laws following the introduction of the duty to use sales register machine for federal taxpayers with the regulation mentioned above since 1999 E.C. (2007). Indeed, as the respondents argued, the penal provision in the state tax law in this case was a replica of the federal tax law.

However, even in cases of permissible multiple prosecutions under multiple sovereigns for the same act there is a tension between the right of the accused to protection against double jeopardy and states' sovereign jurisdiction to enact and enforce their criminal laws. According to the individual perspective of protection from double jeopardy, "the State … should not be allowed to make repeated attempts to convict an individual for an alleged offense". That

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[129] Currently, Article 22 of Tigray State Tax Administration Proclamation No. 284/2009 (E.C.) provides for the duty to use sales register machines.

[130] Reg. No. 139/2007, *supra* note 105. Currently, the Federal Tax Administration Proclamation provides for the duty to use sales register machines. See Proc. No. 983/2016, *supra* note 96, Article 20.

[131] On the authorization and use of receipts state taxpayers, see **በዓል መዚ ልምዓት እቶት ክልል ትግራይ (ጥቅምቲ 2006 ዓ.ም)፣ ዝተመሓየሸ መምርሒ ኣወሃህባን ኣጠቓቕማን ቅብሊት ቁፅሪ** 11/2006 [Tigray State Revenue Development Authority (October 2013), Issuance and Use of Receipts Revised Directive No. 11/2013]. Article 15 of the directive repeals an earlier directive that had been in use since 1996 E.C. (2003/4).

[132] See The State of Tigray Income Tax Amendment Proclamation No. 180/2002 EC, Article 97(A)(2).

would be "subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity" and that would enhance "the possibility that even though innocent he may be found guilty.[133]

As noted above, the prohibition of double jeopardy protects an individual from multiple prosecutions for the same act only within one sovereign. It does not preclude multiple prosecutions for the same act according to the laws of different sovereigns.[134] However, as Justice Black noted in his dissenting opinion in *Bartkus v. Illinois*,

> Looked at from the standpoint of the individual who is being prosecuted, this [dual sovereignty] notion is too subtle … to grasp. … [I]t hurts no less for two "Sovereigns" to inflict [double jeopardy] than for one. … In each case, inescapably, a man is forced to face danger twice for the same conduct.[135]

To limit cases of dual and successive prosecution for the same criminal act, the US Department of Justice has developed a policy for enforcement comity between federal and state prosecution departments, known as *Petite* policy.[136] According to this policy:

> [W]henever a matter involves overlapping federal and state jurisdiction, federal prosecutors should, as soon as possible, consult with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved…[137]

In cases where an individual was tried in state courts without prior consultation between federal and state prosecutors, the policy limits successive federal prosecution substantively to matters involving "a substantial federal interest" not adequately vindicated by the prior state prosecution and trial. Procedurally, successive federal prosecution requires approval "by the appropriate Assistant Attorney General."[138]

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[133] *Greene v. United States*, quoted in Colangelo, *supra* note 85, p. 837.
[134] Colangelo, supra note 85, p. 837.
[135] Quoted in Colangelo, *supra* note 85, p. 837.
[136] The policy assumes its name from *Petite v. United States, 361 U.S. 529* (1960), from which the US Federal Government develops a policy "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions".
[137] Dept. of Justice, U.S. Attorneys' Manual, quoted in Colangelo, *supra* note 85, p. 851.
[138] Id., pp. 851-52.

In Ethiopia, although, as noted above, the same criminal act may violate federal and state tax laws simultaneously, Article 16 of the Criminal Code can be construed to avoid double jeopardy or, at least, to avoid accumulation of punishment. According to this provision, if an individual "who is subject to Ethiopia's principal jurisdiction" was tried in a foreign court, the offender's conviction and sentence, or discharge or acquittal does not bar trial or sentence according to Ethiopian Criminal Code.[139] However, the Ethiopian court should deduct the punishment already served in the foreign country from the punishment to be determined.[140] Courts should apply this to the jurisdictional relation between the federal and state governments in the Ethiopian federalism. Accordingly, if a state court has convicted an accused for the same act that has been tried in a federal court, it should deduct the penalty that the accused has already served according to the prior federal trial. The same applies to a federal court that conducts a successive trial after a state court trial for the same act. This resolves the possible problem of accumulation of penalty based on the federal and state laws.

Federal-state cooperation can also enable to avoid successive prosecution based on federal and state tax laws. Towards this end, the federal government may delegate its prosecutorial power to the states according to Article 50(9) of the Constitution, in cases of simultaneous federal and state jurisdictions. In effect, the state prosecutors will prosecute the case on their behalf and on behalf of federal prosecutors. If the merger of federal and state prosecutorial powers in the same case affects the jurisdiction state courts, the state prosecutors may be required to file the case before the competent state court that has the delegated power of federal court jurisdiction according to Articles 78(2) and 80(2) & (4) of the Constitution. Finally, according to a joint reading of Articles 16(3) and 187(1) (second paragraph) of the Criminal Code, the penalty to be imposed as per the concurrent federal and state tax laws may not exceed the maximum penalty provided either in the federal or state law, whichever is higher.

[139] Criminal Code, *supra* note 2, Article 16(1) & (2).

[140] Id., Article 16(3). For more on this, see Dawit Redae (2019), "Retrial of Persons tried in Foreign Courts and applicability of the constitutional principle of prohibition of Double Jeopardy: A Reference to Ethiopia", LL.M Thesis, Addis Ababa University, School of Law.

6. Concluding Remarks

According to the Criminal Code, an individual may face multiple prosecutions (and convictions) in the three scenarios indicated in Section 3.1 above. First, if the accused successively commits more than one similar or different criminal acts. The second is if several legal provisions or causes several material harms are violated with the same criminal act. The third scenario occurs where the same act violating the same legal provision causes similar harm to multiple victims.

Despite the provisions for concurrence of crimes, however, according to the principle of unity of guilt and penalty a single or successive criminal act(s) flowing from the same criminal guilt violating the same right may not be punished under several penal provisions as highlighted in Section 3.2. Unless the contrary is expressly provided, the provisions of the Criminal Code governing concurrence of crimes are applicable to special penal provisions including tax legislations. Understood in light of the principle of unity of guilt and penalty, tax evasion is the major crime which can be accompanied by predicate tax crimes such as using illicit invoices and presenting misleading statement to tax departments which can be charged if available evidence does not show or prove tax evasion.

In *Yirgalem v ERCA Prosecutor*[141] (highlighted in Sections 2 and 5.2.3) the Federal Supreme Court Cassation Division has ruled that the penal provisions in tax and customs laws apply concurrently despite the principle of unity of guilt and penalty in the Criminal Code. This decision was rendered in the absence of special provisions in the relevant tax laws regulating concurrence of crimes. It is expected that the Cassation Division will revisit this interpretation in future similar cases.[142]

Given the federal experiment in Ethiopia, the notional concurrence of federal and state penal laws to punish the same criminal act deserves due attention. The Constitution gives the power to enact countrywide penal code to the Federal Government, and states can enact penal laws only on matters not covered by the federal law. Yet, the Constitution leaves a room for the concurrence of federal and state tax legislations to punish the same act if the perpetrator violates express duties in both laws. This requires a caveat that before convicting and sentencing an accused concurrently based on federal

[141] *Supra* note 9.

[142] The Cassation Division may change its interpretations with an interpretation given by not less than seven judges. See Federal Courts Proclamation No. 1234/2021, Article 26.

and state tax laws, courts should establish that the taxpayer's duties under the federal and state tax laws are violated. Failure to observe this caveat, courts may find themselves convicting and punishing taxpayers in the absence of law. An example in this regard is the Tigray State Supreme Court Cassation Division's decision in *TRDA Prosecutor v Tsrity and Kifle*[143] that convicted and sentenced the respondents for failure to use sales register machine for state income tax purposes before the duty to use sales register machine was introduced in the state income tax law.

Even for acts that violate express duties in federal and state tax laws simultaneously, there is the need for a mechanism to avoid successive prosecution and the accumulation of penalty. This can be done by federal-state cooperation where the federal prosecutorial power can be delegated to state prosecutors. If avoiding successive prosecution does not work for whatever reason, a state court that conducts a successive trial and convict the accused for the same act that has already been tried in a federal court should deduct the penalty determined and served according to the prior federal trial. The same holds true for a federal court that conducts successive trial for the same act that was under trial in a state court

[143] *Supra* note 12.

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Effect of Formalization of Rural Women's Land Rights in a Plural Justice System: The Case of the Sidama Regional State

Anchinesh Shiferaw Mulu ♣

Abstract

Joint land registration and certification program has been introduced in Ethiopia to secure rural women's land rights through a joint titling of a husband and wife. This article examines the effect of this program in the protection of women's land rights in the context of the plural justice system and the process of women's choice-making among the various justice systems that exist in the Sidama regional state. The findings demonstrate that the land registration and titling process contributed to bring change in the type and frequency of cases brought before courts and in its decision by raising women's consciousness of their land rights. It has also contributed to bringing change in some of the applicable norms in the customary justice system towards women's inheritance rights. Rural women alternate between the formal and informal justice systems by choosing the one that best serves their interests while taking into account various factors that affect their land rights. However, the practice of polygamy, informal land transactions and the entrenched social norms that discriminate against women have made the contribution of the land certification program to be minimal and has limited the enforcement of women's land rights in the plural justice setting.

Key terms:

Women's land rights · Land registration and certification program · Plural justice systems · Sidama regional state · Joint land titling

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Contents

1. Introduction

Land holds an important place in the life of individuals, communities, the state and private sector actors in many overlapping ways. It is a valuable asset that serves as a source of livelihood and a determining factor of the social status of individuals as it "often provide[s] not only a means of existence, but also status and power".[1] It also constitutes cultural identity of communities, and it is an important capital asset that gives people power within a society.[2] It is a determining factor of individuals' economic, political, social and cultural positions in a society.

The protection of land rights for women creates a conducive atmosphere for their overall wellbeing by creating greater bargaining power at household and community levels and resulting in lower levels of gender-based violence.[3] Marginalisation of individuals from accessing, controlling and administrating

[1] Nadia Steinzor (2003), *Women's Property and Inheritance Rights: Improving Lives in a Changing Time; Development Alternatives*, Inc. p.22. See also Brightman Gebremichael Ganta (2019), "Access to Rural Land Rights in Post-1991 Ethiopia: Unconstitutional Policy Shift", *Journal of Land and Rural Studies*, Vol. 7 (1), pp. 2 , 4.

[2] Maxim Mancino and Srinjoy Bose (2021). "Land Rights in Peacebuilding Discourse: Domination and Resistance in Timor-Leste's Ita Nia Rai program", *Australian Journal of International Affairs,* Vol. 75 (5*),* p. 563.

[3] The Gender Gap in Land Rights, FAO Information Brief available at https://www.fao.org/3/I8796EN/i8796en.pdf

land has far-reaching consequences in their lives. Agrarian society is dependent on access to land as it is the precondition for the protection of other correlated rights such as the right to food, the right to housing, the right to culture, the right to participate in public life etc.[4]

Among the various members of the society, rural women are significantly affected by the lack of access to land and its productive resources. Rural women's access to land is limited for various reasons including power relationship in the society, gender norms and unequal access to resources;[5] it is affected by socio-cultural institutions, market economy and the state.[6] The gender dimensions of land ownership indicate that women are significantly disadvantaged relative to men with regard to their land ownership, management, transfer and economic rights.[7]

Rural women's access to land is very limited in Ethiopia. To change this situation, a joint land certification program in the name of a husband and a wife was introduced since 1998 with the financial support from international institutions such as the World Bank, Department for International Development (DFID) and U.S. Agency for International Development (USAID).[8] The certification program involves joint titling of land rights of spouses and individual titling. It started with a pilot program and later expanded to four regional states in the country.[9] According to the FDRE

[4] Smita Narula (2013), "The Global Land Rush: Markets, Rights, and the Politics of Food", *Stanford Journal of International Law,* Vol. 49, p. 132. Access to land gives people the chance to exercise their cultural life freely. Denial of access to land through expropriation prevents agrarian society from exercising their right to land. Land rights are also important to capacitate and empower agrarian society to contribute in public life and local governance. Ganta, *supra* note 1, p. 4-5.

[5] Naadira Nadasen (2012). Rural Women's Access to Land in Sub-Saharan African and Implications for Meeting the Millennium Development Goals, *Agenda: Empowering Women for Gender Equity*, Vol. 26, No. 1 (91), p. 23.

[6] Lastarria-Cornhiel, S. and Garcia-Frias, Z. (2005). 'Gender and Land Rights: Findings and Lessons from Country Studies' in *Gender and Land Compendium of Country Studies*, Gender and Natural Resources Management, FAO5.

[7] Ibid.

[8] Dessalegn Rahmato (2009), "Land Rights and Tenure Security: Rural Land Registration in Ethiopia" in J. Ubink, A. Hoekema, and W. Assies (eds), *Legalizing Land Rights: Local Practices, State Responses and Tenure Security in Africa, Asia, and Latin America*, Leiden University Press: Dordrecht, The Netherlands, p. 59.

[9] The land certification program has gone through two levels in Amhara, Tigray, Oromia and SNNP regional States. The first level certification involved the use of local materials to measure and demarcates land. The second level land certification used a modern technology such as GPS, satellite images or orthography to demarcate and register land

national report on the implementation of the Beijing Declaration and Platform for Action, female landholding increased from 19% in 2008 to 60% in 2011 with the large-scale land certification effort which covered 6.3 million households in Amhara, Oromia, Tigray and Southern Nations, Nationalities, and Peoples (SNNP) regional states.[10]

One of the consequences of formalisation of rural women's land rights through joint land registration and titling is an increase in rural women's awareness of their rights to use, administer and control land.[11] This awareness and recognition of their land rights has improved their bargaining power at the household level and participation in decisions related to land and its products.[12] Some prior studies have demonstrated that the joint land certification and registration has improved equitable division of property during divorce and increased rural women's income during land rental.[13]

There are plenty of studies that demonstrate the effect of land titling on land productivity and women's empowerment.[14] These studies show that land productivity has increased after land certification and female-headed households were able to rent out land and sharecrop with a higher price after

and computerize registration. 3.7 households have been certified with the second level land certificate as of 2020/21. Proportion of total adult population with secure tenure rights to land and with legally recognized documentation based on the second level land certification is 16% in 2020/21. See FDRE Ministry of Planning and development (2022), Ethiopia Voluntary National Review 2022, p. 136.

[10] FDRE (2015), *FDRE National Report on the Implementation of the Beijing Declaration and Platform for Action (1995) and the Outcome of the 23th Special Session of the United Nation General Assembly*, p. 9.

[11] Monterroso I, Enokenwa O and Paez-Valencia AM (2021), "Women's Land Rights in Ethiopia: Socio-legal review. Securing Women's Resource Rights through Gender Transformative Approaches", *Project Brief*. Bogor, Indonesia and Nairobi, Kenya: CIFOR-ICRAF and International Fund for Agricultural Development (IFAD), p. 11.

[12] Dessalegn Rahmato, *supra* note 8, pp. 82 & 85.

[13] *See*, for example, E. Adgo, E. *et al* (2014), "Impact of Land Certification on Sustainable Land Resource Management in the Amhara Region, Ethiopia", *DCG Report No. 7*, p. 43-44; H. Girma & R. Giovarelli (2013), 'Lesson 2: The Gender Implications of Joint Titling in Ethiopia' in *Focus on Land in Africa Brief,* https://gatesopenresearch.org/documents/3-1018 (accessed on 28 July 2022), p. 6; UN Women (2019), *Women's Land Rights and Tenure Security in the Context of the SDGs Situation Anlaysis Report Ethiopia* (final draft), p. 4.

[14] Ibid. Mequanint B. Melesse, Adane Dabissa & Erwin Bulte (2018). "Joint Land Certification Programmes and Women's Empowerment: Evidence from Ethiopia", *The Journal of Development Studies*, vol. 54, No. 10, p. 1756-1774.

the certification.[15] Others have discussed how land certification contributed towards decreasing land related disputes.[16] The land certification programs have an impact of changing women's positions at the household level by increasing their bargaining power in the intra-household resource allocation.[17]

There is dearth of studies regarding the effect of land registration and titling on the delivery of justice by the formal and informal justice systems (in plural legal setting).[18] This article examines the contribution of the land certification and registration program in the adjudication of rural women's land rights before the formal and informal justice systems. It critically reflects on various roles of land registration and titling in the adjudication of these cases. Moreover, it examines the effects of the plural legal system on the protection of rural women's land rights.

In this study, doctrinal and qualitative methodology is employed, and both primary and secondary source of data were used to collect, analyse, and triangulate data. Data collected from May 2-16, 2022, and July 18- Aug. 1, 2022 for the author's PhD study have been used with a view to navigate through the lived experiences of rural women to access justice in case of land disputes. The key informant interviews were conducted in the Sidama Regional State which is a new regional State established following a referendum on 18 June 2020. The research site was selected because of the land certification program has been implemented in the area in the context of

[15] S. Holden, K. Deininger and H. Ghebru (2009), "Impacts of Low-Cost Land Certification on Investment and Productivity", *American Journal of Agricultural Economics*, vol. 91(2), 2009, p. 370; K. Deininger, D. Ali and T. Alemu (2011), "Impacts of Land Certification on Tenure Security Investment, and Land Market Participation", *Land Economics*, Vol. 87, 2011, p. 312–334; S. Holden and H. Ghebru (2013), "Welfare Impacts of Land Certification in Tigray, Ethiopia" in S. Holden, K. Otsuka, and K. Deininger (eds.) *Land Tenure Reform in Asia and Africa: Assessing Impacts on Poverty and Natural Resource Management*, Palgrave Macmillan, London, p. 137.

[16] Dessalegn Rahmato (2009), "Land Rights and Tenure Security: Rural Land Registration in Ethiopia" in J. Ubink, A. Hoekema, and W. Assies (eds), *Legalizing Land Rights: Local Practices, State Responses and Tenure Security in Africa, Asia, and Latin America*, Leiden University Press: Dordrecht, The Netherlands, p. 17.

[17] Mequannent B. Melesse *et al*, *supra* note 14, p. 1756.

[18] The only study that has tried to look into the land related violence against women is the study by Mekonen, W. *et al* (2020) entitled as *Strategy for Preventing and Mitigating Land Certification Related Violence against Women and Vulnerable Groups.* However, this study did not look into the effect of the land certification on the plural justice system.

the preexisting gender norms and local socio-political conditions. The researcher had also prior information that land related disputes are widespread in the area from the legal aid offices of the Center for Human Rights in Hawassa and its surroundings rural areas.

Interviews were made with 51 key informants out of which 14 were rural women who have passed through the justice system as litigants. The remaining 37 informants were officials and experts from regional Bureaus and Woreda offices, judges, elders, staff of Ethiopian Human Rights Commission (EHRC) and Ethiopian Institute of Ombudsman (EIO) of Hawassa branch offices, NGOs, members of women's association and Land Committees). Two focus group discussions with kebele officials and members of Land Administrative Committees (LACs) were conducted. Federal and regional legislations on land rights are analysed using doctrinal method. Secondary data from books, articles, reports etc on the gender impact of land certification and women's land rights complimented the data gathering and analysis of this study.

The next section provides a brief overview of the notion of legal pluralism. The third section discusses the intersection between formalisation of land rights and women's land rights which is followed by the fourth section that examines the normative plurality on women's land rights in Ethiopia. Section 5 deals with judicial plurality in the settlement of rural women's land rights disputes. The last section before the conclusion looks into the relationship between the formal and the informal justice systems.

2. The Concepts of Legal Pluralism, Legal Centralism and Hybridity: An Overview

Legal pluralism 'is generally defined as a situation in which two or more legal systems coexist in the same social field'.[19] In other words, it permits the operation of two or more legal systems simultaneously. Plurality of legal orders and competing ideas of right and wrong are created because the existence of cultural difference brings different legal adjudication and enforcement mechanisms.

The recent definition of *legal pluralism* considers it as "a situation in which people could choose from among more than one co-existing set of rules" while *legal plurality* refers to "co-existence of multiple (sub-)legal systems within one state, to cater to different categories of persons who had no option to

[19] Sally Merry (1988). "Legal Pluralism", *Law and Society Review*, Vol. 22, No. 5, p. 870.

choose from among these bodies of law".[20] The first definition also relates to forum shopping which is the practice of choosing among courts or laws that will give a favourable decision to the case at hand.[21]

Legal pluralism is created when there are customary or informal legal systems that exist in parallel with the state/formal legal system. It is important to take note of the distinct features of legal pluralism in contrast with legal centralism and the hybridity of laws and implementation. According to the concept of legal centralism:

> law is an exclusive, systematic and hierarchical ordering of normative propositions, which can be looked at either from the top downwards as depending on a sovereign command or from the bottom upwards as deriving their validity from ever more general layers of norms until one reaches some ultimate norm . . . It is the factual power of the state, which is the keystone of an otherwise normative system, which affords the empirical condition for the actual existence of 'law'.[22]

According to this theory, "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions."[23] Any other normative order other than the state is considered to be subordinate to the state law. Laws that emanate from religious institutions, community, economic organizations, or from any other entity is expected to be a lesser normative order and should be hierarchically subordinate to the state law.[24] This conceptualization underlines that there is '[a] necessary connection between the conception of law as a single, unified, and exclusive hierarchical normative ordering and the conception of the state as the fundamental unit of political organization.'[25]

However, the empirical evidence and the reality on the ground have shown that law is not monolithic, it is rather plural, and it is not only public but private one as well.[26] The ideals of legal centralism are considered as idealistic claims which do not reflect the reality on the ground. Legal pluralism has been

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[20] Keebet von Benda-Beckmann & Bertram Turner (2018). "Legal Pluralism, Social Theory, and the State", *The Journal of Legal Pluralism and Unofficial Law*, vol. 50 (3), p. 262.

[21] Note (1990). "Forum Shopping Reconsidered", *Harvard Law Review*, Vol. 103, No. 7, p. 1677.

[22] John Griffiths (1986). "What Is Legal Pluralism?" *Journal of Legal Pluralism*, p. 3.

[23] Griffiths, id., p. 3.

[24] Ibid.

[25] Ibid.

[26] Id., p. 4.

a factual phenomenon. This is more pronounced in countries with a history of colonialism or legal transplantation from outside. Since there is pre-colonial legal system that pre-existed the colonial law, the imposition of the later creates the existence of plural legal systems.[27]

Scholars who took the middle ground between legal centralism and legal pluralism argue that a law other than the state can be considered as law if only state law recognizes it as such. This came to be understood as "normative legal pluralism". However, this idea was challenged as there were non-state laws such as religious laws that are considered as laws even though the state has not recognized them as such. This brought the idea that various laws or legal systems can co-exist on equal footing with the state legal system. This idea considers legal pluralism as the coexistence of the various legal systems independently of each other with their own legitimacy and validity.[28]

However, recent scholarships indicate the interaction among the various legal systems. This conceptualization is known as *hybridity*. Accordingly, the intersection of different legal systems leads to their transformation in such a manner that the past will continue to exist in its transformed form.[29] This requires a constant process of negotiation and renegotiation. In hybrid system, the various legal systems overlap without one displacing the other. The various legal systems supplement each other rather than replacing one another.[30]

Legal pluralism does not only result in plurality of legal norms but also judicial plurality/institutional legal plurality. The sections below discuss the effects of the normative plurality and the judicial/institutional legal plurality on women's land rights after discussing the relationship between formalization of land rights and women's land rights.

[27] Merry, *supra* note 19, p. 869.
[28] Benda-Beckmann & Turner, *supra* note 20, p. 263.
[29] N. Fairclough (1992). *Discourse and Social Change*, pp. 64-65.
[30] S. MuÈller-Mall (2013). *Legal Spaces: Towards a Topological Thinking of Law*, Springer Science & Business Media, pp. 12-13.

3. The Intersection between Formalisation of Land Rights and Women's Land Rights

Formalization of land rights is the recognition of specific rights through official and written documents. It is associated to "a shift from 'informal' to 'formal' norms, from oral to written, from extra-legal to legal or from unofficial to official."[31] It involves "giving written and legal form to undocumented land rights".[32] It implies state recognition of property rights that would be accorded protection from the legal system.[33]

Formalisation of land rights has many advantages. It can change assets which are not fixed with a marketable value into capital which has economic and social recognition in the formal property system.[34] Hernando de Soto argues that informal transactions have extra-legal effects and causes insecurity of transaction.[35] De Soto's view is similar with the views that are held by "the Property Rights School" and "the Evolutionary Theory of Land Rights". Both theories underline that title deeds to land are "a logical and painless culmination to the relentless process of increasing land scarcity, increasing land conflicts, and increasing individualisation that eventually flow from growing populations and agricultural commercialization".[36]

A host of benefits are embodied in formalisation of land rights such as "increased investment demand, increased credit supply, and efficient redistribution of property, […] consolidation of scattered holdings, efficient input and output choices, and an increased tax base".[37] De Soto emphasized

[31] However, such dichotomy between formal and informal norms has been criticized since it does not reflect the complex and dynamic intersection and interaction between state laws and local norms and practices. See I. Ikdahl *et al* (2005), *Human Rights, Formalisation and Women's Land Rights in Southern and Eastern Africa*, p. 4.

[32] 'Land Tenure and Development' Technical Committee (2015). *Formalising Land Rights in Developing Countries: Moving from Past Controversies to Future Strategies*, Paris, Ministère des Affaires étrangères et du Développement international (Maedi), Agence française de développement (AFD), p. 11.

[33] H. Stein and S. Cunningham (2015). "Land Grabbing and Formalization in Africa: A Critical Inquiry", *ASC Working Paper* 124/2015, p. 3.

[34] Hernando de Soto (2000). *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. New York: Basic Books, p. 47.

[35] De Soto, Id. cited in Stein and Cunningham, *supra* note 33.

[36] E. Sjaastad and B. Cousins (2008). "Formalisation of Land Rights in the South: An Overview", *Land Use Policy*, Vol. 26, p. 2.

[37] Jean-Philippe Platteau (1996). "The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment," *Development and Change*, International

the formalization of 'already existing rights' rather than introducing new private holdings through titling. He underlined the need to register the formal property representation. The State is assumed to have a greater role in the provision of titles.[38]

The formalisation of women land rights by the state has the advantage of protecting rural women from land alienation by investors, local elites and private individuals. It brings both social and economic benefits to women. Women's access to land is essential to ensure their social inclusion and to facilitate their access to agricultural inputs. It is also an important factor to sustain cultural and collective identity.[39] Furthermore, the formalization of land rights through land certificates can play an important role in the judicial enforcement of women's land rights by serving as important evidence in the adjudication process.

Women's land tenure security requires not only recognizing women's rights to land but also securing tenure and judiciary enforcing their rights.[40] In this sense, tenure security has multiple dimensions. The first refers to completeness of the bundle of rights.[41] In bundle of rights, land can be "held by one individual or group or the rights be distributed among different individuals or groups".[42] There are multiple rights individuals or groups hold under the concept of bundle of rights.[43] These rights include the right to access to land, the right of withdrawal or the right to take the fruit of the land, the right to management, the right of exclusion and transfer rights.[44]

Institute of Social Studies, vol. 27(1), pages 29-86cited in E. Sjaastad and B. Cousins (2008), "Formalisation of Land Rights in the South: An Overview", *Land Use Policy*, Vol. 26, p. 2.

[38] Sjaastad and Cousins, Ibid.

[39] Jennifer C. Franco (2008). *A Framework for Analyzing the Question of Pro-Poor Policy Reforms and Governance in State/Public Lands: A Critical Civil Society Perspective*, FIG/FAO/CNG International Seminar on State and Public Sector Land Management, Verona, Italy, p. 5.

[40] W. Mekonen *et al* (2020). *Strategy for Preventing and Mitigating Land Certification Related Violence against Women and Vulnerable Groups*, The World Bank-Washington DC, March 16-20, p. 12.

[41] C. Doss and R. Meinzen-Dick (2018). *Women's Land Tenure Security: A Conceptual Framework*, Seattle, WA: Research Consortium, p. 4, available on https://consortium.resourceequity.org/conceptual-framework.

[42] Doss and Meinzen-Dick, Id., p. 2.

[43] Id., p.12.

[44] E. Schlager and E. Ostrom (1992). "Property-Rights Regims and Natural Resources: A Conceptual Analysis", *Land Economics*, Vol. 68, No. 3, University of Wisconsin Press, pp. 250-252.

The second component is duration of the right. The longer the person holds the land, the more secure his/her rights on the land are. The third component is robustness, which refers to the social and legal enforceability of the rights on the land. The enforceability of the rights depends on the legal, social, or institutional systems. Rights that are "legally and culturally legitimate are more robust than those that are contested by laws or social norms".[45] The fourth component refers to individual and shared rights. This is particularly important to women's land tenure security. The individual and joint ownership of the land and the relationship among shareholders affect how much the tenure is secured.[46] Mostly women's rights to land depend on their relations to a man who might be their father, husband, brother or son. Their social status or family relations determines their shared rights. The unequal power relations between men and women have a negative effect during land rights negotiation process within a family.[47]

Ethiopia has introduced a land registration and certification program in the late 1990s. Previously, land registration was limited in some parts of the country and did not include joint ownership. In the Southern part of the country, for example, the land tenure system was characterized by patrilineal inheritance and virilocal residence.[48] While this was the widespread phenomenon in the country, the FDRE Constitution guarantees gender equality in all its aspects. It is hence the proper enforcement of the constitutional provisions that guarantees women's equal rights with men to use, transfer, administer, and control land under Article 35(7) that necessitated the land registration program. The program promoted women's rights through joint rural land titling in the name of a husband and wife. It has empowered women to rent out their land.

Women are now demanding their rights related to the land within family and in the community. For example, in one study it was found out that the joint-titled women are more informed about their land rights and have improved lobbying capacities than untitled women.[49] While there are anecdotal examples about the increase in the level of awareness, one may not aptly say that the right holders are fully aware of their rights. Even if the law

[45] Doss and Meinzen-Dick, *supra* note 41, p. 5.
[46] Id.
[47] Ikdahl et al, *supra* note 31, p. 11.
[48] United Nations Human Settlements Programme (UN-HABITAT) (2008). *Land Registration in Ethiopia: Early Impacts on Women*, Summary Report.
[49] Adane Dabissa (2013). *Impacts of Joint Land Rights Titling on Women Empowerment: Evidence from Ethiopia*, Master Thesis, University of Wageningen, p. 36.

prohibits a husband from entering into any transaction on the land without the consent of his wife,[50] there is plenty of evidence which shows the existing practice does not adequately respect this rule. Accordingly, most of the land transactions are made without the wife's consent through informal transactions.[51] Although these kinds of transactions can be made null and void if the wife files a complaint within two years of the conclusion of the contract,[52] most rural women do not bring cases because of either lack of awareness or not taking their rights seriously.

In the study area, the landholding certificate program has contributed to bring change in the views of some of the members of the society who have now started to challenge the social norms that perpetuated the view that land belongs to the husband's clan only and land inheritance should only be through the male lineage by denying daughters' inheriting from their natal family.[53] This is evidenced in the shift of land inheritance practice which only promoted patrilineal inheritance. The land inheritance practice in some places is now shifting through father's initiative to leave a testament inheriting some of their property including land to their daughter/s.[54]

There is also change in the view that a woman cannot own land. One informant stated that:

> I am a third wife and the two before me have land in their own names. My husband has land in his own name too. When a husband has more than one wife, he gives a share of the land to each wife so that upon his death there won't be any land related dispute among his wives.[55]

Most of the key informants also confirmed that the land certification and registration has increased women's confidence and decision-making power at

[50] Article 8(2) of SNNP Rural Land Use and Administration Proclamation No. 110/2007 and Article 8(1(a)) of Rural Land Administration and use regulation No. 66/2007.

[51] Interview with Director of Ensuring women, Children and Youth inclusion and benefit Directorate at Sidama Regional States Women, Youth and Social Affairs Bureau on 04 May 2022 at Hawassa.

[52] Article 68(1(a)) cum. Article 69(2) of the federal revised family law. Interview with a judge and registrar at Hawassa Area High Court on 04 May 2022 at Hawassa.

[53] *Supra* note 51.

[54] Interview with Sidama Regional State Agriculture and natural Resources Development Bureau on 09 May 2022 at Hawassa.

[55] Interview with key informant 01 conducted on July 19, 2022 at Sheberdina Woreda. This was also collaborated by a judge.

the household level.[56] The participation of women has improved in decisions that are related to the type of crops to harvest, land management, decision regarding the income from the sale of crops, when and how to harvest, and similar issues. For example, the findings of a study undertaken in Southern Ethiopia using data from 600 households show that women's intra-household bargaining power and awareness of their rights to land increased after the joint land registration and certification.[57]

In spite of the positive changes that the land certification program has brought (in increasing women's confidence and participation in land related decisions at the household level), women's access to justice has not steadily improved. The subsequent section discusses the role of the formalization of rural women's land rights in the administration of justice in a plural legal setting in the Sidama Regional State.

4. Normative Legal Plurality on Women's Land Rights in Ethiopia

The normative systems that are applicable at different levels of legal orders at international, regional and national levels overlap in most cases. At the international level, there is the international legal order that plays a role in human rights norm and standard setting. These norms complement each other although there are instances of distinctiveness.[58] Since the institutional framework for the enforcement of rights in the various international conventions is weak at the international level, it is left for the domestic legal system to enforce these rights through domestic laws, institutions, and practices.

The international and regional human rights framework has recognised women's equal rights to access, control and use land with men in binding conventions.[59] The jurisprudence assures women's land rights regardless of

[56] Interview with Director of Ensuring women, Children and Youth inclusion and benefit Directorate at Sidama Regional Sates Women, Youth and Social Affairs Bureau on 04 May 2022 at Hawassa. Interview with key informant 2 conducted on 19 July 2022 at Shebedino.

[57] Stein T. Holden and Sosina Bezu (2014). *Joint Land Certification, Gendered Preferences, and Land-related Decisions: Are Wives Getting More Involved?*, 1.

[58] Frans Viljoen (2011). "Human Rights in Africa: Normative, Institutional and Functional Complementarity and Distinctiveness", *South African Journal of International Affairs*, Vol 18, No. 2

[59] Article 14 of CEDAW and Article 19(C) of Maputo Protocol are the binding instruments that protect women's land rights. In addition, there are non-binding soft

conditions that the land tenure is based on statutory or customary, individual or communal ownership. In particular, it protects women from losing their rights to land merely because they do not have a formal title to it. These protections are based on substantive equality considerations.[60] The existing framework also ensures women's participation in land reform initiatives, the recognition of informal/customary rights during formalization of land rights, application of non-discrimination principle in land redistribution process, making the justice system accessible to women, ensuring land institutions' transparency, representativeness, and accountability, and creating awareness on women's land rights.[61] These principles and frameworks are applicable in Ethiopia based on the FDRE Constitution which makes ratified instruments part and parcel of the law of the land.[62]

At national level, women's land rights are protected by the FDRE Constitution and subsequent laws.[63] The Federal Rural Land Administration and Use Proc. No. 456/2005 (Proclamation No. 456/2005) has provision regarding women's equal access to such critical resources. According to Article 5(1)(c) of Proclamation No. 456/2005, a woman who wants to engage in farming can access and use rural land. It also upholds that rural land that is held jointly by a husband and wife should be registered in the name of both.[64]

The SNNP regional state's Land Administrative Law provides that rural women who are above the age of 18 and interested to engage in agricultural activities have the right to access and use agricultural land.[65] In its preamble,

laws that protect women's rights to land. There are para. 165 (e) of Beijing Platform for Action (1995), the Habitat Agenda (2003), Goal 5 of the Sustainable Development Goals (SDG) (2015) and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT).

[60] Substantive (*de facto*) equality requires taking measures to address inequalities created because of the imbalance in the socio-economic positions of men and women in the society. It requires going beyond formal (*de jury*) equality which are provided in the law.

[61] See the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests.

[62] Article 9(4) of the FDRE constitution. Ethiopia has ratified CEDAW and Maputo Protocol.

[63] Article 35(7) of the FDRE Constitution and regional land Administration Proclamations.

[64] Article 6(4) of the Federal Rural land administration and Use proclamation 456/2005.

[65] Article 5(2)(3) of Proclamation No. 110/2007 of Southern Nations, Nationalities and Peoples (SNNP) Rural Land Use and Administration Proclamation. This proclamation is currently applicable in the Sidama Regional State pending the adoption of a new

the Proclamation recognizes that protection of women's land-holding rights ensures agricultural productivity and environmental development. The proclamation protects female heads of household to use their land rights.[66] Women are entitled to obtain land holding certificate in their own name.[67] It also protects a woman whose husband is away to use the rural land and obtain land certificate in her own name.[68] It furthermore provides that a husband and wife are entitled to a joint holding certificate.[69] Accordingly, a jointly owned rural land can only be leased or exchanged upon the consent of both the husband and wife.[70] If the consent of one of these parties is missing, the lease or exchange contract is void.

This national legal system does not accommodate customary rules in the broad sense of the term. The main reason for this is that the modernization process of the Ethiopian state in the early 20th century opened the gate for modern laws to be transplanted from other foreign legal systems. The modern laws in Ethiopia are characterized by codification of laws based on the western legal system i.e., predominantly the civil law legal system. The Civil Code explicitly made any customary rules which were applicable in the country null and void save for those which are expressly recognized under the Code.[71] However, it attempted to incorporate some customary rules in family, successions and property laws.[72]

Similarly, the customary laws in Ethiopia have not been subjected to much interference or influence by foreign systems or the state system until recently. The lack of history of colonialism and the Ethiopian state's approach towards customary justice system that did not profoundly allow for any relationship to blossom can be considered as an explanation for the customary system to maintain its originality.[73] However, in recent years, it is observed that the

legislation for the new region in accordance with Proc. 8/2020 of Sidama Regional State.

[66] Article 5(6) of Proc. No. 110/2007.

[67] Id., Article 6(5).

[68] Id., Article 5(7) and 6(6).

[69] Id., Article 6(4).

[70] Id., Article 8(2); and Article 8(1(a)) of Reg. No. 66/2007.

[71] Article 3347 of the Civil Code.

[72] Vanderlinden 1966–67:259 cited in Getachew Assefa (2020), "Towards widening the constitutional space for customary justice systems in Ethiopia" in Susanne Epple and Getachew Assefa (eds.), *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions*.

[73] Getachew Assefa, id., p. 56.

relationship between the actors of the customary system and the state has been changing. The state is using the elders of customary system to resolve various communal conflicts by admitting the limits of formal mechanisms in terms of reach, legitimacy, and capacity.[74] This relationship has also been observed to be political with a view to get political allegiance.

Departing from the previous approaches, the FDRE Constitution recognizes the role of the customary and religious institutions in the adjudication of family matters, and it states that the particulars shall be determined by subsidiary laws.[75] However, it does not allow criminal matters to be adjudicated by customary or religious justice system. A Proclamation has been adopted in relation to sharia courts providing its jurisdiction.[76] Until recently there is no subsidiary law that specifically authorizes the customary justice system to adjudicate cases in a general manner. A specific law on the scope of their jurisdiction, the rules that should be applied by these institutions which include both substantive and procedural laws and their relation with formal justice system has not been introduced except in Oromia regional state.[77] The lack of such law that recognizes customary justice system has allowed forum shopping by going back and forth between the formal justice system and the customary justice system.[78]

Although the existing subsidiary laws have not incorporated much from customary laws, there is an exception in the case of rural land administration and use proclamations. Most of the regional land administration proclamations

[74] Gebre Yntiso (2020). "Understanding Customary Laws in the Context of Legal Pluralism", in Susanne Epple and Getachew Assefa (eds.), *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions*, p. 82.

[75] FDRE Constitution allows customary and religious laws to be applied on personal and family matter based on the consent of parties (art. 34 (5)). It also gives recognition of customary courts under Article 78(5).

[76] The Federal Courts of Shari'a Consolidation Proclamation No. 188/1999.

[77] Assefa, *supra* note 72, p. 55.Oromia Regional State has adopted a proclamation to establish and recognize the Oromia Regional Customary Courts (Proc. No. 240/2021). It has also issued a Regulation to implement the Oromia Region Customary Courts, (Regulation No. 10/2021). These laws provide for a procedure for giving recognition and establishing customary courts that resolve disputes and reconcile in accordance with customary laws, their responsibilities, and the manner of revocation of the recognition given to them etc.

[78] Desalegn Amsalu (2020). "Use and abuse of 'the right to consent' Forum shopping between shimgilinna and state courts among the Amhara of Ankober, North-central Ethiopia" in Susanne Epple, Getachew Assefa (eds.), *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions*.

mandate elders to settle land disputes.[79] According to Article 12(1) of Rural Land Use and Administration Proclamation No. 110/2007 of SNNPR, whenever parties to land disputes cannot resolve the dispute amicably, they can take their case to Kebele level Land Administration and Use Committee (LAC). LAC should facilitate the dispute to be resolved by local elders through negotiation and arbitration. It is only when the elders cannot resolve the case that it is submitted to Woreda court.[80]

This can be taken as *legal hybridity* which allows an accommodation of the affiliation of individuals to two or more institutions or legal systems whereby elders can play their roles in the customary system and at the same time become members of LAC (a state institution) to adjudicate land disputes.[81] This recognition by the law is a form of deference given to the roles of elders in the settlement disputes related to rural land holding rights. However, the Proclamation and current practice demonstrate that the parties to land disputes are required to take the case first to LAC before submitting it to courts. If parties in dispute submit cases directly to courts, they are referred to settle the land dispute through LAC. This approach contradicts the constitutional provision which requires that parties should give their consent when they take cases to alternative dispute resolution mechanisms.[82]

Normative compatibility is very fundamental for human rights protection although normative distinctiveness is tolerable in liberal democracy. In the study area, there are customary norms that are not only distinctive from state law but are also incompatible with the state law. Some of these gendered social norms and customary laws discriminate women from inheriting land. According to the views of elders who were interviewed at one of the research sites: "women are excluded from inheritance because upon marriage they are considered to belong to their husbands' clan and that they will get land when they move to their husbands' residence".[83]

Thus, daughters' inheritance of land is prohibited by the customary system because of this patrilocal nature of marital residence. Furthermore, the customary system does not prohibit polygamous marriage which is

[79] Article 29 of the Revised Amhara Regional State Rural Land Administration and Use Determination Proclamation No. 133/2006, and Article 16 Oromia Rural Land Use and Administration Proclamation No. 130/2007.
[80] Article 12(2) of Proc. 130/2007.
[81] P.S. Berman (2010). "Towards a Jurisprudence of Hybridity", *Utah Law Rev*., Vol. 1, p. 11.
[82] Article 34(5) of the FDRE Constitution.
[83] Interview with elders on 11 May 2022 at Dore Bafano Woreda.

widespread in the study area although it is declining through time because of religious condemnation and the economic pressure that accompanies polygamous marriage.[84]

This normative incompatibility between the two systems in relation to the practice of polygamy has brought the development of new rules by the formal normative system in order to address the effect of polygamous practices on women's land rights. The regional land certification and registration program has tried to deal with the negative effect of the practice on women's land rights by issuing a joint land certificate to the wives in such marriages even though the family law of the region (SNNP) prohibits bigamous marriage. Although the FDRE Constitution recognizes normative and judicial pluralism; it is not a *carte blanche* recognition.[85] In fact, the FDRE Constitution clearly stipulates that the obligation of the state relates to 'the duty to support, on the basis of equality, the growth and enrichment of cultures and traditions that are compatible with fundamental rights, human dignity, democratic norms and ideals, and the provisions of the Constitution'.[86]

Furthermore, the FDRE Constitution requires all organs of the government to enforce the human rights provisions of the Constitution including the provisions on women's rights.[87] It further declares that the FDRE Constitution is the supreme law of the land and any law including customary law that contravenes the constitution is null and void.[88] Thus, the normative plurality that is permissible under the Constitution is subject to the supremacy clause of the Constitution.[89] In light of this, it is important to inquire the constitutionality of the practice of joint land titling of a husband and wives in polygamous marriage. In this regard, it is argued that the practice of issuing a joint certificate for wives in polygamous marriage entail *de facto* recognition of polygamous marriage which is prohibited under the family codes of both

[84] Interview with Director of Land Administration and Use Directorate of the Sidama Regional State Agriculture and Natural Resources Development Bureau on 09 May 2022. Protestant religion which condemns polygamous marriage is dominant in the Sidama region.

[85] Girmachew Alemu Aneme (2018). "The Coupling of State and Sharia Justice Systems in a Secular State: The Case of Ethiopia", *SFB- Governance Working Paper Series*, No. 75, p. 19.

[86] Article 91 of the FDRE Constitution.

[87] Id., Article 13(1).

[88] Id., Article 9(1).

[89] Girmachew, *supra* note 85, p. 20.

the federal and the regional state and this might inadvertently encourage polygamy.[90]

The author of this article argues that law should not ignore the effects of polygamous marriage and its negative effects on women, and it needs to regulate the effect of such act on women. Thus, joint certification of wives' rights should not be taken as *de jure* recognition of polygamous marriage (especially its personal effects), but it should be understood as the response of the law recognizing the *land related effect* of such forms of marriages.

The FDRE Constitution's approach to legal pluralism has allowed normative and judicial plurality in the operations of the state and customary/religious systems. However, the co-existence of the two systems has also created a various complex outcomes in the settlement of land disputes as discussed in the section below.

5. Judicial Plurality in the Settlement of Rural Women's Land Rights

5.1 Nature of land disputes involving rural women

Dispute or competing claims over land is a fact of life. It emanates from the struggle among various social groups or individuals to have effective access and control over land and its productive resources. These disputes are settled by a third-party umpire to determine who has rights, what these rights are and for how long these rights can be exercised.[91]

As the analysis of the empirical data from the field shows, the types of land disputes in the study area can be categorized as disputes over land boundaries, demarcations, land transactions (rentals and disguised sales), and those that arise within family relations such as in relation to inheritance and divorce. Disputes related to state acquisition of local land is rare in the rural area as it happens mostly in the peri-urban areas and its resolution mostly involves only men except in case of a female headed household.[92] Most of land right

[90] Belachew Mekuria Fikre (2013). "Bigamy and Women's Land Rights: The Case of Oromia and SNNP National Regional States", *Ethiopian Journal of Human Rights*, Vol. 1, p. 106 and 107.

[91] Franco, *supra* note 39, p. 5.

[92] Interview with Dr. Addiswork Tilahun, Assistant Professor at Hawassa University on 12 May 2022.

disputes involving women arise in relation to divorce cases, inheritance cases and in case of bigamous/polygamous marriage.[93]

In the study area, land boundary related disputes are not court-centered. These disputes are settled by Land Administrative Committee (LAC), which is established by the regional Bureau of Agriculture and Rural Development with the mandate, *inter alia*, to settle land related disputes between neighbors.[94] The method of dispute resolution before LAC is based on the customary form of mediation whereby the members of LAC attempt to resolve the dispute in a reconciliatory manner to keep the peace and tranquility of the community. LAC has five to seven members elected by the community, and usually includes members from the community/elders. They try to identify the proper demarcation of land whenever there are boundary disputes through testimonies from neighbors. If a dispute arises over land among family members including among married couples, they try to mediate the parties with the view to maintaining family relations.[95]

The study further finds that court centered land disputes that relate to transfer/rental, marital property division during divorce, petitory action, trespass action and inheritance. These land disputes are submitted before the formal justice institutions and the informal institutions including the customary organs. It is rare for women to be involved in expropriation cases and compensation claims relating to land expropriation because the field research shows that it is mostly the husband who brings such cases representing the household.[96]

5.2 Avenues to resolve land related disputes involving rural women

To be meaningful, land rights need to be legally recognized; and should be socially and judiciary enforceable.[97] There are three avenues to resolve land related disputes involving women, namely: - administrative organs, the formal justice system, and the informal justice system.

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[93] Interview with judges conduced on 06 and 10 May 2022 at Hawassa Area High Court and Hawyela Tula First Instance Court. Most of the cases submitted to the legal aid centers at Hawassa also demonstrate this reality.

[94] Article 12 of Proc. No. 110/2007 of SNNE Rural Land Administration and Use Proclamation.

[95] FGD conducted on 26 July 2022 at Alawa Ano Kebele.

[96] *Supra* note 92.

[97] Workwoha Mekonen *et al* (2020). *Strategy for Preventing and Mitigating Land Certification Related Violence against Women and Vulnerable Groups*, The World Bank- Washington DC, March 16-20, p. 12.

5.2.1 Administrative organs

One of the formal avenues to resolve land disputes related to land boundary is before the administrative organs. As some studies demonstrated, land is perceived to be a political issue which is mostly resolved by political office as an administrative matter rather than as a legal case that should be resolved by courts.[98] This is especially true to the kind of land disputes involving demarcation of land, grazing lands and dispute over uncultivated land. This kind of land disputes are handled by district level peasant associations and district administrative organs rather than by a judicial organ.[99]

The main purpose of these administrative organs is to resolve the dispute as peaceful as possible and at the same time maintain the social cohesion. The administrative organs decide such disputes relying on eyewitness testimonies and documents presented before them.[100] Since the decisions of these organs are the main evidence considered by courts, parties to the dispute are reluctant to take their cases to courts as a first instance unless the disputes continue despite the decisions of the administrative organs.

The administrative organs that are involved in settling the disputes include LAC. Most of the members of LAC are village elders.[101] The elders tend to apply customary rules rather than state law. This has a negative implication on women's rights as some of the customary rules on inheritance are not compatible with state laws as discussed above. Furthermore, if the customary rules are applied, the disputants should give their consent to be adjudicated by the customary system. However, as the law and the practice demonstrate, they are not given a chance to give consent since LAC is the first instant body to entertain land disputes under the law.

The other main challenge is that women's participation in the decision-making process by the administrative organs is very limited. According to informants, women are not part of the core membership in LACs except a representative of the kebele's women association who has the privilege to be

[98] Mamo Hebo (2005). Land Disputes Settlement in a Plural 'Institutional' Setting: The Case of Arsii Oromo of Kokossa District, Southern Ethiopia, *African Study Monographs*, Suppl. 29, p. 127

[99] Id., p. 128 and 130.

[100] FGD conducted with LAC members on 26 July 2022 at Alawa Ano Kebele.

[101] Interview conducted with Dore Bafano Land Administration and Use expert on 11 May 2022 at Dore Bafano.

a member by virtue of her nomination from the association.[102] The absence of voice representing women to defend their interest, preferences and needs has a negative implication on the decisions. The 'politics of presence' theory argues that the inclusion of women in any decision-making process at the public sphere is necessary for a legitimate, democratic, responsive, inclusive, and effective outcome of the decisions.[103] The current thinking is that women's participation and inclusion should not be considered as a favor done for women, but it should be taken as part of their human rights.

The various international human rights instruments and their jurisprudence require states to ensure women's participation in decision-making processes.[104] The State is not only required to refrain from any action that undermines women's participation, but is also required to take a positive action which can be in the form of gender quota. Gender quota can serve as an effective tool to bring women on board in decision-making processes especially in contexts where systemic and structural gender inequalities exist.

It should also be noted that the inclusion of women in decision-making process should be sought with a view to including women from diverse socio-economic backgrounds. Gender quotas should be implemented by ensuring the inclusion of women from diverse class, ethnicity, religion, urban/rural residency, disability, and other diversity.[105] Unlike other regional proclamations,[106] the SNNP Rural Land Use and Administration Proclamation does not provide quota for women participation in LACs while the laws of

[102] Interview conducted with Dore Bafano Land Administration and Use expert on 11 May 2022 at Dore Bafano.

[103] Institute for Democracy and Electoral Assistance (IDEA) (2019), *Women Constitutional-Makers: Comparative Experiences with Representation, Participation and Influence: First Annual Women Constitution-Makers' Dialogue*, Edinburgn, 2019, p. 9.

[104] One of the 12 objectives of the Beijing Platform for Action, adopted at the Fourth World Conference for Women in 1995, was 'women's equal access to and full participation in power structures and decision making'.

[105] Meskerem Geset and Tayechalem G. Moges (2020), "Counting Absence in Political Equality: A preliminary Gender Analysis of the Electoral Law Reform in Ethiopia" in Meron Zeleke and Meskerem Geset (eds.), *Gender, Development and Women's Rights: Ethiopian Perspective*, p. 66.

[106] Article 5(4) of Proclamation 239/2014 of Tigray Regional States Proclamation requires a minimum of two members of LAC out of five to be women. Article 26 of the Proclamation No. 133/2006 of the Amhara Regional States Rural Land Administration and Use requires the LAC to have at least one-woman member.

other regional states such as the Tigray and Amhara regional states' proclamations provide quota for women's representation in LACs.[107]

Thus, the lack of women's participation in the decision-making process on land related disputes before the administrative organs puts women's rights in a precarious situation. This discourages women from taking their cases to the administrative organs. According to many of the informants, it is men who bring land disputes before LAC in most of land related disputes. This relates to existing gender norms which requires men to represent the family in bringing cases against third parties.

5.2.2 Formal Justice System

The formal justice system comprises of courts as recognized under the FDRE Constitution. The law recognizes parallel or dual court systems that are established at the federal and regional levels.[108] The court system is established at the regional level having three tiers, i.e., Woreda Court, Zonal Court, Regional High Court, and Supreme Court (with regional cassation power to adjudicate matters arising from regional laws or in their delegated power over federal matters). Disputants can have access to these regional courts on matters that arise based on regional laws. They have one additional opportunity to bring their case (cassation petition) to a Federal Cassation Division of the Federal Supreme Court when there is basic error of law.[109] In addition to these mechanisms, the parties can bring a case before CCI and HoF if the case involves a constitutional matter.[110]

For women to be able to use the formal justice system, it is important that they are aware of their legal rights. Furthermore, there should be support from

[107] Article 5(4) of Proclamation 239/2014 of Tigray Regional States proclamation requires a minimum of two members of LAC out of five to be women. Article 26 of the Proclamation No. 133/2006 of the Amhara Regional States Rural Land Administration and Use requires the LAC to have at least one-woman member.

[108] Article 78 of the FDRE Constitution.

[109] Article 80(3) of the FDRE Constitution. Cassation over cassation has been controversial subject and its constitutionality is challenged. See Muradu Abdo (2014), *The Cassation Question in Ethiopia*, School of Law of Addis Ababa University. However, this is put to rest with the adoption of a new proclamation that clearly support cassation over cassation in circumstances when the decision by the State cassation division involves constitutional matters, misinterpret the law or apply wrong law in a way that it affects public interest and have a national importance and when it fails to apply the binding decisions of the Federal Supreme Court Cassation Division. See Article 10(1(c & d)) of the Federal Courts Proclamation No. 1234/2021.

[110] Article 83(1) of the FDRE Constitution.

the justice system to ensure access to justice by requiring the formal system to support a disputant when women bring a case and during the litigation of a case. Thus, the provision of legal assistance is fundamental. In the study area, legal assistant is accessible to women who live in the surroundings of Hawassa. In the remote rural areas, legal aid service is not available.[111]

The prosecutor office has started to provide legal support in civil cases. However, these services are not publicized well, and it is only a few individuals who are benefiting from this service. According to informants, the prosecutor offices have very limited human resources to represent indigent members of society. Thus, they have not yet publicized the service to avoid being overwhelmed with the demand for such services.[112] According to most informants, they often do not get support from informal networks such as family members and elders to take the case to the formal justice system due to the deep entrenched societal view that such cases should be settled privately or by the customary system.[113]

When cases are taken to the formal justice system, the land title deed serves as evidence since courts do not use the certificate as *prima facie* evidence. According to judges, there are some irregularities during the issuance of certificates they have observed from the cases brought to them. Accordingly, in some instances, it was found that the same certificate on the same land is issued for more than one family. There are also fraudulent acts committed by husbands by registering a female relative instead of the wife to deprive the wife from sharing the land.

Corruption and disappearance of documents have also been reasons for courts to hesitate to take the land certificate as the sole evidence to prove holding rights. The available literature and jurisprudence at the international level is also against using land certificate as the sole evidence to prove land rights. Accordingly, land titling may "further reinforce the inequality to access land especially in countries which have a justice system that require certification as evidence in formal claims. The commodification of land mostly benefits elites and those with access to capital and credit rather productive producers."[114]

[111] Interview with Directors of EWLA Hawassa branch and Mizan Youth Lawyers Center on May 12 and 04, 2022 at Hawassa.
[112] Interview with prosecutor at Sidama Regional State Attorney General on 20 July 2022 and prosecutors at Hawyela Tula Justice Office, on 10 May 2022.
[113] Interview with key informant 14 on 23 July 2022 at Moricho town.
[114] Narula, *supra* note 4, p. 146.

In COHRE v. Sudan[115], the African Commission on Human and peoples' Rights has dealt with whether legal title to land is a necessary condition for the protection of property rights.[116] The Commission held that "[i]t doesn't matter whether they had legal titles to the land, the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by Article 14."[117] Here, the Commission considered traditional usage as a means to property rights rather than land titling.

According to informants, even though courts can promote women's rights by applying the law and treating men and women equally during divorce and inheritance, the expenses involved to bring cases before courts and the time it takes to get final decisions are very discouraging for rural women. In addition to costs related to legal services, most women who come to Woreda courts or a high court in Hawassa, incur transportation and accommodation costs. An informant, remarked:

> I spent 10,000 Birr to take my case to court including the expenses I have incurred for the transportation and accommodation of witnesses. However, when I took my case to elders, I incurred 1,200 Birr for six sessions of the elders meeting, 200 Birr for each session.[118]

The other challenge is that the decision of the formal justice system may not be easily socially enforced on issues that involve customary norms of gender-bias thereby causing lack of social legitimacy. Even when a court decides for women to share land from her husband upon divorce or from her family during inheritance, such decisions are not socially enforced. She is pressured (by her ex-husband and his family) to 'sell' or rent out the land and leave the area in case of divorce; or she can face similar pressure from her relatives who are co-heirs and got a reduced share from inheritance because of the decision.[119] Thus, these factors are mostly discouraging women from taking cases to the formal justice system.

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[115] African Commission on Human and peoples' Rights: *Center on Housing Rights and Evictions (COHRE) v. Sudan*, Communication No. 296/2005 (29 July 2010).
[116] OHCHR (2015). *Land and Human Rights: Annotated Compilation of Case Law*, p. 28.
[117] Ibid.
[118] Interview conducted with Key informant 03 on 19 July 2022 at Shebedino Woreda.
[119] *Supra* note 51.

5.2.3 Informal Justice System

The constitutional recognition of the customary justice system did not only bring normative plurality but also it resulted in judicial plurality. According to Girmachew, "[n]ormative plurality emerges from the coexistence of different sources of order and leads to judicial plurality through the development and expansion of institutions which serve the various sources of order".[120]

Though a subsidiary law has not yet given official recognition to customary law and its institutions, they are the legitimate *modus operandi* in the study area to settle land related cases that are brought by the parties to a case. According to the study informants, *afini* system is one of the customary systems that exist in the study area. *Afini* –meaning 'hear me'– is very respected phrase and "when the elders ("chamesa") use [this] word, no one moves or speaks out. Everybody listens to when the elder says *afini*a nd respects their decision."[121]

The elders hear cases in public and in a transparent manner. The hearing involves 5-7 elders based on the level of the customary court. The different clans (*Gosa*) in Sidama have their own *Afini* system. The highest decision maker is the *Moti* or the king of each clan.[122] These elders get the responsibility to mediate through their lineage. All of these elders are senior males. The services by elders are rendered without any monetary remuneration. The place of adjudication is not permanent except for the highest tier where the *Muti*/clan's king resides. Sometimes the elders go to the claimant's house to adjudicate the case or hear the case where the parties have agreed to go. Customary systems are generally perceived to be free from favoritism and stand for the truth. However, this is eroding through time. Some women informants raised the issues that some elders favor men for the mere fact that they socialize with them outside of adjudication.[123]

Eyewitnesses are the main sources of evidence in the customary system. It is believed that oath is a means to find the truth. The system has its own rules regarding punishment. Anyone who is not respecting the customary rules is socially ostracized. According to informants, "he/she is outcasted by the local community. They will not be allowed to attend funerals or weddings when

[120] Girmachew, *supra* note 85, p. 5.
[121] *Supra* note 83.
[122] Interview with elders on 22 July 2022 at Yergalem.
[123] Interview with key informant 13 on 21 July 2022 at Dori Bafano Woreda.

they are found to be at fault."[124] This kind of punishment is not time bound. It is only when the violator agrees to respect the customary rules and gives deference to the system that the punishments cease. The final decisions of elders are respected and enforced by the community.[125]

The customary justice system reaches the wider population, and it is considered legitimate and cost effective to deliver speedy justice on a win-win basis. Its proximity to the disputants and efficiency to deliver speedy justice has enabled them to be the primary preferences by disputants. The decisions of the customary justice system are respected without having any police officer that enforces the decision.[126] Moreover, the customary system focuses on reconciliation and it has a flexible procedure that makes it preferable by justice seekers.[127]

However, the customary system does not allow women to participate as elders or litigants. The elders are appointed either because of their ancestral lineage or because of their ability to mediate and their social acceptance.[128] This is confirmed as a common trend in most of the customary systems at various parts of Ethiopia.[129] In customary systems, women are expected to bring cases through their male family members. This has denied them from representing their cases and interests and renders them to become *persona non grata*. The lack of power to bring a case in their own name –*locus standio in judicio*– has diminished their legal capacity and personality.[130]

Though the rule is that a woman can access the customary justice system through her male relatives, there is now an exception to it. It has become

[124] Interview with a Judge at Social court conducted on 19 July 2022 at Shebedino Woreda.

[125] *Supra* note122 & 123.

[126] Ibid.

[127] Meron Zeleke (2010). "*Ye Shakoch Chilot* (the court of the sheikhs): A Traditional Institution of Conflict Resolution in Oomiya Zone of Amhara Regional State", Ethiopia, *African Journal on Conflict Resolution*, Vol. 10, No. 1, p. 82.

[128] Interview with elders on 22 July 2022 at Yergalem and Dore Bafano.

[129] Meron Zeleke (2015), *Beyond the Exclusion Theses: Women and Customary Courts in Ethiopia*, ILPI, p. 5. Meron in this paper argues that even if women are underrepresented in most customary justice system, there are few customary systems which are inclusive or lead by only women. She mentions *ErfoMereba* in Wallo, *Siinqee* in Arsi and *Ya Shaykoch*Chilot.

[130] Abiola Sunmon (2005). *Gender Inequality, Legal Pluralism & Land Reform in South Africa*, unpublished thesis p. 24 (A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Master of Arts, Department of Law, Carleton University, Ottawa, Canada)

evident that a woman can access the customary justice system by her own when she does not have close male relative, or a widow can present her case whenever there is no male family member to represent her. Despite the lack of direct access to the customary justice system, women in the study area are active in making choices for what type of cases they use the customary justice system. In most instances, women prefer their cases related to divorce to be adjudicated by the customary system either by privately consulting elders or delegating their male family members to take the case on their behalf. One of the informants said: "Women won't go to courts because they face ostracization, instead, prefer to go to elders. They also believe that the case will be referred to the elders by courts if they first take the case to court".[131]

Women's choice is constrained by the culture which expects them to take the case to elders through male family member. In spite of this challenge, they try to explore and make choice between the court system and customary justice system. This kind of forum shopping takes place in the study area when rural women prefer the customary justice system to adjudicate divorce cases with the belief that the marriage can be saved through the reconciliatory approaches of elders.[132] However, rural women tend to take inheritance cases to the court because of their awareness of the rules of the customary justice system that do not allow women to inherit land from their family because of the patrilineal inheritance system.[133] In these cases, women users of the justice system swing back and forth between these legal systems.

Lack of official recognition of the customary system by subsidiary law has made the enforcement of decisions of the formal organs such as land administrative organs challenging. If elders decide for a share of land to be given to one of the parties in the dispute, the land administration authorities find it difficult to enforce the decision for the lack of a legal framework that officially recognizes the customary justice system. According to one of the informants, in a dispute with her husband to get her share of the crop from their jointly owned land, the elders decided for her to get an equal share of the crop. However, the elders were not able to enforce the decision upon the refusal of her husband to give her share.[134]

[131] Interview with key informant 1 on 19 July 2022 conducted at Shebedino Woreda.
[132] Interview with key informant 12 on 13 July 2022 conducted at Moricho town.
[133] Interview with judges and prosecutors in Hawassa 06 and 10 May 2022.
[134] Interview with Key Informant 02 on 19 July 2022.

5.3 The relation between the formal and the informal justice systems

The relationship between two or more co-existing normative/judicial systems is mostly characterised by inconsistencies in most of the available literature.[135] Such inconsistency is peculiarly observed in relation to women's rights.[136] However, it is also important to look beyond such inconsistency and look into where these two systems interact or influence each other to transform themselves.

In the study area, a certain level of cooperation in the form of cross reference between the customary system and formal justice system is observed. This is reflected in the court's tendency to refer a case to elders if the parties to the case agree to a mediation process by elders. This goes against legal centralism which considers law (and the formal legal system) as legitimate, capable of providing solution to all problems and hierarchically above all other normative systems.

Moreover, customary law is adapting to the changing circumstances as a 'living customary law' does. This change is observed in relation to land inheritance. The view that a woman cannot inherit land is eroding through time. The elders now consider a daughter's right to inherit her father's land in case he is not succeeded by a son/s. In previous times, the share of the inheritance was given to male relative such as her uncle or cousins because of the cultural rule that prohibits/excludes women from inheriting land.[137] Because of the growing awareness too, fathers are leaving a will behind for their daughters to inherit land.

Furthermore, land certificate is becoming one of the pieces of evidence on which the customary justice system relies for its adjudication of cases from time to time. Thus, the joint land certificate, which has introduced the idea that a woman can have a right on the land, has contributed in changing some of the customary rules to be more gender sensitive and responsive.

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[135] Susanne Epple (2020). "Introduction" in Susanne Epple and Getachew Assefa (eds.), *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions*, p.12.

[136] Berihun Adugna Gebeye (2013). "Women's Rights and Legal Pluralism: A Case Study of the Ethiopian Somali Regional State", *Women in Society*, Vol. 6, p. 9. See also Epple, id., p. 20.

[137] Interview with a Judge at Social Court conducted on 19-07-2022.

6. Conclusion

The customary and the formal systems have co-existed for many years, and this coexistence is changing towards a complementary synergy one over time. In relation to land rights, there are competing interests between the state and the clans in Sidama Regional State to control or exert power on the administration and management of land. This has led to competition and sometimes complementarity between the state and the customary systems depending on each context.

The customary system has been serving as a means to reduce the backlog that would have been created if all land-related disputes were taken to courts. The customary justice system is better placed to resolve land related communal problems in reconciliatory and peaceful manner than the court system. In such circumstances, the courts should respect the choice of the parties to the case to resolve their dispute through the informal mechanisms as long as the decisions of the customary justice system do not violate constitutionally guaranteed women's rights. However, when there is a collision between the formal and informal rules of the justice system, the constitutionally protected human rights should prevail. Thus, normative complementarity between the formal and the informal justice system becomes appropriate on constitutionally protected rights including women's rights.

The establishment of Land Administrative Committee (LAC) has shown that the state systematically uses elders to address land related disputes. However, the lack of women's participation in this mechanism has been the main challenge that violates women's rights to participate in decision-making processes and in the outcome of decisions. Thus, the state needs to promote women's participation in land dispute settlement and in land governance. To this end, it is, *inter alia*, expected to design programs that aim to increase women's literacy and strengthen the cooperation between the formal and informal justice systems.

The customary system with regard to rules on inheritance is a factor which puts women's rights in a precarious situation when their cases are adjudicated before the customary justice system. The rise in women's awareness of their rights and the related informed choice making between the two systems is a new development that is observed. Women exercise their agency through forum shopping by choosing between the two justice systems based on the extent to which their rights are protected. But for the women to be able to exercise their agency, the state should make sure that the customary system only adjudicates cases when the parties to it gave their free and full consent. If proven otherwise, decisions by the customary justice system should be quashed as unconstitutional. For this to happen, the state should regulate the

relations between the state justice system and the customary justice system and make the decisions of the customary justice system reviewable.

Although the land registration program has positively contributed in the realm of productivity and in women's decision-making power at the household level, it has little contribution in the justice system as document of evidence. This is because of the prevalence of informalities and irregularities related to land transactions including fraudulent acts, disappearance of documents, corruption, registration of a female relatives rather than the wife. This has minimized the evidentiary role of land certificates before courts of law. Thus, the courts are not taking the landholding certificates as exclusive evidence, and they rather rely on other collaborative evidence such as eyewitness testimonies to prove the holding rights when the certificate is contested. For the certification program to play its role in the justice system, it is important for good governance and rule of law to be maintained in the issuance process of land certificates. An accountability mechanism should also be strengthened. ■

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The Need for Reform towards Comprehensive Legislation on Court Annexed ADR in Ethiopia

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Abstract

In spite of various legal reform measures in Ethiopia, delay in the judicial process, predictability and access are still challenges of utmost concern. This article examines whether court annexed ADR can serve as an effective reform measure to lessen these judicial problems. Compared with litigation and private ADR, court annexed ADR's institutional merits and procedural advantages –in resolving certain civil suits within reasonable time, less cost and improved fairness– are examined. I argue that settlement of civil disputes through court annexed ADR reduces courts' caseloads. Such reduction of case load in courts can significantly improve litigation processes and enables courts to resolve other civil suits within reduced time, cost and quality. Moreover, the referral to ADR by courts enables disputants to choose and access dispute resolution methods. However, lack of comprehensive national regulation, inadequate awareness, ineffective administration and execution, are among the potential challenges in the optimal utilization of this dispute resolution tool. It is argued that there is the need for a comprehensive law on court annexed ADR. And subsequently, courts can carefully implement court annexed ADR with the requisite level of competence and diligence to minimize the challenges.

Key terms:

Court Annexed ADR · Judicial problems · Prospects · Challenges · Reform measures

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1. Introduction

Relationships and disputes are taken as an inevitable fact of life in human history.[1] Access to the resolution of disputes within a short time, lower cost, and in the context of fairness is thus the legitimate expectation of disputants. In order to fulfill disputants' expectations and interests, modernization and strengthening civil justice systems has drawn due attention.[2] To this end, different joint reform measures have been undertaken by federal courts. This includes the 2008 new procedures for resolution of civil disputes that are partly put into practice.[3] Moreover, the 2005 *Comprehensive Justice System Reform Program*, *inter alia*, included judicial reform.[4] There is a steadily increasing attention towards judicial reform which can be observed principally from the establishment of new benches, new buildings, and

Acronyms

ADR	Alternative Dispute Resolution
MOU	Memorandums of Understanding
EACC	Ethiopian Arbitration and Conciliation Center
LMDC	Lagos Multi Door Court House

[1] *See*, Osher, D. *et al*, (2020), "Drivers of Human developments: How Relationship and Context Shape Learning and Developments, *Applied Developmental Science*, Vol. 24, Issue 1.

[2] Yoseph Aemiro (December 2012). "የፍትሐብሔር ክርክሮች ሂደት፣ ፈተናዎችና ተስፋው/ The Litigation Process of Civil Cases, Challenges and Prospects" (Amharic), *Ethiopian Business Law Series,* Vol. V, p. 9

[3] Ibid

[4] *See* details of the reform measures from *Comprehensive Justice System Reform Program Baseline Study Report* (February, 2005), Ministry of Capacity Building Justice System Reform Program Office, pp.159-178 (Hereafter the Reform Program). See also Federal Judicial Administration Commission Establishment Proclamation No.24, (1996), Article 8 and 7; and Ombudsman Proclamation No.165, (2000), Article7(2)

application of new technology, and the budget augmentation of federal courts since 2019.[5]

Delay, excessive cost, unfairness, unpredictability and inaccessibility of litigation process are among the major factors that erode public confidence in courts.[6] Case congestions exacerbate these problems. Delayed justice is a major problem in federal courts' dispute resolution services. Delayed services directly and indirectly affect economic and social lives of citizens. And there are various problems specified as causes for the delay of cases before federal courts which relate to inadequate number of judges, litigation patterns including delay techniques by some trial lawyers and other factors.[7]

Other major problems include some instances of inconsistency in Federal Supreme Court Cassation decisions[8], delay in hearing schedules whereby client appointed at 9 AM in the morning may wait until 12.00 AM.[9] And there are times when some federal judges mistreat clients and attorneys.[10]

With regard to the afore-stated problems, this article investigates whether court annexed ADR can serve as a reform measure. To this end, Court Annexed ADR in four major jurisdictions are examined. The article further includes some comparative discussion on court annexed ADR in USA, India and Nigeria. The article further investigates prospects and challenges of court

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[5] Interview with Ato Getaw Legese, (on 12 Tir 2013. E. C,), newly appointed coordinator to supervise court annexed mediation centers in Addis Ababa (hereafter Ato Getaw L.)

[6] There are also other factors that adversely affect public confidence in the services of courts.

[7] *See*, *Case Study Report on Continuing -Job-Training Needs for Judges of Federal Supreme Court, Ethiopia* as cited on the Reform (2003), p.160

[8] Contradictory and inconsistent decisions erode public confidence on judicial services. For example, see the following decisions of Cassation Bench in general: Addis Ababa City administration vs. Dinku PLC, September 24, 2004 G.,C., Federal Supreme Courts Cassation Bench File No.54697; Decision of Federal Cassation Division on Tikemt13/2002 EC; Decision of Federal Cassation Division, 2002(E.C.,),Cassation file No. 696/5738. See also W/o Amzia Sh/Abraham vs Ato Abdu Ismail, 2002., E.C. Federal Supreme Court Cassation Division, Cassation File, No. 696/5738

[9] Yoseph, *supra* note 2, p. 23

[10] Judicial systems are neither accessible nor responsive to the needs of the poor. The indigent and powerless simply do not see courts as an institution that serves their interest and poor system for case management, little knowledge of the justice system by general public and hence very limited confidence of the general public in courts and other institutions in the administration of justice. The Reform Program, *supra* note 4, pp.159-178.

annexed ADR if it is employed as a reform measure against judicial problems.

The next two sections of this article mainly discuss conceptual overview and recent developments of court annexed ADR in Ethiopia. Section 4 deals with litigation methods and discusses prospects of court annexed ADR as appropriate dispute resolution. The section discusses court annexed ADR's potential to reduce courts' case congestions. The fifth section examines the factors that can potentially hinder the introduction and implementation of court annexed ADR in Ethiopia.

2. Court Annexed ADR: Brief Conceptual Overview

There are various dispute resolution processes that have been used for resolution of disputes. These are broadly classified into rational and irrational processes. The irrational process involves chance and physical strength.[11] Rational dispute resolution processes*, inter alia*, include judicial dispute resolution, private ADR and court annexed ADR.[12] Private ADR has received enthusiastic support from citizens.[13] This has prompted courts of some legal systems to adjust their services mainly through introduction of different types of ADR into court systems.

Court annexed ADR is defined as: [14]

> … an alternative to trial modes of dispute resolution that takes place inside a court. It is when trial court launches a program that would supply range of alternative dispute resolution mechanisms for litigants. It occurs after case is filed in a court and when a disputant initiates an ordinary law suit.

Court Annexed ADR is a model which contains some attributes that are different from private ADR. These features include state funding of ADR, state offices, multi-door court house and compulsory use of some ADR

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[11] D. Paul Edmond (ed.) (1986). *Alternative to Litigation*, Edward Street Aurora Centririo, Canada Law Book Inc. pp.16-17 (hereafter Edmond1.)

[12] See Robert M. Cover (1979), "Dispute Resolution: A Foreword," *Yale law Journal of Dispute Resolution*, Vol. 88, No. 5. pp. 910-915. *See* also: Iftikhar Hussain Bhat, (2013) "Access to Justice: A Critical Analysis of Alternate Dispute Resolution Mechanisms in India", *International Journal of Humanities and Social Science Invention,*Vol.2, Issue No.5*,* p. 47

[13] *See* Frank Sander, (1976), "Varieties of Dispute Processing", *F.R.D*, Vol.70, pp. 111,130.

[14] *See* in general Patricia M. Wald (1997), "ADR and the Court: An Update" *Duke Law Journal* Vol. 46, No.6

techniques by court in specialized circumstances.[15] In court annexed ADR, the court regulates the process by issuing procedural rules and certifying court annexed ADR practitioners. The court systems that adopt such programs offer them with their implicit endorsement as a public service, and practitioners are responsible and accountable to the public.

3. Court Annexed ADR: Recent Developments in Ethiopia

ADR is recognized under the 1960 Civil Code and the 1965 Civil Procedure Code.[16] Moreover, the FDRE Constitution impliedly recognizes ADR's role in promoting and enhancing accessibility of justice in Ethiopia.[17] Indeed, ADR is expressly given priority under various modern private laws in Ethiopia.[18] This is substantiated in the interpretations of Federal Supreme Court Cassation Bench.[19]

Proclamation No.1237/2021 –A Proclamation to Provide for Arbitration and Conciliation Working Procedure– gives due attention to the establishment of ADR in order to complement the constitutional right to justice and in particular, to contribute to the resolution of investment and commercial related disputes and to the development of the sector.[20] The preamble of the Proclamation underlines the importance of arbitration and conciliation in rendering efficient decision by reducing transaction costs of contracting

[15] Some "first-Stage models of ADR" are now privately institutionalized operating within their own jurisdictional settings. See, General Peter B. Edelman (1984), "Institutionalizing Dispute Resolution Alternatives*" The Justice System Journal*, Vol. 9, No. 2, pp. 134-150. See also Stevens H. Clarke and Elizabeth Ellen Gordon, (1997), "Public Sponsorship of Private Settling: Court-Ordered Civil Case Mediation", *Justice System Journal*, Vol.19, No.3, pp. 311-339.

[16] Article 3347(1), and Article 3307-3318 of Ethiopian Civil Code.

[17] Article 34(4), 78(5) and 78(4) of Constitution of Federal Democratic Republic of Ethiopia, August 1995, Federal Negarit Gazette, Extra Ordinary Issue No.1, Addis Ababa,

[18] *See* for instance, Articles 274-277 of Ethiopian Civil Procedure Code. And for mandatory ADR *see* in general Cooperative Societies Proclamation No. 147/1998, Federal Negarit Gazzetta 5th year , No. 27, Addis Ababa; *see* also Federal Revised Family Code Proclamation No. 213/2000, Federal Negarit Gazzetta, Extra ordinary Issue No.1, Addis Ababa, 2000,

[19] *See* for example, Demise Oda vs. Asfaw Worku Federal Supreme Court, Cassation Bench Decision, 2013. E.C., File No. 196228.

[20] Proclamation No.1237/2021, A Proclamation to Provide for Arbitration and Conciliation Working Procedure, Preamble, Paragraph 1.

parties, protecting confidentiality, allowing participation of experts and use of simple procedure which provides freedom to contracting parties.[21]

In spite of the legal recognition accorded to ADR in general, Court Annexed ADR has not yet been introduced through legislation in Ethiopia.[22] Pilot court annexed mediation program was introduced by Federal courts in Addis Ababa since December 2013 based on memorandum of understanding (MOU) entered between the Ethiopian Arbitration and Conciliation Center (EACC) and Federal Supreme Court.[23] The program was subsequently launched before the Federal First Instance Courts in Addis Ababa –in particular before *Lideta, Menagesha, Kirkos, and Akaki* Federal First Instance Courts. The pilot program operated under some relevant articles of the Civil Procedure Code, the Labor Proclamation and other guidelines prepared by Federal Supreme Court.[24]

Since 2012, E.C. (i.e. 2019/2020), court annexed mediation is organized as department under the Vice President office of federal first instant courts.[25] Under this new restructuring, the pilot court annexed mediation was introduced at five centers in Addis Ababa. Those centers were *Lideta, Kolfe, Bole, Yeka, and Kirkos*. The pilot programs handled family, labor, and commercial disputes. Each center had at least 10 mediators selected among assistant judges. Furthermore, in 2013 E.C. (2020/2021), the Federal Supreme Court signed MOU with EACC and German International Mediation Campus to strengthen the program and provide training for mediators.[26] The Federal Supreme Court actively supports the program through, *inter alia*, organizing various discussion panels with scholars, federal court judges and lawyers.

The achievements in the program include a draft legislation for federal court annexed mediation that was submitted to the parliament; and ultimately Court Annexed Mediation legal provisions have been embodied under the Federal Court Proclamation No. 1234/2021.[27] The Proclamation is intended

[21] Id., Preamble Paragraph two

[22] Other than court annexed mediation at federal courts in Ethiopia.

[23] Activity report of Ethiopian arbitration and conciliation centers, (2004-2010); available at: www.eacc.com.et

[24] See relevant provisions of Civil Procedure Code Decree No. 52 of 1965; and the Civil Code of 1960.

[25] Interview with Ato Getaw L., *supra* note 5.

[26] International Mediation Campus is German based mediation campus that well recognized in terms of giving training for mediators through our Europe.

[27] *See* Articles 45-48 of Federal Court Proclamation No.1234/2021

to ensure effective, efficient and predictable services by federal courts.[28] The Proclamation enables civil cases (suits to Federal First Instances Court and Federal High Court) to be referred to Court Annexed Mediation Centers for resolution.[29] The Proclamation embodies provisions that state the criteria to be appointed as mediator, mediators' fee, mediation procedures, mediation principles, criteria for courts' recognition of mediation settlements and legal effect of court annexed mediation settlements.[30]

However, the Federal Court Proclamation No. 1234/2021 does not address issues such as the extent of judicial intervention in Court Annexed Mediation proceedings with a view to avoiding over-regulation that adversely affects the independent nature and operation of ADR. Moreover, the legal criteria such as the amount of money involved and complexities of cases that can be referred to Court Annexed Mediation are not addressed in the Proclamation. Thirdly, it deemphasizes the importance of respecting disputants right to voluntarily opt litigation method over Court annexed Mediation for their cases. Another major limitation is that the Proclamation only applies to federal courts. There are also types of Court Annexed ADR that are not covered under the Proclamation which include Court Annexed Conciliation, Court Annexed Arbitration, Court Annexed Early Neutral Evaluation and other more newly emerging ADR schemes.

Based on its mandate under Articles 45(7), 48(5) and 48(8) of Proclamation No. 1234/2021 the Federal Supreme Court has enacted Federal Court Annexed Mediation Directive No. 12/2014 (EC). The Directive aims at supporting the reform measures and embody ethical rules of conducts that clearly state the duties and rights of mediators.[31] It, *inter alia*, provides standards and quality in performance, competence, and discipline required from mediators. Moreover, it provides reasonable timeframe within which the mediation process ought to be finalized by mediators.[32]

The Directive also establishes disciplinary committee that investigates disciplinary issues of mediators.[33] And it also provides foundational principles of mediation process such as the need to respect parties' freewill and privacy,

[28] Id. Preamble Paragraph 4.
[29] Id., Article 45
[30] Id., Articles 45 -48.
[31] Federal Court Annexed Mediation Directive No.12/2014 E.C. Preamble Paragraph 3.
[32] Ibid
[33] Id., Preamble Paragraph 4.

neutrality and equal treatment of parties by mediators.[34] The directive provides detail procedural rules that direct mediation process and penalties for the violation of the provisions on ethical rules of conducts.[35] Furthermore, Article13(2) (a) &(b) of the Directive requires the referral of certain specified cases to Court Annexed Mediation services at any stage of formal proceedings. This shows improved level of state recognition for court annexed mediation. Thus, such formal legislation for court annexed ADR deserves appreciation.

Although the Directive[36] requires certain types of cases to be referred to court annexed mediation, such stipulation shall not preclude disputants' right to opt for direct court proceedings whenever disputants are able to provide proof and show sufficient causes such as the exhaustion and repeated failure of informal methods in order to resolve their disputes. Hence, for such types of cases, prior exhaustion of other informal methods and attempt for mandatory court annexed mediation may merely result in wastage of resources and time.

4. Court Annexed ADR: Reform Measure for Judicial Problems in Ethiopia

4.1 Court Annexed ADR: Comparative procedural advantages

The nature and qualities of procedural rules employed by certain dispute resolution processes partly determine the method's capacity to resolve disputes fairly, economically and without delay. For example, unlike ADR methods, court litigation processes have win/lose features; and they involve adjudicatory, straightjacket and complex procedures for the resolution of disputes thereby, *inter alia*, potentially involving excessive emotional and economic cost, delay, and unfair outcomes.

On the other hand, ADR enables disputants to control the process and outcomes of dispute resolution, and it creates sense of ownership of the overall process. Win/win, transparent, predictable, flexible, and precise processes of mediation and conciliation reduces unreasonable emotional, economic and time cost which in turn can improve disputants' satisfactions and trust. Reduced litigation time in turn allows the parties in dispute to allocate their time to different economic and social activities. Win/win outcomes of court

[34] Id, Chapter 2
[35] Id, Chapters 3 and 7 respectively.
[36] Id., Art. 3(1), 13(1) (a)&(b)

annexed ADR process also preserves the post-litigation relationship among disputants.

Focus Group Discussion with lawyers at Federal Courts conducted in September 2022 shows merits of Court Annexed ADR.[37]

> … Currently courts have huge backlog of cases with increasing number of files each year. There are a number of cases that could have been resolved through amicable solutions. Thus, Court Annexed ADR gives the chance for litigants to reconsider settling their disputes amicably with reduced cost and shorter time. Above all, Court Annexed ADR led by court increases the trust between parties and makes resolution [of disputes] easily enforceable. Therefore, commencing it in full scale throughout the country will save unnecessary litigation cost and time".

Currently court annexed Mediation for divorce cases are launched before family benches of four federal courts. These are the Federal High Court Lideta Bench, Federal First Instance courts: Yeka, Nefassilk Lafto. Child justice project office functions under the auspices of Federal Supreme Courts.[38] The principal purposes of this program, *inter alia*, are meant to promote children's best interests and to save institutions of marriages.[39] Bezawit notes the benefits of Court Annexed mediation over litigation method for resolutions of divorce disputes.[40] This is because Court Annexed Mediation procedures are more confidential and may reduce economic and emotional costs. Mediation for divorce cases also saves courts' resources.[41]

4.2 Court Annexed ADR: Institutional and legislative Merits.

Court Annexed ADR results from creative integration of ADR with formal justice systems as discussed under preceding section. ADR assimilated into courts systems acquires institutional merits in addition to its inherent procedural qualities. Most importantly, institutional merits like public acceptance that is acquired due to integrity and impartiality established by court can be shared by ADR that is connected to the same court. ADR annexed

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[37] Focus Group Discussion, (September 16, 2022) undertaken with senior Licensed lawyers (namely Belachew Girma Degife, Addissu Ayenew Yemeta, and Taklewold Tilahun), Addis Ababa.

[38] Bezawit Eshetu (2017). "Court Annexed Mediation Services in Divorce Cases; the Case of Four Federal courts", (LLM Thesis, Addis Ababa University).

[39] Id., at 63.

[40] Id., at 72.

[41] Ibid.

to a court can also use properties, finance, and facilities, human and other resources of the court. This enhances the effectiveness of court annexed ADR as a reform measure for judicial problems.

Court Annexed ADR operates under the control, support, guidance and supervision of court. This enables it to be complimentary and not competitive with the formal dispute resolution mechanism. The complementary relationships between Court Annexed ADR and courts improves efficiency and effectiveness.

An interview with a coordinator who supervised court annexed mediation centers in Addis Ababa showed that the attitude of lawyers and judges is positive regarding the success of pilot court annexed mediation in Addis Ababa.[42] Awareness enhancement sessions –such as the session conducted in Tir 2012 E.C. (January 2020) – were provided to federal judges by the Federal Supreme Court; and responses showed that trust upon pilot court annexed mediation has improved.[43] As a result, the number of cases referred by judges to court-annexed mediation centers has progressively increased.[44]

For instance, between Yekatit 2012 E.C. (February 2020) to Hamle 2012 EC (July 2020); 39 cases were referred to the centers.[45] Both parties appeared in 23 cases, and 17 cases were settled.[46] Hence, the settlement rate of court annexed mediation was 74%. According to the interview response of the coordinator of court annexed mediation centers in Addis Ababa, the success of court annexed mediation in 2013 E.C. (2020/21) has led to the increase in the number of suits that were referred to court annexed mediation centers in 2014 E.C (2021/22).[47]

The experiences of USA, India, Nigeria and other legal systems[48] show the effectiveness of court annexed ADR both in the quality and the number of

[42] Interview (April 25-2 2007. E.C) with attorneys, presidents, senior judges and court annexed mediators of Federal First Instance Courts of Lideta, Menagesha and Kirkos branches in Addis Ababa.

[43] Interview with Ato Getaw L. *supra* note 5.

[44] Ibid.

[45] Ibid.

[46] Ibid.

[47] Ibid.

[48] Court annexed ADR also set in motion in other number of legal systems. In most countries an average mediation session takes 1.5 days and 80% of cases referred to [court annexed] mediation are settled on that very day. The remaining 20% settle within a three week period after adjournment of the initial session.

cases that are disposed. This has progressively reduced cost and time required to resolve disputes in USA. Court annexed ADR in these jurisdictions has succeeded in terms of improving clients' satisfaction, trust and access to justice.[49] In India, appreciable success of court annexed ADR was reported in terms of quality and quantum of case disposal.[50] Court connected ADR in Nigeria shows similar success stories as a reform measure for similar judicial problems.[51]

Court annexed ADR that is introduced through comprehensive regulatory frameworks is more effective. This is because it proves government's level of commitment, serves as platform for the program, improves recognition of judges, lawyers and general public. It also enhances uniform practices, controls potential arbitrariness and makes all substantive and procedural issues (in relation to court annexed ADR) predictable and clear.[52]

Therefore, procedural qualities and the institutional and legislative merits of Court Annexed ADR gives them enhanced capacity to settle relevant civil suits timely, economically, fairly, and satisfactorily than the formal litigation method that follows intricate procedures. This in turn improves disputants' faith upon court which provides such mechanism. The enhancement of public

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Lecture Given to Strathmore University (2004). Mediation – *A Solution for Legal Sector Crisis -The Role of Legal Ethics and Jurisprudence in Nation Building*. pp. 13—15

[49] See Sharif (2019). "Using Court-Connected ADR to Increase Court Efficiency, Address Party Needs, and Deliver Justice," *Massachusetts Boston Update*. Vol. 8, p. 279.

[50] See Bhat, *supra* note 12.

[51] Between 2002 and 2011, a total of 1,136 civil disputes were filed before Lagos multi door court house (LMCH); from this 1,071 cases was mediated by court and 321 (30%) were resolved while 467 (43.6%) were unresolved and 327 (29%) were withdrawn or discontinued. In terms of time within which settlement was reached, arbitration through LMDC can take up to a year whereas mediation takes an average of three months. *See* Emilia Onyema (2013), "The Multi-door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC," *Apogee Journal of Business Property and Constitutional law,* Vol. 2, No. 7; Ayinla Lukeman (2014) "Enhancing Sustainable Development by Entrenching Mediation Culture in Nigeria", *Journal of Law, Policy and Globalization,* Vol. 21.

[52] For instance, "the concept of court annexed ADR [and the] insertion of section 89 into Indian Civil Procedure Code (CPC) … gave massive boost to ADR revolution in India for it legalized court annexed ADR. This legislation also assisted development of settlement culture in India." *See* Bhat*, supra* at note 12.

confidence and trust upon court in turn improves access to justice because the public will be motivated to bring disputes before such courts.

4.3 Court Annexed ADR: Additional and Alternative Merits

Congestion of cases compels courts to make long and frequent adjournments which naturally result in delayed justice which exposes disputants and courts for extra litigation cost. One of the factors for delay of cases before Ethiopian federal courts is incompatibility between numbers of cases with number of Judges.[53] In addition to delay, such case congestion compels judges to rush on cases which adversely affects the quality of their decisions.

As an additional tool for the resolution of civil disputes, Court Annexed ADR indeed reduces congestion of cases at courts, and reduced caseload in turn gives some room for the litigation process to settle legal suits with improved speed, cost and fairness. Thus, the integration of ADR into the court system as additional tool of dispute resolution enables litigation method to effectively resolve disputes.

Providing court annexed ADR as alternative mechanism also enables disputants to access and choose dispute resolution methods of their interest. This can promote client satisfaction and increase access to justice. In effect, disputants, both from domestic and international business communities, prefer ADR to litigation methods.[54] The following statement of a disputant in a succession dispute among close relatives –and whose case was resolved through Court Annexed Mediation– illustrates its merits:

> We are satisfied by court annexed mediation process since it is family issue; we [all disputants] are from the same extended family; our case is resolved through peaceful means, and this strengthens our future relationship. Ato Alelign further goes on to say that under this mechanism, our cases are resolved within a short period of time and with reduced cost. [55]

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[53] Yoseph, *supra* note 2

[54] Hailegabriel G. Feyisa (2010). "The Role of Ethiopian Courts in Commercial Arbitration" *Mizan Law Review,* Vol.4. No. 2. p. 203

[55] Interview with Ato Alelign, litigated over succession and business cases before Menagesha and Lideta Branch, Addis Ababa, cited in Samuel Ephrem (2016), *The Call to Legally Introduce Court Annexed Alternative Dispute Resolution in Ethiopia*, LLM Thesis, Addis Ababa University, School of Law, Footnote 82, page 47.

5. Challenges of Court Annexed ADR

5.1 Ineffective regulatory frameworks

The *first* challenge can be lack of comprehensive and clear national regulatory framework that rules all substantive, procedural and institutional issues in relation to Court Annexed ADR. Such challenge substantially hampers its effective application. For example, unreasonably narrow scope of its application reduces quantum of case disposal based on this tool.

Secondly, some drawbacks relating to institutional rules can hamper its effective implementation. This, *inter alia*, includes absence of requirements for continuous awareness creation such as continuous training; and the absence of timeframe for finalizing the proceedings of Court Annexed ADR thereby causing unreasonable extensions of time needed for disputes resolution.

The *third* caveat relates to the extent of courts' intervention into Court Annexed ADR proceedings which should not be left unregulated and non-demarcated. Such legal gaps open rooms for courts to abuse their discretion to the extent of compromising and frustrating the independent operation of ADR. It is to be noted that efficacy of ADR cannot be fully obtained if the law permits broader and excessive judicial intervention against the independent operation of Court Annexed ADR.

5.2. Implementations gaps

The *first* potential challenge during implementation can be the historical tension[56] between courts and ADR in Ethiopia. This can result from the judiciary's intervention which compromises the independence of ADR. Hence, courts should strive to clearly understand the limits and extent of their role in court annexed ADR proceedings based on the relevant law.[57]

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[56] *See*, for example, Marta Belete (2012), "Good Faith in Investment Arbitration and the Conduct of the Ethiopian Government in the Saline Case: Exercise of Legitimate right or Exhibits for Guerrilla Tactics," *Ethiopian Business Law Series* Vol. V.; Tewodros Meheret (2012), "Reconnaissance of the Ethiopian Law of Arbitration: Is reform due?" *Ethiopian Business Law Series* Vol. V, p. 241; Mekbib Tsegaw, (December 2012), "The Necessity For and Extent of Courts Interventions in the Process of Arbitrations", *Ethiopian Business Law Series.* Vol. V, p.154.

[57] *See*, Robert A. Baruch Bush (2008), "Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts over Four Decades", *84 N. DAK. L. REV.,* Vol. 54, No.705; pp. 135-137.

The *second* factor that can be considered as a challenge is the level of awareness about Court-Annexed ADR as a result of which disputants may – due to lack of awareness– fail to choose this mechanism. Some disputants may not also have strong belief that their disputes can be settled through this mechanism. The challenge related to gaps in awareness was manifested during the pilot court annexed mediation because there were some disputants who declined to make full payment to lawyers merely because their disputes were resolved within a short period of time.

The *third* challenge can be related to disputants' rigid position, lack of readiness for settlement during mediation proceedings because these problems were observed thereby limiting effectiveness of court annexed mediation in Addis Ababa.[58] Likewise, Bezawit states that limited awareness and couples' unwillingness to participate in mediation process are among the challenges that limit the success of court annexed mediation for divorce disputes.[59]

With regard to labor disputes that come before Federal pilot mediation centers, a unique challenge caused by employers was observed. As some labor disputes were resolved through mediation at the centers within few days, the number of employees who institute their cases increased because many employees used to ignore such suits against employers due to fear of intricate litigation process. [60] On the contrary, many employers had the tendency of impeding mediation proceedings through non-appearance, rejecting mediation and using various techniques.[61]

Lack of persistent and periodical evaluation and assessments regarding the successful implementation of Court Annexed ADR was another challenge during the pilot program.[62] The issues relating to adequate budget is also a key factor in implementation because it is indispensable in the realms of human resource and facilities, including infrastructure.

[58] Interview with Ato Getaw L. *supra* at note 5
[59] Bezawit, *supra* note 38, pp.72-73.
[60] Ibid
[61] Ibid.
[62] Interview with Ato BeraneMeskel, President of Federal First Instance Court, cited in, Samuel Ephrem (2016), *The Call to Legally Introduce Court Annexed Alternative Dispute Resolution in Ethiopia*, LLM Thesis, Addis Ababa University, School of Law, Footnote 69, page 45.

6. Concluding Remarks

As discussed in the preceding sections, Court Annexed ADR has comparative advantages in the settlement of civil disputes fairly at lower cost and without delay in contrast to the formal litigation method that follows complicated procedures. This enhances disputants' faith in court and it renders the justice system more accessible. The good practices in USA, India, Nigeria and other legal systems show frequent use of ADR service by courts accompanied by the benefits thereof both in terms of quality and quantum of case disposal.

As highlighted earlier, settlement of cases through Court Annexed ADR, in addition to its comparative procedural advantages, indeed reduces courts' caseloads. In so doing, it improves problem of delay, cost, and unfairness that can arise from congested legal suits in courts' archives. Providing court annexed ADR as one of the alternative mechanisms also enables disputants to access and choose the dispute resolution method of their interest. This can promote clients' satisfaction and improves access to justice.

Yet**,** there can be major challenges in the process of enhancing the usage of Court Annexed ADR which include lack of clear and comprehensive legislative framework for Court Annexed ADR, and the risk of excessive judicial intervention in the absence of clear demarcation by the relevant law thereby impeding independent and fair operation of court annexed ADR. Other limitations can relate to lack of adequate awareness and poor administrative system such as lack of persistent and periodic evaluation, lack of proper internal cooperation, lack of quality training and lack of adequate budget that is required for effective operations of the program.

In order to effectively utilize Court Annexed ADR, as a reform measure for some judicial problems in Ethiopia, a comprehensive legal framework is thus indispensable. It is also to be noted that its introduction and execution should be comprehensive and it should not merely be restricted to the federal jurisdiction. Moreover, the role and discretions of courts in relation to this reform measure should be clearly demarcated by law, and the challenges highlighted above should be proactively addressed. ■

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Private Security Companies in Ethiopia: An Insight from a Rights Perspective

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Abstract

In Ethiopia, the private security services sector has grown considerably over the previous three decades. Although the sector has a positive role in the protection of persons, property and institutions, there are concerns, *inter alia*, regarding the violation of rights of employees. This article examines the privatization of security services in Ethiopia from a rights perspective. Specifically, it deals with the extent of privatization and its implication on rights of its employees, the obligation of state and private operators to ensure the rights commonly violated, the drivers for the violations, and the measures that need to be taken to rectify the situation. A combination of doctrinal and non-doctrinal approaches was employed to conduct this study. The study is based on both primary and secondary data through in-depth interviews, focus group discussion, observation, and document reviews. The study indicates that the private security service sector is one of the grey areas of rights abuses including labor exploitation, poor working conditions, and workplace discrimination. These abuses emanate from the practice of employment agencies and the existing regulatory frameworks. I argue that the adoption of a comprehensive private security industry legislation and the establishment of a framework for private security services providers' regulation and oversight will assist to address the rights violations that have been observed in the sector.

Key terms:

Private security · Privatization · Human rights · Ethiopia

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1. Introduction

The private security services sector in Ethiopia has a recent history. Yet, it has played an important role in maintaining the country's peace and security. It greatly contributes to the law and order of the country by ensuring the safety and security of critical infrastructures such as financial institutions, hotels, universities, hospitals, and small and medium-scale businesses as well as their employees. Moreover, this sector is increasingly becoming an important partner of the country's security actors, specifically the police. However, the employees of this sector are susceptible to labor exploitation and poor working conditions. Most private security guards are poorly trained and do not undergo adequate vetting. These factors combined with serious deficiencies in the rule of law across the country too often enable private security companies to effectively operate outside state control.

This article examines the violations of rights that have been observed in Ethiopia's private security services sector. In particular, it examines the extent of privatization and its implication on rights, the obligation of state and private operators to ensure the rights of the employees that are commonly violated, the factors that cause the violations, and the measures that are necessary to address the problems. The methodology of the research is socio-legal which involves doctrinal legal research that focuses on the relevant laws, and an empirical approach which, *inter alia*, includes primary and secondary data collected from 46 research participants and four focus group discussions.

The next section briefly presents overview of private security services in Ethiopia. The third section highlights the extent of privatization and its impact on human rights. Section 4 deals with the duties of the state and private operators to respect human rights. Sections 5, 6 and 7 respectively examine

the rights abuse that has been commonly observed in the sector, gaps in the regulatory framework, and the drivers for these violations. The eighth section deals with the measures that need to be taken to address the rights abuses witnessed in the industry followed by a conclusion.

2. Private Security Services in Ethiopia: An Overview

In Ethiopia, private security companies have contributed, *inter alia*, to the security of persons, property and institutions. Private security companies are supplementing the government law enforcement agencies in protecting critical infrastructures such as hotels, embassies, financial institutions, universities, hospitals, and other international, regional, and domestic organizations.[1] They play a critical role in preventing and combating criminal activities directed to premises, properties and persons under their control.[2]

The evolution in the use of private security guards for certain purposes (in Ethiopia) has undergone four phases: pre-modern times, the era of Emperor Haileselassie, *Derg*, and the government of the Federal Democratic Republic of Ethiopia (FDRE). Since pre-modern times, individuals were employed by other persons to protect their families, properties, and personal safety. The so-called "Zebegna", served the community as a watchman and this practice has continued to date in Ethiopia.[3] During the reign of Emperor Haile Selassie, there were attempts to establish and introduce the business of private security companies. During this time, the first private security company that operated in the country was an Italian-owned firm 'Securicor'.[4] However, this security company did not continue its operations due to the ideology followed by the military regime (*Derg*)- that denied the privatization of such services as it advocated Marxism-Leninism and the nationalization of various private businesses.[5]

Since 1991, Ethiopia has witnessed a rapid expansion of the private security services sector. The factors that influence this expansion include privatization

[1] Interview with an owner of a private security company, Addis Ababa, January 23, 2022.
[2] Interview with a police official, Addis Ababa, January 10, 2022.
[3] Solomon Hassen (2015). The Evolution of PMSCs in Ethiopia. Paper presented to Regional Conference on Private Military and Security Companies (PMSCs). Available at: https://www.slideshare.net/IPSS-Addis/the-evolution-of-pmscs-in-ethiopia
[4] Ibid.
[5] Desta Asemelash (2011). 'The Role of Private Security Companies in Enhancing Human Security and their Relationship with Public Security Institutions: The Case of Addis Ababa' [Unpublished MA thesis]. Addis Ababa University.

of public corporations, globalization, the magnitude of insecurity, a severe reduction in the size of military forces, and a growing quest for profit-making, among others.[6] Solomon (2010) notes two key reasons for the growth of private security activities in Ethiopia.[7] The first is related to the country's political transition. During this time, the military dictatorship was overthrown and the Ethiopian People's Revolutionary Democratic Front (EPRDF) took power. The demobilization program[8] that ensued resulted in a high rate of unemployment of many former armed and security personnel. The emergence of the private security industry at the national level was greatly aided by the availability of trained but unemployed security forces.

The second factor is related to the rise in crime and criminality in the country, specifically in the capital. During the 1990s, criminal activities such as organized crime, robbery, hold-ups, and incidents of petty offenses increased in the country. However, the capability of the country's law enforcement agencies specifically the police to prevent and investigate the perpetrators of those criminal activities was exceedingly limited.[9] The police institution was not adequately established and reorganized. Policing at this time was often severely under-resourced and understaffed due to the departure of many personnel from serving in the police force.[10] Such factors had eroded the level public trust on police structures and performance of their assigned duties.

The ratio of police to the population in 2022 was 1:600 which is very small when compared to the UN global standard ratio of 1:435.[11] There was the same problem during the 1990s and this implies that there was a significant security gap that must be filled. Thus there was the need for other security service providers that can fill the gap and protect businesses and personal safety.[12] These realities led to the proliferation of private security institutions, and some former soldiers were encouraged to enter the labor market.

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[6] Sabelo Gumedze (2007). '*Private Security in Africa: Manifestations, Challenges, and Regulation'* Tshwane, South Africa, Institute for Security Studies, pp. 22-23.

[7] Solomon Hassen (2010). '*The status of private security companies in Ethiopia: The case of Addis Ababa*,' An Ontology of Peace and Security Research Volume I. Addis Ababa University Institute for Peace and Security Studies in collaboration with Friedrich Ebert Stiftung, Addis Ababa, p.132.

[8] Mulugeta Gebrehiwot Berhe (2017). "Transition from war to peace: the Ethiopian disarmament, demobilisation and reintegration experience," *African Security Review* 26

[9] Interview with a former police official, Addis Ababa, February 18, 2022.

[10] Ibid.

[11] Tracy Hunter (2014). 'Police per 100,000 populations by a country world map.svg'

[12] Solomon, *supra* note, 7.

In 1992 "Tila (ጥላ)" private security company was founded by ex-officers who were demobilized upon the downfall of the *Derg*[13]. Since then, there has been a significant increase in the number of private security companies in the country. Ethiopia's two successive five years growth and transformation plans (2010-2020) and vision 2025 provide due emphasis to the private sector. As a result, several private security companies such as Sebhatu and Lijochu, Dejen, Agar, Lion, Trust, Nisir, Selam, Walta, Securicor, and ABC among others were able to be formed and develop.[14] However, in 2021, some of those private security companies were banned from operating by the government due to the conflict in the northern part of the country.[15]

Even though the private security sector has been growing since 1991, it is important to note that the number of private security companies operating in Ethiopia is still not known precisely. This is because some of these companies operate in an unlicensed and unregulated environment.[16] However, according to the official report of the Ethiopian Federal Police Commission, there are more than 335 private security firms/companies operating in the country, and most of them are categorized as small to medium-sized and owner-managed.[17] According to informants of this study, the number of private security companies in Ethiopia would be between 350 and 450 and the sector employs more than 200,000 persons.[18] Their size varies from 50 guards to more than 12,000.[19]

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[13] The term *'Derg'* in Amharic means 'committee.' It stands for the Provisional Military Administrative Council, which was formed shortly/soon after imperial power was overthrown in September 1974. The Council was initially made up of about 120 military officers, both commissioned and non-commissioned. Colonel Mengistu Haile-Mariam, the most powerful of these, ruled Ethiopia and Eritrea for 17 years under one of the world's most ruthless dictatorships. *See* Andargachew Tiruneh (1993), '*The Ethiopian Revolution 1974–1987: a transformation from an aristocratic to a totalitarian autocracy'*, Cambridge: Cambridge University Press, p. 15.

[14] Security Service Companies in Ethiopia, available at https://addisbiz.com/business-directory/business-professional-services/security-service (accessed June 18, 2022).

[15] Ethiopia bans 14 private security agencies, available at https://newbusinessethiopia.com/crime/ethiopia-bans-14-private-security-agencies/ (accessed June 18, 2022).

[16] Interview with a police official, Addis Ababa, January 10, 2022.

[17] Ethiopian Federal Police Commission (2022), annual report private security companies.

[18] Interview with a police official, Addis Ababa, January 12, 2022; Interview with a civilian government official, Addis Ababa, March 5, 2022; Interview with a police officer, Addis Ababa, January 14, 2022.

[19] Ibid.

While the majority of these companies operate in one town or locality, the larger ones operate in several major cities and main towns of the country. Addis Ababa has the highest percentage (82.3%) of private security companies. The largest employers in the sector are Commercial Nominees which employ around 12,000 persons, Agar which has about 8,000 employees, Selam (about 3500 employees), Trust (about 3000 employees), and Lion (approximately 2,900 employees).[20] These companies are owned and run by Ethiopians; and foreign citizens or organizations are not allowed to own or operate private security companies in Ethiopia. The private security companies in Ethiopia are dominated by former and retired members of the military, police, and security services. Most former security personnel have either founded private security companies or are employed by them.[21]

Hiring private security is now common practice in many commercial enterprises, financial institutions, public service agencies and facilities, tourism industry, international organizations, manufacturing, and non-governmental organizations. Leaders of private security companies confirm that they are engaged in all areas of business activities. Based on analysis of elicited information, it was found out that there is a complex market dynamics taking place in Ethiopia. This encompasses, commercial security, residential security, security consulting and training, VIP protection service, event security and cash in transit (CIT) security that are identified as the major services provided by private security companies. Because of the industry's growing base, the largest firms offer all forms of protection, while the smaller ones tend to specialize in limited activities.

Generally, until the security demand of the citizens and the capability of the state to provide such services become compatible, the demand for private security companies will continue to rise. The global context (globalization and marketization of security) also provides an appealing environment for the growth and expansion of private security services in Ethiopia.

3. The Extent of Privatization and Its Implication on Human Rights

The modern norm of the state's exclusive right to the legal application of physical force was established in the 17th century.[22] The main objective in this

[20] Ethiopian Federal Police Commission, (2022), annual report private security companies.

[21] Interview with a police official, Addis Ababa, January 10, 2022.

[22] Elke Krahmann (2010). *States, Citizens and the Privatization of Security,* Cambridge: Cambridge University Press.

regard is to make it illegal for individuals to use violence, which is attained by giving the state exclusive use of force to maintain peace and order. The theory assumes that only the state can provide security for its citizens.[23] However, this approach has been challenged as a result private security operators particularly after the conclusion of Cold War. As many researchers agreed, the origin of the privatization of security can be attributed to the end of the Cold War. This period is considered as the 'age of privatization,' during which members of the communities hire for-profit companies to carry out duties that have previously been fallen under the responsibility of the state. According to Avant[24] , security privatization leads to the issue of changes in and challenges to the relationship between the state and its exclusive control over the utilization of force. Privatizing security denotes the relinquishing of governmental control over the maintenance of law and order as well as resolving conflicts, which makes the state unable to fulfill its duty to provide security services to its people.

The privatization of security experienced spectacular growth and has now become an increasingly global phenomenon. This is due to many reasons, including widespread human insecurity, marketization of the public domain, armed forces downsizing, and the desire to maximize profits. Changes in national and international settings, such as the introduction of a tendency toward reducing or cutting police and military spending and the rise in conflict episodes, boosted demand for security services and the industry's stated comparative advantages.[25] Because of these factors, contracting private protection is becoming more common.

Despite their geographical diversity, several commercial firms, educational institutions, international organizations, non-governmental organizations, and an increasing number of private individuals are now engaging and hiring private protection. This trend is commonly accepted –and frequently encouraged– by public officials with which private security providers have

[23] Max Weber (1994). *The Theory of Social and Economic Organization*, London: The Free Press of Glencoe Collier-Macmillan Limited. (Originally published in German, 1920)

[24] Deborah Avant (2005). The Market for Force: *The Consequences of Privatizing Security.* Cambridge: Cambridge University Press.

[25] N. Tzifakis (2012). Contracting out to Private Military and Security Companies. Belgium: Centre for European Studies [CES]. Brussels, p.11.

formed tight links.[26] At present, private security companies are playing key roles in maintaining and ensuring peace and security at the international, regional, national, and local levels.

Privatization gives chances for the private groups to address the urgent security voids that have been left vacant by governments and other organizations. The expansion of the private security industry as a result of privatization has been charged with granting states and public security enough time to focus on their core competencies and security provision. Though this approach gives a sense of improved security among the consumers, privatized domestic security creates several problems: the private security sector is largely unregulated, unaccountable, and often employs poorly trained and insufficiently vetted security personnel who, in some occasions, might have been involved in unwanted activities. Legitimizing the utilization of violence by individuals who are not bound by stringent restraints has the potential to increase the frequency and gravity of violations on human rights or other offenses against humanity.

Of course, it is challenging to generalize the impact of security privatization on the enjoyment of human rights. As a UN report indicates,[27] well administered privatized security possesses the capacity to advance and safeguard fundamental human rights. Nowadays, the majority of emerging nations look the privatized security as a means of advancing peace and development. From this, it is possible to assume that there exists a positive link between the privatization of security and the protection of human rights.

Despite this potential to improve the respect of human rights, various human rights issues associated with the privatization of security have arisen over time and are anticipated to persist in the forthcoming future. Human rights problems may manifest/arise in this situation in two ways. First, the provision of privatized services might not adhere to the established human rights norms. For instance, a person cannot access security protection, if he is not able to pay for security services. This is because, the private security sector only responds to client-driven responsibilities and is governed only by market

[26] R. Abrahamsen & M.C. Williams (2007). Securing the City: Private Security Companies and Non-State Authority in Global Governance. International Relations, Vol. 21(2), pp. 237-253.

[27] *See* Ursula Kriebaum (2007). Privatizing Human Rights, p.167. Retrieved August 6, 2023: https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Kriebaum/Publikationen/pub_uk_10.pdf.

forces. Thus, many of those who most require private protection cannot afford it.

Secondly, human rights violations may arise as an inadvertent consequence of the operations of privatized service providers. Cases of child labour, cases of ill-treatment by privately contracted security services, cases of unfulfilled working conditions are some examples among the most commonly occurring forms of such violations. Moreover, these organizations exhibit a tendency to evolve into dominant powers, and may surpass local political institutions in terms of power, especially in areas of weak governance.[28] In this respect, there are general suspicions among scholars that privatized security tends to collaborate with other parties, thereby increasing the likelihoods of jeopardizing national security as well as engaging in human right violations.

4. The Obligation of State and Private Operators to Ensure Human Rights

Human rights are well defined in different international and regional human rights laws, and should be respected and protected by all concerned including the state. The obligations of the state with regard to human rights are commonly characterized as having three distinct components: the obligations to *respect*, *safeguard*, and *advance* those rights. The obligation to *respect* human rights means that the state itself must abide by the rights and refrain from violating human rights. The obligation to *safeguard* human rights means that the state must have robust legal and institutional frameworks as well as a mechanism for implementing those measures, thereby preventing any actors from violating such rights. In other words, state has a duty to intervene and impose restrictions in such a manner that no services provided by private security companies constitute a threat to its employees and/or customers. The duty to *advance* human rights implies that the government must consistently endeavor to enhance the extent to which human rights are manifested.

States have a primary obligation to observe all human right violations and the corresponding governing rules. As highlighted below, some private security companies (PSCs) are criticized for failing to pay a minimum wage to their employees, and this calls the adoption of strong codes of conduct and enforcement mechanisms.

[28] Peter W. Singer (2008). *Corporate Warriors: The Rise of the Privatized Military Industry*. Itahaca: Cornell University Press, pp.18-39.

Even though the international human rights law regime does not expressly make reference to private operators, an issue arises whether the delegation of some of the functions of the state –such as maintenance of peace and security to private operators– entails functional responsibility including accountability for the violation of human rights. Apparently, non-state actors are not directly subject to international treaties that aim to safeguard human rights.[29] However, from the perspective of international human rights law, it is legitimate to demand that private operators respect human rights and take necessary measures to stop others from any violation within their sphere of influence. This obligation must thus be imposed upon private operators by states as part of their responsibility to monitor and uphold human rights, rather than being imposed directly upon private operators.

Human rights are by their nature inherent to all human beings and as such, they remain unaffected by the identity of the potential perpetrator. The act of depriving a person's right to employment, for example, will be a violation of international human rights law whether it is carried out by a private individual, or a company or a government agency. As Skogly notes, 'for the victims of human rights violations, the effects are the same whoever is responsible for atrocities'.[30]

As PSCs have direct control over their employees, their action or inaction can violate the rights of employees. In this situation, it makes sense that PSCs would have a sole responsibility to take all reasonable steps to stop human rights violations. For this reason, obligations deriving from international human rights law must extend to the private sphere since private operators have the potential to violate human rights. Such obligations might be enforceable with the assistance of the state since state has a duty to monitor and enforce human rights in its jurisdiction. Sections 5 and 6 here-below respectively examine rights violations that originate from the employment agencies and violations attributable to the existing regulatory framework.

[29] See e.g. United Nation Global Compact, available at http://www.globalcopmact.org; Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development.

[30] Sigrun Skogly (2001). *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish Publishing), 51.

5. Human Right Violations Emanating from Employment Agencies

As highlighted above, international as well as regional human rights instruments require private parties to uphold and safeguard human rights in their spheres of impact. However, in Ethiopia, many of the human right violations are taking place in the private security services sector. Most of these violations are related to the activities of employment agencies.

5.1 Labor exploitation

The services of private security companies are currently used by a large number of government offices, corporate organizations, small and medium scale businesses, private residences, and individuals. However, the employees of these companies are exposed to labor exploitation. Labor exploitation is one of the most serious human rights abuses manifested in Ethiopia's private security industry.[31]

The labor market of the Ethiopian private security service providers is increasingly becoming an employers' market, with the exploitation of youth and underprivileged workers becoming the order of the day. The common forms of labor exploitation include the worker being paid less than he or she should be paid, being required to work long hours without proper compensation, gaps in day offs, sick leave, access to occupational health services, and poor working conditions.[32] In some instances, private security companies hire minors, resulting in child labor exploitation.

Labor exploitation begins during the recruitment and selection process. It is widely perceived that many firms employ undocumented persons as security guards who readily agree to accept low payments determined by companies. In this regard, one of the study's participants stated:

> [t]he majority of private security guards are from low-income rural families with limited educational opportunities. Since they do not speak the country's working language, they are unable to communicate with others properly. They also lack formal documents and relatives in the urban areas, and hence they are required to pay a guarantee of up to 1,000 Ethiopian Birr. Unless they do this, they have little opportunity of obtaining employment in the industry.[33]

[31] Interview with an employee of a private security company; Addis Ababa, January 28, 2022; Focus Group Discussion (group 1), Addis Ababa, February 15, 2022.
[32] Ibid.
[33] Interview with a government official, Addis Ababa, February 19, 2022.

Another form of labour exploitation is putting the workers on duty for long hours. The Ethiopian Labor Proclamation No.1156/2019, sets the maximum hours of work to be 8 hours per day. The Proclamation further stipulates that an employee should work for 6 days and 48 hours a week.[34] This means that instead of two shifts in a day, there should be three shifts, each lasting a total of eight hours.

However, private security guards are continuously deployed. Most employees of private security companies continuously work for a duration of two days and are allowed to be off-duty for the following 24 hours.[35] This arrangement contravenes the Labour Proclamation. By working more than 8 hours per day, an employee loses concentration and becomes ineffective due to fatigue, thereby putting the property he or she is guarding at high risk.[36]

Working for private security companies is a notoriously low-paying job in Ethiopia. Most of the companies pay low wages that are insufficient to support their families.[37] The current entry-level guard wage varies from 1,700 Birr to 2,500 Birr[38] per month, whereas renting a single room in a poor slum area costs 2,000 to 3,000 Birr per month.[39] Thus most private security guards look for extra jobs and work for two or more companies. This makes them tired and jeopardizes their regular tasks.

More than half of the money paid by the clients to private security service providers goes to the companies' coffer, while the employees are underpaid. In one typical case, a client [NGO] agreed to pay ETB 7,500 per security guard to the service provider. The security company pays the guards ETB 3,500, with the remaining 53.3% going to the firm's coffer.[40] In some cases the benefit collected by the employer goes up to 70%. According to many respondents, absence of the provision of minimum wage in the country is the main exacerbating factor to this problem.

[34] Labour Proclamation No.1156/2019, Art 61(2)

[35] Interview with an owner of a private security company, Addis Ababa, February 12, 2022.

[36] Interview with an employee of a private security company, Addis Ababa, February 2, 2022.

[37] Focus group discussion (group 3), Addis Ababa, February 18, 2022.

[38] Birr is the official currency of Ethiopia and as of June 6, 20022 the exchange rate of the US Dollar to Birr is 52 ETB.

[39] Interview with a guard of private security providers, Addis Ababa, January 18, 2022.

[40] Focus Group Discussion (Group 4), Addis Ababa, February 25, 2022.

Compelling the security workers to undertake jobs that are not part of their original job description is another type of labor exploitation.[41] During a single shift, most guards perform extra duties. These range from answering phone calls, offloading the client's goods, brewing tea, delivering mail, and filing documents.[42] Moreover, there is the practice of requiring guards to clean cars and water the client's garden. If the security guard refuses, the client will submit a complaint with the security guard's employer. The employer usually penalizes or suspends or dismisses the employee.

Even though it varies from one private security service provider to another, this study shows that that lack of payment for overtime work is one type of labor exploitation in the industry. According to the *Ethiopian Labor Law*, working overtime is undertaken by agreement unless there is an urgent demand that the employee has no reasonable excuse for declining to work.[43] The law provides that whether or not workers are compelled to do overtime work, the employers are required to compensate them from a minimum of 1.5 to a maximum of 2.5 times their regular pay for any additional time spent on work in excess of the normal 8-hour schedule.[44]

However, in practice, private security service providers often do not comply with this standard. As a respondent stated, employees of the security services providers are compelled to work overtime; and the employer may refuse to pay them or pay them less than the minimum payment stated in the labor law.[45]

Though the majority of workers and members of society believe that private security workers are subject to exploitation, certain private security company owners have refused to recognize this criticism.[46] Most of the company owners and managers admit that the wages paid to employees are insufficient to allow them to live a decent life. According to these respondents, the main reasons for the insufficient payment are lack of appropriate rules and the presence of market dynamics, which is manifested in two ways.[47]

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[41] Ibid.

[42] Interview with an employee of a private security company, Addis Ababa, February 14, 2022.

[43] Labour Proclamation, *supra* note 34, Art. 67(1(a-d)).

[44] Ibid, Art. 68 (1(a-d)).

[45] Interview with an employee of a private security company, Addis Ababa, February 14, 2022.

[46] Interview with an owner of a private security company, Addis Ababa, February 13, 2022; Interview with a COE of a private security company, Addis Ababa, February 13, 2022.

[47] Ibid.

To begin with, the clients/service users are not interested to pay sufficient wages for the services they require. For example, the client/customer needs to hire a guard with a maximum of 2,500 Birr in exchange for safeguarding assets worth millions of Birr. Second, there is a surplus labor force in the market (due to high unemployment). Many people migrate to big cities/towns in search of employment from various parts of the country, notably from countryside and many firms hire these individuals by offering low wages that they readily accept. Third, there is no rule that forces the employers to pay a minimum wages to their employees.

The exploitation of labor engenders low morale and motivation among workers and adversely affects their ability to protect lives and properties. Low wages as practiced by private security service providers is a threat to security. This point is self-evident because private security guards under the prevailing working conditions and terms of payment cannot be expected to effectively provide security to assets worth millions and billions thereby pushing them towards being a new security problem rather than a solution. In recent years, for instance, some Banks have been robbed by their security guards.[48] Some security guards have also been apprehended for either colluding with criminal groups as informers or by taking part in criminal activities.[49]

From the preceding discussions, it is evident that there are a lot of signs that indicate the presence of private security guard exploitation in Ethiopia. As a participant in this study stated:

> [t]he employees of private security service providers are unaware of their real employers (whether the client or the agency). The majority of the workers do not have a valid contract of employment with their immediate employers. When they request an annual salary increment or weekly leave, they are denied by both the client and the agency by stating that they were not their employees. If they are absent due to family or health issues, they are subject to a deduction of a three to five-day salary. Their occupational safety is not guaranteed. Moreover, they have no job security since they can be fired or punished at any time for no valid reason. Paying very little wage and

[48] Bank Robbery Rampant as Police Fail to Arrest Perpetrators, February 1, 2020, Retrieved June 6, 2022, https://addisfortune.news/bank-robbery-rampant-as-police-fail-to-arrest-perpetrators/

[49] Bank Robbery Suspects Nabbed Hours After Getting Away with 2.1 million Birr (October 29, 2021), Retrieved June 6, 2022, from https://ethiopianmonitor.com/2021/10/29/bank-robbery-suspects-nabbed-hours-after-getting-away-with-2-1mln-birr/

> denying overtime payment including non-fulfillment of basic work conditions, lack of statutory law, and standards are the problems of the sector.[50]

The majority of private security guards work for an average of 12 hours a day. There are workers who are assigned to two or more employers while earning a fixed salary. According to the country's labor law, they are entitled to receive sufficient remuneration for the amount of work they do, as well as vetted with protective equipment, clothes, and other materials deemed necessary for their effective performance. In this regard, Article 42(2) of the Ethiopian Constitution clearly stipulates that "Workers have the right to reasonable limitation of working hours, to rest, to leisure, to periodic leaves with pay, to remuneration for public holidays as well as healthy and safe work environment". However, employees of PSCs in the country are denied these right**ts.**

5.2 Poor Working Conditions

Safe and healthy working conditions commonly known as occupational safety and health (OSH) are globally recognized human rights. The Universal Declaration on Human Rights (UDHR) states that "[e]veryone has the right to life, to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment".[51] The International Covenant on Economic, Social, and Cultural Rights (ICESCR) recognizes the right of everyone to safe and healthy working conditions.[52] This right specifically includes the right to the highest attainable standards of physical and mental health, in particular, the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of epidemic, endemic, occupational and other diseases; the creation of

[50] Interview conducted by Nahoo TV with the president of Ethiopian Workers Confederation concerning the working conditions of private security in Ethiopia, 26 March 2018, Addis Ababa.

[51] See Art 23(1) of the Universal Declaration of Human Rights, retrieved April 12, 2022, from https://www.un.org/en/about-us/universal-declaration-of-human-rights

[52] See 7(b) of the International Covenant on Economic, Social and Cultural Rights: Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27, retrieved 12 April 2022: https://resourcecentre.savethechildren.net/pdf/International-Covenant-on-Economic-Social-and-Cultural-Rights.pdf/

conditions which would assure all medical service and medical attention in the event of sickness.[53]

The International Labor Organization (ILO) Constitution states:

> [U]niversal and lasting peace can be established only if it is based upon social justice; and whereas conditions of labor exist involving such injustice; hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required; as, for example... the protection of the worker against sickness, disease, and injury arising out of his employment.[54]

Employees of private security companies are involved in security operations. They have to deal with fraudsters/cheaters and criminals. They also pursue their work in bad weather conditions. There is a likelihood that these individuals may inflict harm on the life and body of the private security companies' employees and the bad weather condition may cause health problems. As the research result reveals, the employees of private security companies lacked (i) proper health care, (ii) adequate training, and (iii) personal protection equipment to protect themselves from such hazards.[55]

Article 12(5) of Proclamation No. 1156/2019 requires the employer to take all the necessary occupational safety and health measures. Article 92 of the same Proclamation further stipulates that an employer should take the necessary measures to adequately safeguard the health and safety conditions of their workers by providing them with protective equipment, clothing, and other necessary materials. The police guideline also requires the private security service providers to avail uniforms, caps, badges, or other identification marks, and ID cards to their employees.[56]

However, in practice, the workers of private security service providers are poorly equipped. During field observations, this author discovered that some employers are unable to provide the necessary logistics to their employees. They lacked radio communication, electronic devices, and firearms to mention a few. It is not uncommon to see private security guards protecting properties worth millions of Birr but armed just with wooden batons and

[53] Ibid, Art 12.
[54] See the preamble of the ILO Constitution, retrieved 12 January 2022: https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO
[55] Interview with an employee private security company, Addis Ababa, 12 January 2022.
[56] Art 9 of the police guideline enacted to guide the private security service providers.

flashlights.[57] Though they are entitled to adequate attire that is suitable for changing weather conditions, this is not available for the majority of them[58] thereby exposing security guards to health risks.

Article 105 of Ethiopia's Labor Proclamation stipulates that an employer has a duty to cover expenses related to (1) general and specialized medical and surgical care; (2) hospital and pharmaceutical care; and (3) any necessary prosthetic or orthopedic appliance where a worker sustains employment injury or occupational accident. However, employees in private security services who are injured while performing their duties are rarely reimbursed or receive medical assistance.[59]

5.3 Lack of adequate training

According to Article 92(3) of the Ethiopian Labor Proclamation, an employer is required to "provide workers with protective equipment, […] and other materials and instruct them of their use". This requirement is reiterated in other regional and international instruments. However, the existing practice in Ethiopia demonstrates that security guards are deployed without adequate training. The majority of these guards are poorly trained and do not undergo adequate vetting.[60] Guards are required to carry or operate security equipment that they are unfamiliar with. This improper usage of security equipment is susceptible to causing harm.

For example, the data from the field research demonstrates that private security guards (commercial and in-house) from different companies regularly carry AK-47s and other types of rifles while on duty. These companies bought these weapons from the government. The practices of those companies that have distributed the weapons without proper training on the use of firearms is causing much concern in the public.[61]

There have been instances where the guards of private security companies have used these weapons to injure both themselves and other innocent individuals. Official documents indicate that several individuals were killed by guards as a result of improper use of these firearms. In 2008, more than 7 guards were killed by other guards while carrying out their duties. Likewise, in 2016, a guard killed six (6) bank workers, including a branch manager in

[57] Focus group discussion (Group 2), Addis Ababa, February 17, 2022.
[58] Interview with employees of private security services providers, Addis Ababa, February 14, 18, and 25, 2022
[59] Focus Group Discussion (Group 1), Addis Ababa, February 15, 2022.
[60] Interview with a police official, Addis Ababa, February 27, 2022.
[61] Focus Group Discussion (Group 2), Addis Ababa, February 17, 2022.

the Mytsemri district of Tigray regional state. In 2017, the Wegagen Bank's chief security manager and one of his subordinates were killed by a guard.[62] Many guards also experienced physical injuries, ranging from minor to serious. In addition, many others were jailed or lost their job due to improper use of these firearms.

6. Human Right Violations Emanating from the Existing Regulatory Framework

6.1 The regulatory framework on firearms

There are gaps in the legal regime such as the firearm law as a result of which private security guards are exposed to threats posed by criminals due to lack of firearms. The Ethiopian Firearm Administration and Control Proclamation No. 1177/2020 has granted the Federal police the authority to issue firearms licenses for legal persons.[63] However, the Federal Police guideline prohibits the employees of private security service companies to carry firearms.[64] There are several reasons for this prohibition. The primary reason is relates to the shortage of firearms. Firearms are not commercially traded properties within the country, thereby contributing to a scarcity of firearms. Second, the Ethiopian Federal Police Commission or the delegated Regional Police Commission is the only place where private security companies can obtain weapons through their employers or recruiting organizations. But because of the scarcity of firearms in the country, the commission is unable to fulfil this demand.[65] Third, the country had no firearm policy, regulation, standards, and guidelines up to this day.

Because of these and other reasons there are strong restrictions on the usage of firearms by security guards. This situation forces guards to equip only with a baton although criminals often carry modern firearms and other weapons. Many security officers admitted that their work is risky and that they don't always feel secure because criminals frequently target them.

This restriction has put employees of private security companies in danger, as they occasionally bump into heavily armed robbers.[66] This is a difficult situation that puts the guards in a life-threatening environment while they

[62] Interview with head of a crime investigation unit, Addis Ababa, February 14, 2022.
[63] Articles 6(2) and 12 of Firearm Administration and Control Proclamation No. 1177/2020
[64] Police guideline for the regulation and control of private security companies, Article 9.
[65] Interview with a police official, Addis Ababa, February 18, 2022.
[66] Interview with an owner of a private security company, Addis Ababa, March 21, 2022.

protect millions and billions of Birr worth of assets and people's lives. As evidence from the police shows, many guards lost their lives and sustained body injury by robbers due to lack of protective equipment. In such a situation, it is not fair to deny the companies and their employees' access to firearms.

Thus, under strict regulatory mechanisms and special training packages, it would be preferable if the companies have some access to or procurement of small arms and light weapons for some specific business activities (cash-in-transit and VIP protection) and guarding sensitive organizations such as financial institutions, critical infrastructures, embassies, relief convoys, and others. This helps guards to protect assets and lives from criminals.

6.2 Discriminatory practices in employment

The field research indicated that most private security services providers are organized along ethnic lines. The majority of the company's managers, employees, and sometimes their clients share the same ethnicity. It is not uncommon to have security personnel from the ethnic group working at the same company and speaking the same language (local language). Even though such practices have far-reaching negative consequences on the country's peace and security, persons of various ethnic backgrounds feel discriminated against during the recruitment, selection, and assignment processes.[67]

This allows some members of the group to have access to certain benefits while others do not. Individuals who do not belong to this group often face discrimination in areas of employment and other perks/benefits offered by the security companies. For instance, some privileged guards are assigned to protect the facilities of international organizations or escort private persons and benefit from payments more than others in the same work category.[68] This kind of practice is against the right to equal treatment.[69]

Pursuant to ILO Convention of 1958 regarding employment discrimination, to which Ethiopia is a party, any practice that impairs equal opportunity or treatment in employment or occupation on the basis of distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, is strictly prohibited and constitutes a serious violation of human rights.[70] The African Charter on Human and Peoples' Rights also recognizes the right, emphasizing conditions and pay,

[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Article 1 of ILO Convention of 1958 regarding Employment and Occupation Discrimination.

i.e. labor rights. Article 15, provides that "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work". [71]

Likewise, according to Article 14(1)(f) of the Ethiopian Labor Proclamation No. 1156/2019, "the employer shall not be discriminate between workers on the basis of nation, sex, religion, political outlook, […] or any other grounds". Thus, there should be a strong enforcement mechanism to ensure that treatment in the employment environment is free from any discriminatory practice.

6.3 Licensing problem *vis-à-vis* the freedom of business movement within the country

The licensing system of private security companies in Ethiopia is based on federal regulation and it does not allow regional states and city administrations to engage in licensing private security companies. According to this system, PSCs which have licenses from the concerned federal entities can operate in places of their choice within the country. However, according to a respondent in an interview, regional states do not allow PSCs to operate in areas under their jurisdiction unless they secure additional licenses from the concerned regional offices.[72]

This practice by regional states is contrary to the pertinent federal law. It is the Ethiopian Federal Police Commission (EFPC) that is solely mandated to issue professional license to PSCs unless it delegates relevant regional state bodies (police commissions and security offices) to do so. According to most informants, delegation of the function to regional states has not yet been made by the EFPC. This has created a gap and PSCs have not been able to conduct their business wherever they like. In the researcher's view, the disposition of the regional states in this regard can be taken as a sign of resistance to the current practices.

It is to be noted that Article 22(2) of the Commercial Registration and Business Licensing Proclamation No. 980/2016 requires businesses to have one trade license for providing a specific security service across the country. The provision states that "a business person having a valid business license pursuant to this Proclamation shall not be required to obtain an additional business license for branches he opens for the same type of business activity". Article 25(2) of the Proclamation further stipulates that a licensee shall not be

[71] African Charter on Human and Peoples' Rights: www.achpr.org. Retrieved 2023-08-05.

[72] Interview with owner of a private security company, Addis Ababa, January 18, 2022.

required to obtain additional business license for branches he/she opens to engage in a similar business. According to article 86 sub-articles 1&2 of the Commercial Code,[73] a business shall be registered only in one local register or has one registration number even if it carried out in different regions or localities. These provisions indicate that licensees can provide their services in the country once they obtain a single business license.

Moreover, Article 41(1) of the FDRE Constitution grants every citizen the right to freely participate in any economic activity and work in places of own choice in the country. The current practice, however, deprives PSCs to exercise their constitutional right and violates the free movement of business firms and their personnel throughout the country. The practice, therefore, is against Ethiopia's current law and this needs to be resolved to facilitate conducive business environment.

7. The Drivers for Abuse in the Rights of Employees

7.1 Legal lacuna

Even though the Labor Proclamation provides a general framework for employers and employees, private security providers and their personnel need to be governed by a distinctive law. This is the established norm in other countries. For instance, in South Africa, the private security industry is regulated by the Private Security Industry Regulatory Act.[74] The same is true for other countries such as England, the US, Australia, Ghana, Kenya, and Brazil.

The legal lacuna in this regard creates several shortcomings in the private security sector. It paves the way for labor exploitation and other poor working conditions.[75] As owners of private security companies in Ethiopia noted their activities need proper legislation.[76] Currently, there is neither specific legislation nor statutory authority that regulates the activities of the Ethiopian private security industry. The industry lacks consistent and coherent private security standards. Private security companies are registered as business

[73] Article 86 of Commercial Code of the Federal Democratic Republic of Ethiopia, 2021.
[74] Governing Legislation, retrieved June 6, 2022: https://www.sasecurity.co.za/governing-legislation/
[75] Interview with owners of a private security company, Addis Ababa, January 18, 2022.
[76] Ibid

enterprises under the applicable Commercial Registration and Licensing Proclamation No. 980/2016[77] and not as security firms.

Proclamation No. 980/2016 does not specify the modality of security provision as a type of business.[78] Private security companies cannot also fully fit into the category of employment agencies recognized by Labor Proclamation No. 1156/2019 [79] because such agencies act as brokers linking employees and clients. Because of this gap in the law, the police (as the custodian for the maintenance of peace and order) has automatically emerged as the controller and regulator of private security companies in Ethiopia.

Currently, the Ethiopian Federal Police Commission is mandated to oversee private security companies through established working guidelines. However, the guideline is inadequate and the private security sector has largely been left to regulate itself. Most of these private security organizations have attempted to establish and maintain minimum standards, but none of these has an extensive enforcement capability that is in tune with the standards it seeks to promote.

The nature and operations of private security companies significantly differ from other typical business activities. Thus, there is the need for an independent regulatory authority that can be established through legislation enacted by parliament.

7.2 Gaps in institutional framework and oversight

The existence of a strong and well established institutional and oversight mechanism is very important for creating a conducive working environment within the private security sector. In countries such as the US, South Africa, the UK, and some European countries, there are governmental entities (parliamentary committees, or other regulatory bodies and authorities) with exclusive oversight responsibility to monitor and scrutinize the operation of private security companies. In Ethiopia, different governmental institutions such as the Ethiopian Federal Police, National Intelligence and Security Services, Ministry of Trade, and Ministry of Labor and Social Affairs have some authority over the private security sector. These institutions, however, lack the capacity to administer the activities of private security companies

[77] Interview with a civilian government official, Addis Ababa, March 5, 2022

[78] Commercial Registration and Licensing Proclamation No. 980/2016

[79] Agency means any legally licensed person who provides local employment exchange services without entering an employment relationship or deploys workers under its authority to the services of a service user enterprise by creating employment contracts with those workers, or combines both services without charging the worker a fee directly or indirectly. See more Labour Proclamation*, supra note* 34.

since most of them lack the required material and human resources, skills, and technology.[80]

Proclamation No. 720/2011 gives the Ethiopian Federal Police Commission the authority to issue certificates of competence to private security companies. As the organization in charge of issuing licenses and reviewing applications for gun permits, the Commission should have detailed data about each company and its operations. However, the data collected from field research reveals that the Commission does not have the data on the exact number of registered private security companies that operate in the country and it also lacks data on unregistered security companies operating in the country.[81] Private security sector practitioners also stated that periodic inspection is essentially nonexistent and there are several irregularities in the private security service sector's documentation, training services, employing qualified staff, and enlisting of personnel working with uniforms or company badges.[82]

The oversight of the sector by the abovementioned different institutions exacerbates the susceptibility of the sector to human rights abuse. A focus group discussion indicated that none of those organizations have a clear priority regarding the private security sector.[83] The regulatory authorities lacked the focus or competence to enforce rules, coordinate tasks, and provide regular oversight.[84] Moreover, there are gaps in coordination among those institutions relating to the oversight functions because every institution tries to carry out its task independently. As a result, the industry operates with little or no effective state oversight.

7.3 Lack of trade union or association

It was observed in the field research that the employees of private security services providers are subjected to exploitation due to a lack of trade unions or associations that would enhance their bargaining power. Although the Constitution and the Labor Proclamation of Ethiopia grant employees the right to form any association and join any trade unions to improve their conditions of employment, economic well-being and defend ill treatments,

[80] Interview with a civilian government official, Addis Ababa, April 9, 2022; Interview with a police official, Addis Ababa, March 20, 2022.
[81] Focus Group Discussion (Group 2), Addis Ababa, February 17, 2022.
[82] Focus Group Discussion (Group 1), Addis Ababa, February 15, 2022.
[83] Ibid.
[84] Interview with a civilian government official, Addis Ababa, April 9, 2022; Interview with a police official, Addis Ababa, March 20, 2022.

employees in the private security services sector lack the capability to assertively demand the realization of these rights.

The field research indicated that the majority of the workers have just completed primary school and are unaware that their rights are being violated by their employers. What matters to most employees is having work and being able to support their families by working for more than 8 hours a day. To this end, employers arrange and let their employees work for many clients. The magnitude of the financial distress in the livelihood of employees can be easily observed from the views of some employees who (during interviews) expressed gratitude to their employers for enabling them to work in two or three areas/businesses and earn a better monthly salary.[85]

8. Potential Avenues in Addressing the Gaps and Challenges

Ethiopia is a signatory state to many ILO Conventions, including the Fundamental Principle and Rights at Work[86] that was introduced by member states on 18 June 1998. The ILO conventions were declared as a measure to curb the abuse of employees at work and as a way of promoting decent work for everyone who has a job. Though Ethiopia has ratified and domesticated some of the ILO Conventions, their implementation in the private security industry remains a major challenge.

As discussed in the preceding sections, employers and the government have failed to acknowledge unfair labor practices such as the payment of low wages, failure to pay overtime, appalling workplace safety, and inadequate health care. These poor working conditions experienced by a large number of private security guards in Ethiopia entail the prevalence of low job satisfaction leading to reduced performance and lack of commitment to the job. These unfavorable working conditions in the sector have rendered the retention of qualified and committed operators difficult thereby lowering the quality and standards of services across the sector. This calls for measures (such as a comprehensive legal framework, a sectoral association and the enhancement of institutional oversight) that must be taken into consideration.

8.1 Enacting a comprehensive legal framework

As private security service provision has distinct characteristics, the existing normative framework has gaps and deficiencies in regulating it. This necessitates enacting a comprehensive legal framework. The legal framework

[85] Interview with an employee private security company, Addis Ababa, 15 January 2022.
[86] ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up. Geneva, 18 June 1998.

is expected to, *inter alia*, address among the problems of labor exploitation and poor working conditions in the sector.

Improved working conditions of employees have a significant impact on job satisfaction. Employees' morale and productivity can be enhanced by favorable working conditions and appropriate health and safety standards. Moreover, employees' job satisfaction is vital for employers because it enables them to achieve the goals of the businesses they own or run.

8.2 The need for security services sector association

Freedom of association and collective bargaining can lead to better labor-management consultation and cooperation, thereby reducing the number of costly labor conflicts and enhancing social stability.[87] According to the ILO standards, all workers should enjoy unionization. In line with this international standard, the right of every worker to form or join a trade union or an association of his or her own choice is enshrined in the laws of many countries, including Ethiopia.

Article 31 of the FDRE Constitution recognizes the right of every person to form or join a trade union of his or her choice for the promotion and protection of his or her economic and social interests. Article 113(1) of the Ethiopian Labor Proclamation also provides, "workers and employers shall have the right to establish and form trade unions or employers' associations respectively and actively participate therein".

In the private security industry, the formation of an association would (i) influence the government to change various laws and policies that have failed to promote employee rights, (ii) ensure representation of members whose rights have been infringed, (iii) promote employee rights by raising awareness of their rights and laws that govern their activities; and (iv) serves as a highly effective mechanism for improving working conditions in the industry.[88]

Over the years, private security companies in Ethiopia have taken several initiatives to form a security sector association. However, such association that can monitor the activities of its members[89] and serve as a forum to standardize private security services is not yet established. The association

[87] *Rules of the game: An introduction to the standards-related work of the International Labour Organization,* International Labour Office, Geneva, 2019, retrieved 16 January 2022: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_672549.pdf

[88] About SIA, retrieved 16 January 2022, https://www.securityindustry.org/about-sia/

[89] Interview with an owner of a private security company, Addis Ababa, January 15, 2022.

can indeed enhance the protection and promotion of the rights of persons who work for private security companies.

Some research participants argued[90] that private security services are as essential as those provided by the police force. They also noted that the workers of private security service companies usually adhere to the norms, code of conduct, disciplinary principles, and ethics of the armed forces. Thus, they argued that allowing the personnel of those companies to exercise trade unions' rights including boycotts and strikes, could paralyze other economic sectors such as financial institutions, shopping malls, factories, large and medium-sized businesses, international hotels, and multinational corporations that rely on private security service providers for security.[91]

This argument against private security agency workers forming or joining labor unions may appear to be sound. However, this argument should not be a pretext to justify the repression of rights of employees in the sector that are widespread. It is to be noted that in the absence of a trade union, the bargaining power of workers and business owners becomes unbalanced; and the idea of trade unions arose as means of redressing inequity.[92] Thus, increasing the collective bargaining power of workers plays a critical role in addressing the human rights violations witnessed in the private security service sector.

Although allowing employees to boycott and strike has its own set of negative implications for any business, it is self-evident that granting such rights to employees of private security service providers has far-reaching negative consequences for the business they provide security services. However, equating the workers of those companies with public security services providers such as police is misleading. It is to be noted that the global thinking on police unions is changing, and several countries have passed legislation allowing police officers to join unions.[93]As a midway between the opportunities and challenges, I thus argue that the Ministry of Labour and Social Affairs or Ethiopia's Employers' Confederation must recognize and

[90] Interview with an owner of a private security company, Addis Ababa, January 23, 2022; Focus Group Discussion (FGD 2), Addis Ababa, January 29, 2022.

[91] Interview with owners of private security companies, Addis Ababa, January 23, 2022; February 12, 2022; February 13, 2022.

[92] C. Kollmeyer (2018). "Trade union decline, deindustrialization, and rising income inequality in the United States, 1947 to 2015". *Research in Social Stratification and Mobility*, *57*, pp.1-10.

[93] How Police Unions Became Such Powerful Opponents to Reform Efforts, retrieved June 6, 2022: https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html; European Police Union – EPU Retrieved June 6, 2022, from http://www.europeanpoliceunion.eu/

establish an Ethiopian Private Security Industry Association for the workers as well as the business owners.

8.3 Strong institutional and oversight mechanisms

The private security industry can be regulated by enacting and enforcing effective regulations as well as establishing strict oversight procedures. As Harris (2012), argues, "a key set of concerns surrounding the role of private security are how to ensure accountability, transparency, and the principles of democratic policing".[94] According to Harris, the private security sector is subject to very little public oversight and the existing institutional frameworks that Ethiopia has, are not keeping up with the growth of the sector.

This institutional weakness and the legislative deficiency pose challenges in ensuring effective private security governance in the country. In consideration of the role played by the private security sector and its implications for the socio-political conditions of the country, there is the need for a strong regulatory and supervisory regime that can operate within an effective and efficient institutional structure. As Kena notes, "[t]o make the private security industries and private security guards more reliable and accountable security actors and to make them contribute to the overall security of the country, they need to be well regulated, and become more professional."[95]

This is essential because proper regulation of the private security sector has numerous benefits. It can, *inter alia*, help in reducing practical flaws in the private security sector's efforts to safeguard people from crime, promoting the fundamental rights of the employees, as well as improving public confidence in the sector.[96] Therefore, the effective enforcement of existing and future laws require proper and robust institutions, proper oversight mechanisms, and political will.

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[94] J. Harris (2012). "How Police Privatization was Recast as Common Sense." *The Guardian*, retrieved June 6, 2022: https://www.theguardian.com/commentisfree/2012/mar/05/police-privatisation-recast-common-sense

[95] Kenna Tariku Ejeta (2017), *Labour Rights of Security Guards in the Ethiopian Private Security Industry: Case Study in Addis Ababa*, LLM Thesis, Addis Ababa University School of Law. Available at: http://etd.aau.edu.et/bitstream/handle/123456789/19190/Kenna%20Tariku.pdf?sequence=1&isAllowed=y

[96] Interview with a private security owner, Addis Ababa, March 21, 2022; Interview with a police official, Addis Ababa, February 18, 2022.

9. Conclusion

As the discussion and analysis in the preceding sections indicate, although private security services render a useful contribution in ensuring safety and security, the broad scope of their activities combined with the lack of common minimum standards across the sector, unprofessional conduct of some private security staff, and inadequate oversight and public control over these services, and other factors highlighted earlier pose potential risks to the protection of fundamental rights. Even though the state and private operators have a moral and legal obligation to ensure these rights, many pertinent issues relating to these rights are neglected.

This author argues that it is unacceptable to stay indifferent and non-responsive while a considerable proportion of workers in the private security services sector express outright displeasure with the low remuneration and poor working conditions. As a famished security guard is a potential criminal accomplice, sufficient remuneration and good working conditions for employees is indispensable. Strong institutional and oversight mechanisms, enforcement of the existing laws and the enactment of comprehensive legal norms are key to entrenching more efficient, committed, and reliable private security operators.

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Regulation of Group of Companies in Ethiopia: A Comparative Overview

Mesfin Beyene ♣

Abstract

Companies that are organized in a group aim at leveraging the market share, mitigate liability or facilitate long-term management efficiency. The reasons that make group establishment attractive for the parent company can be a basis for concern to other stakeholders, mainly, minority shareholders and creditors of the subsidiary company. The strict application of separate existence of a company and directors' fiduciary duties towards their companies –applicable in cases of single entity companies– may be difficult in the case of group companies. States, therefore, devise regulatory mechanisms to protect the subsidiary company and its minority shareholders and creditors while at the same time protecting corporate freedom and entrepreneurial reality. Ethiopia has introduced regulatory rules regarding group company (*parent-subsidiary company*). The objective of this article is to discuss the nature and regulation of group company as specified under the new commercial code and in comparison, with other countries' laws. The article argues that the rules stipulated are not designed to adequately protect the interests of the subsidiary and its stakeholders. It also argues that the liberal interpretation of the provisions governing group companies to include the application of rules governing single company can contribute to potential protection rules missing under the sections in the group company.

Key terms:

Group companies · Parent-subsidiary · Creditor protection · Minority shareholder protection · Power to direct

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Contents

1. Introduction

Companies are organized and protected as a group as a result of entrepreneurial reality to respond to traders' aspiration for growth, isolate risks from each part within the segregated entity while the rest of the enterprise may remain unaffected in the course of managing large enterprises with comparatively little investment. The same factors that make a group structure attractive for a parent company can be the basis for concern to other stakeholders. While the activities of subsidiaries are conducted in the interest of the whole group, liability arising from these activities is limited to the assets of the individual subsidiary.

Although entrepreneurial reality justifies parent company's direction of its subsidiary, some cases of regulation such as when "cases of directions to the subsidiary to act in a way which is disadvantageous to it (and its creditors and outside shareholders) in order to benefit the parent (and its creditors and shareholders)" may be deemed necessary. It is, therefore, common for countries to regulate corporate groups to protect the subsidiary, its shareholders, and creditors and even the minority shareholders of the parent company. Some countries regulate them using the general creditor protection rule[1] and others develop distinct rules[2] to mitigate the setbacks of group companies.

[1] UK applies general creditor protection rules to corporate groups; Paul L. Davies, *et al* (2021), *Gower Principles of Modern Company Law* (Thompson Reuters, Sweet and Max Well), p. 586.

[2] Germany regulates group structure using distinct rules. Ibid.

Ethiopia opted to set specific rules to regulate group companies under the Commercial Code of 2021. Though some provisions that govern single entity companies are made applicable to group companies, most important safeguards are left out[3] exposing the protection of the subsidiary company and its stakeholders to uncertainty. Moreover, extensive power of direction and intervention bestowed upon the parent company makes the management of the subsidiary under the mercy of the parent company and its directors. Although the independent directors of the subsidiary, not appointed by the parent company, are not obligated to follow the parent's directives, this autonomy may prove ineffective against a dominant parent company as the majority shareholder.

Accordingly, the law has gaps in providing safeguard measures to the subsidiary, its management and its stakeholders including the minority shareholders and creditors. Therefore, beyond taking legal amendment measures, interpretation of the provisions governing group companies to include the application of rules governing single company –such as safeguards stipulated under Article 295 (obligations of shadow directors)– can contribute to potential protection rules that are missing under the sections in the group company.

The next section and Section 3 deal with the salient features of and the rationale for the establishment of group companies. Sections 4 to 8 examine the regulatory regime of group companies in Ethiopia followed by a brief conclusion.

2. Definition and Nature of Group Companies

2.1 Definition

Phillip Blumberg describes corporate groups as "enterprises organized in the form of a dominant parent corporation with scores or hundreds of subservient sub-holding, subsidiary, and affiliated companies."[4] These enterprises involve a "single unity of purpose for a common design"[5] and conduct a single integrated enterprise under common control and often under a "common

[3] Please see *infra* note 77.

[4] Phillip Blumberg (1995). "The American Law of Corporate Groups", in Mc Cahery, Picciotto and Scott (eds.), *Corporate Control and Accountability*, Clarendon Press publication, p. 192.

[5] Damien Considine (1994). "The Real Barriers to Regulation of Corporate Groups", *Asia Pacific Law Review*, Vol. 3: No.1, 1994, 37-57.
DOI: 10.1080/18758444.1994.11787986

public persona."[6] In practice, they share a common purpose whether or not the parent keeps a tight restraint over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.[7]

Group companies are, interchangeably, called parent-subsidiary[8] or holding-subsidiary companies[9] in different jurisdictions. The holding and parent companies do not have differences in controlling the operations of the subsidiaries or undertaking, one or more of the trading activities of the group.[10] The integration may be caused by agreements, also called "enterprise agreements" or control of majority rights, also called a default concern in German Law.[11] Under German law, a holding company is created if one or more persons are subject to common management by another person.[12] It is assumed that the controlling and controlled persons form a holding-type group (or a holding company). Persons may also be subject to common management on the basis of a controlling agreement to cover relations between a controlling person and the person or persons as a group controlled by it (i.e. "the controlled persons").[13]

However, as it is easily discernible, each corporate entity has its own legal personality, and the management of corporations owe specific duties to their company and its shareholders.[14] When, however, each separate island is entombed into "a single integrated enterprise under common control and often under a common public persona," by equity participation or contractual obligations, various tensions between independence and interdependence arise.[15] Most of these tensions make themselves felt as particular problems in

[6] Blumberg, *supra* note 4, p. 192
[7] Considine, *supra* note 5.
[8] Davies *et al*, *supra* note 1.
[9] In UK's company legislation the holding subsidiary nomenclature was used to define group companies, currently, however, the CA 2006, the two terms have slightly different meanings, the definition of a "parent" company being broader than that of a "holding" company; and the term "parent" company being used in relation to company accounts and that of "holding" company elsewhere where the Act recognizes group situations, *see* Ibid.
[10] Ibid.
[11] Andreas Cahn and David C. Donald (2018). *Comparative company law: text and cases on the laws governing corporations*, Cambridge University Press, second edition, pp. 827-860.
[12] German Stock Corporation Act, 2016, Section 66.
[13] Id., section 18.
[14] Cahn & Donald, *supra* note 11, pp. 827-860.
[15] Ibid.

the law of corporate groups.[16] This is because business decisions may be taken on the basis of maximizing the wealth of the group as a whole (which usually means the value of the parent company), rather than of "the particular subsidiary of which the claimant is a creditor."[17]

The Commercial Code of 2021 (the Code) sets out distinct rules[18], like the German Law, to regulate group companies. It defines group companies as "a set of companies comprising the parent company and all its domestic and foreign subsidiaries unless otherwise provided by law."[19] Looking at this provision, one might assume that Ethiopia preferred the parent-subsidiary terminology to define what group companies denote. The last phrase, "unless otherwise provided by law" is not clear whether other group companies can be named with a different name such as "holding companies." Moreover, the Code defines a holding company as "[a] company that does not itself conduct operations to produce goods or render service by engaging in activities specified under Article 5 of the Code but holds shares in other business organizations that do so shall be deemed to be a trader."[20] This definition frames a holding company differently from a parent company defined under Article 550(3) where "control" is an essential element.

The fact that the parent and its subsidiary are traders is recognized as per Article 5 of the Code. The complication, however, lies on the fact that even a holding company can engage in commercial activities by itself.[21] Caution is needed with regard to the interpretation of Article 559, –a provision specifically set to govern parent-subsidiary company– which refers to Articles 358 and 381.[22] Does this mean that the Code preferred to use holding company and parent company interchangeably? If this is so what will be the effect of Article 9?

What makes the case more complicated is that the instance of the control is also used to define a holding company under Article 382(3) and Article 313(1)(C) of the Code. Article 382/3 specifically states that "…where the

[16] Ibid.
[17] Davies *et al*, *supra* 1.
[18] The Commercial Code of the Federal Democratic Republic of Ethiopia, Proclamation Number 1243/2021, Article 550-564.
[19] Id., Article, 550(1).
[20] Id., Article 9(1).
[21] Article 9(2) states that "Notwithstanding the provision of Sub-Article (1) of this Article a holding company may directly produce goods or render service."
[22] The Code utilized the name of holding company under Articles 358, 353, 313, 307, 9, 382 and 431

company is a holding company or has direct or indirect effective control over other companies" …[23] and the latter provision also shows the possibility of a director to hold a share or shares in a holding company.[24] Since a director can be a legal person,[25] will there be a possibility for a cross-shareholding to exist in this scenario? Moreover, the need to consolidate the accounts of a holding company and its subsidiary for accounting and tax purposes may be unnecessary where the holding "company and its subsidiaries carry out the business of such a differing nature that they may not reasonably be deemed to form a single enterprise."[26]

Here, it can be discerned that not only may the holding company engage in business but also the area of business can be different from what its subsidiary has been engaged in. Therefore, the Code employs the parent-subsidiary and holding-subsidiary companies interchangeably to define corporate groups. In this article, unless specifically indicated otherwise the name Parent Company is applied.

Other laws employ different terminology to define Group Company for tax, accounting and registration purposes. For example, the Commercial Registration and Licensing Proclamation No. 980/2016[27] employs "holding company" and defines it as a company incorporating "two or more limited liability companies and issued with a special registration certificate and managed by holder".[28] There is a visible difference between these two provisions because the Code states "comprising a controlling power" as a necessary element the Proclamation gives emphasis to management by the holder.

2.2 Nature

The issue at hand is whether ownership dictates management in group companies, just as it does in a single company. The issue that companies are distinct legal persons separated from their owners is a conventional understanding. Hence whether a parent company with significant ownership in the subsidiary will be entitled to appoint directors or be appointed as a director can be in conformity with the company law. If this is the case, does the definition in Proclamation No. 980/2016 –that envisages the existence of

[23] Id., Article 382(3).
[24] Id., Article 313(1)(c).
[25] Article 296(4).
[26] Article 431(3)(b).
[27] The Federal Democratic Republic of Ethiopia, Commercial Registration and licensing Proclamation No. 980/2016, Art. 2(40).
[28] Id., Article 2(40).

the power to manage the subsidiary as a prerequisite for acquiring the status of parent company– hold true?

Even in wholly-owned subsidiaries[29], the principles of limited liability and separate identity can impact the subsidiary's creditors. This holds even when the parent company intervenes in the subsidiary but still invokes these principles. However, if the parent company holds controlling ownership of shares in the subsidiary, there may be a possibility that management by the parent will negatively affect shareholders of the subsidiary who have no interest in the parent company.[30] It is because the Code recognizes group identity resulting from share ownership or share ownership plus controlling vote.[31]

The Federal Income Tax Proclamation No. 979/2016[32] recognizes the possibility of a "Group Company existence" by focusing in terms of share ownership. It provides: "underlying ownership in relation to a body means a membership interest in the body held directly or indirectly through an interposed body or bodies by an individual or by an entity not ultimately owned by individuals.[33] Moreover, Article 550(2) defines a "subsidiary" as a company subject to the control of another company, the "parent" company, either directly or indirectly through another company. A "parent" is also defined as a "company that has subjected another company to control either directly or indirectly through the instrumentality of another company."[34] The term control in these sub-articles is defined under Article 552. Accordingly, the elements of 'control' include:

- Formulating the financial and operating policies of a subsidiary (Article 552/1)
- Administering the financial and operating policies of the subsidiary (Article 552/1 and Article 552/3/b)
- Ownership of more than half of the voting shares of the subsidiary (Article 552/2)
- Agreement with shareholders (Article 552/3/a)
- Controlling the management of the subsidiary (Article 552/3/c)
- Actual control of the business by voting (Article 552/3/d)

[29] Commercial Code, *supra* note 18, Art. 551.
[30] This is further discussed in section 6 of this article.
[31] Commercial Code, *supra* note 18, Article 552(2) & (3).
[32] FDRE Federal Income Tax Proclamation Number 979/2016, Article 2/25
[33] Ibid.
[34] Commercial Code, *supra* note 18, Article 550(3).

In general, control entitles the parent company to provide rules and policies, administer them; direct the management and control the business.[35] These powers may result from an agreement or a default law. What triggers the dominant influence may be difficult to decide beforehand but, in most jurisdictions, a majority holding creates a presumption of such influence.[36] Another factor may be the ability of the management of one company to appoint or remove the management of another –which can exist even without a majority holding.[37]

The fiduciary duties of the management of the parent company may be required to secure the group's strategic interests. In such cases, conflicts of interest between the duty of the subsidiary's management to serve the subsidiary's best interests and the influence of the dominating person to secure strategic interests will certainly arise. To regulate such conflicts of interest, legal safeguards should be available. The difficult question arises when to put such safeguards, or whether the possibility of influence or its actual exercise is determinative. [38] Under German Law, the possibility of influence and not its actual exercise is determinative.[39]

The provisions of the Code are ambiguous whether one should presume influence or if actual control is mandatory. Article 552(2) states that merely possessing more than half of the voting capital in a subsidiary does not inherently indicate control. Specifically, it provides, "the legal effects of 'control' shall not follow if, in exceptional circumstances, it's evident that such ownership does not equate to control." Nonetheless, Sub-Articles 3(c), 3(d), and 4 appear to lean towards presuming control when the parent company has the capability to appoint or remove over half of the management or carries the majority of votes at general meetings or an equivalent body.[40] Still, relying on this perspective is debatable, particularly as Sub-Article 3(d) emphasizes a conjunction of majority votes and tangible control.

The debate on the legal status of and realties about group companies "has ossified into a contest between the view of a group of companies as separate and autonomous individual entities and the view of such a group as a single

[35] Id., Article 552.
[36] Cahn & Donald *supra* note 11, p. 840.
[37] Ibid.
[38] Ibid.
[39] German Stock Corporation Act, *supra* note 9 Section 17, see also Cahn & Donald, *supra* note 11, p. 841.
[40] Article 552(3) & (4).

economic unit."[41] These realities raise issues involving directors' obligation to their corporation *vis-à-vis* their duty to the entire group; directors' independent judgment versus following instructions of the parent company; subsidiary company's debts versus the parent's duty to compensate.[42] This is because for the interests of the group, the parent may instruct the board of the subsidiary to do something which is not in the best interests of the subsidiary or it may allocate a business opportunity to a certain subsidiary in preference to another which can maximize the benefit for the group.[43] Finally, if a subsidiary falls into insolvency, the parent may refrain from rescuing it, even though the group has sufficient funds to do so.[44] The application of the separate entity and limited liability doctrines without the consideration of a sophisticated and nuanced regulatory system may, therefore, not result in a sensible policy term.[45]

3. Rationale for Grouping

The purpose for which a business organization may opt to be organized as a group than a single business entity can be explained by manifold justifications. According to Cahn and Donald, traders prefer group organization to single entity model for at least five reasons.[46] The *first* factor can be traders' aspiration for growth, because this model allows them to reinvest and multiply their capital in multiple organizations with multiple divisions. *Secondly*, grouping enables limited liability; by segregating parts of the enterprise into separate legal entities, investors isolate risks from each part within the segregated entity while the rest of the enterprise may remain unaffected.

Thirdly, Group-Structure allows control of large enterprises with comparatively little capital. For example, if parent Company A acquires 50.1 percent of the shares of Corporation B, and Corporation B acquires similar rights in Company C this entitles Company A to determine all shareholder decisions that require only a simple majority of the votes in B and C. *Fourthly*, a streamlined/shallow hierarchy under a group structure promotes quicker decision-making and enables the management of the holding company to

[41] Janet Dine (2000). *The Governance of Corporate Groups*, Cambridge University Press, First edition, p. 43.
[42] Cahn & Donald, *supra* note 11, p 828.
[43] Davies *et al, supra* note 5.
[44] Ibid.
[45] Ibid.
[46] Cahn & Donald, *supra* note 11, p. 829.

concentrate on long-term strategic planning and supervising operations. The *fifth* reason relates to easier integration of acquired companies and use of the value embodied in their firm names, as well as access to foreign markets where it might be more difficult to establish and to operate through a mere branch office.[47]

The same factors that make a group structure attractive for a parent company can be the basis for concern to other stakeholders. While the activities of subsidiaries are conducted in the interest of the whole group, liability arising from these activities is limited to the assets of the individual subsidiary.[48] For the creditors of a subsidiary this is particularly dangerous if the company is engaged in hazardous activities or is thinly capitalized and sustained by intra-group loans.[49] Transfers of value from the subsidiary to its parent company or other related corporations by way of pricing arrangements for goods or services, or the taking of the subsidiary's corporate opportunities, may be harder to detect than in a single corporation where passages to a dominant shareholder will usually be more obvious.[50] For these reasons, corporate groups can present significant dangers for the creditors and minority shareholders of a subsidiary.

According to Janet, important issues arise with regard to corporate groups. Such issues include: Whether directors of a member company of a group can be justified to extend benefits including financial and non-financial benefits to the interests of the group, at the expense of their own company's interests? Whether the controlling shareholders of the group owe a duty of good faith and fair dealing towards outside minority shareholders in the group? When will the controlling company in the group be liable for the debts of an insolvent member? Whether there should be a pooling of assets and liabilities in the liquidation of a group of companies?[51]

Not all states, however, take these issues as concerns of priority. In horizontal groups, which is common in the Japanese traditional *Keiretsu*, a complex network of small cross-shareholdings, coordination may be achieved through regular meetings of the chairpersons and by interlocking

[47] Ibid, see also Davies *et al*, *supra* note 1, p. 590.
[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Janet, *supra* note 41, p 44.

directorships.[52] In the *Keiretsu* system it is unusual for wholly owned subsidiaries to exist because of the system of cross-shareholdings.

Though entrepreneurial reality[53] justifies parent company's direction of its subsidiary, some cases of regulation may merely consider one-sided benefits such as "directions to the subsidiary to act in a way which is disadvantageous to it (and its creditors and outside shareholders) in order to benefit the parent (and its creditors and shareholders)".[54] It is, therefore, common for countries to regulate corporate groups to protect the minority shareholders and/or creditors of the subsidiary, its shareholders and creditors and even the minority shareholders of the parent company. Some countries regulate them using the general creditor protection rules[55] and others develop distinct rules to mitigate the setbacks of group companies[56].

In general, there are two approaches in this regard: the *protective approach* and the *organizational approach*.[57] While the former, also called an '*entity approach* is based on a view of the group as a 'risky' institution, the latter regards corporate groups as an entrepreneurial reality, trying to provide them with safe guidelines for their operation and for the ongoing interaction between the member entities and, in particular, between their organs.[58] The organizational approach, also called an '*Enterprise Theory*' model of corporate groups, according to Philip Blumberg, gives legal form to real-world experience.[59] Blumberg's enterprise model counters the separate entity doctrine, "the most significant barrier to acceptance of the existence, and,

[52] James Cox & Melvin Eisenberg (2019). *Business Organizations, Cases and Materials*, Foundation Press, 12th edition.

[53] In essence, 'entrepreneurial reality' in this context signifies the practical, real-world operations of businesses within a corporate group, where decisions are often made for the collective benefit, even if they challenge older, traditional business and legal concepts. *See* Jose Miguel (2005), "Trends and realities in the law of corporate Groups", *European Business Organization Law Review*, Vol.6, No.1, 65-91, p.77.

[54] Davies *et al*, *supra* note 1.

[55] UK is an example.

[56] The German statutory regulation of public companies provides two models of regulation, one of which is contractual and thus optional. Under the optional provision, in exchange for undertaking an obligation to indemnify the subsidiary for its annual net losses incurred during the term of the agreement, the parent acquires the right to instruct the subsidiary to act in the interests of the group rather than its own best interests. *See* Section 18 of German Stock Corporation Act.

[57] Miguel, *supra* note 53, p. 81.

[58] Ibid.

[59] Blumberg, *supra* note 4; see also Considine*, supra* note 5, p 40.

therefore, responsibility and obligation, of corporate groups," by ignoring it, constructing a new entity with legal consequences from the totality of the individual corporations."[60]

As polar extremes, both approaches show specific features and they are based on different standards. Mere emphasis on the organizational approach will make the subsidiary irrelevant making it a mere vehicle for an act or harm that may be raised by a third party in interest.[61] The protective approach has the potential to mitigate risks that may result from the primacy of the group interests by putting forward measures to protect creditors and minority shareholders in the subsidiary.[62]

However, the indiscriminate application of criteria such as "'piercing of the corporate veil', does not suitably reflect the intrinsic complexity of corporate group interests.[63] There are countries that apply enterprise theory in intra-corporate group conspiracy for purposes of the antitrust laws.[64] Something in between which involves a balanced combination of regulation and autonomous will should be in order.[65] This will defend corporate freedom without compromising the protection of the weakest interests thereby building a 'serious' public image and legitimacy and responding intrinsic complexity of corporate groups and entrepreneurial reality.[66]

US Courts devise mechanisms to harmonize both interests. They allow some directive power of the parent to secure group interest at the same time making some exceptions to separate legal entity using prescriptions such as agency or the '*utter identity and community of interests*' test.[67] Other grounds such as economic integration, financial interdependence, administrative

[60] Ibid, Considine, *supra* note 5, p 42.

[61] Ibid.

[62] Miguel, *supra* note 53, p. 79.

[63] The traditional 'piercing' jurisprudence resting on the demonstration of three fundamental elements: the subsidiary's lack of independent existence; the fraudulent, inequitable, or wrongful use of the corporate form; and a causal relationship to the plaintiff's loss will not suffice in the matter of group companies. Blumberg; *see* also Ibid.

[64] [T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of s 1 of the Sherman Act. The European Court of Justice, in dealing with an appeal from a decision under Art 85 of the EEC Treaty dealing with 'concerted practices', said that the fact that the subsidiary has a distinct legal personality does not suffice to dispose of the possibility that its behaviour might be imputed to 'the parent company' Considine, *supra* note 5 at 40.

[65] Miguel, *supra* 53, p. 81.

[66] Ibid.

[67] Considine, *supra* note 5, p. 43.

interdependence, overlapping employment structure and a common group persona give rise for implicating liability.[68] Thus, these courts have refused to recognize corporations that have lacked any realistic independent existence where they have no business objective, are sham or where the parent company's exercise of 'control' has been so intrusive making day-to-day decisions, 'piercing' has been approved without regard to the other elements traditionally required.[69]

4. Regulating Group-Entity Interest Dichotomies under Ethiopian Law

This section and the next four sections (Sections 5 to 8) examine the Ethiopian legal regime in regulating group companies. The themes addressed in the sections are based on the aforementioned discussion. Ethiopia has primarily adopted the German model regarding the nature, formation, and control of Group Companies, albeit certain exceptions. Ethiopia has also integrated elements from the UK Company Act. For instance, while German law imposes the duty of due diligence and fiduciary responsibilities on the directors of the parent company, the Ethiopian Code places more stringent fiduciary duties on the directors of its subsidiaries.[70]

Under German law, in exchange for the undertaking, an obligation to indemnify the subsidiary for its annual net losses incurred during the term of the agreement, the parent company acquires the right to instruct the subsidiary to act in the interests of the group rather than its own best interests.[71] This may contribute to the achievement of the entrepreneurial reality by pursuing the interests of the group, "even if a particular transaction was to the disadvantage of a particular subsidiary, provided that, over time, there was a fair balance of burdens and advantages for the subsidiary."[72] This balances between a coherent group policy and the protection of creditors and minority shareholders in the subsidiary. However, the Code follows British law

[68] Phillip Blumberg (2005). "The Transformation of Modern Corporation Law: The Law of Corporate Groups", Faculty Articles and Papers.192
[69] Ibid.
[70] Commercial Code, *supra* note 18, Article 563(1).
[71] Paul Davis, *supra* note 5
[72] Ibid.

applying to the directors of a subsidiary who ought to consider whether it is in the interests of the subsidiary to follow instructions from the parent.[73]

4. 1 Power to give instructions

While the Commercial Code's provisions give much power to the parent company to direct and intervene in the affairs of its subsidiary, it is not clear whether these provisions involve the doctrine of "institution of hierarchy"[74] *vis-à-vis* the liability of the parent. The controlling mechanisms that the parent company can apply show that the Code recognizes the "asset control" and "management/structural control models."[75] The Code recognizes the creation of a group on the basis of the operational structure of each corporate entity within the group and on the financial nexus between them, the level of dependency of their managements, and the degree of centralization and autonomy of decision making.[76] Looking at the provisions related to the parent company's power of direction, the Code seems to incline towards treating group companies as a single enterprise under common control.

Other than few rights of shareholders, the Code does not refer to the principles of individual companies that can be applied in the cases of corporate groups.[77] If the parent has more than half of the subsidiary's ownership of shares it can direct the subsidiary in the general meeting as a controlling shareholder. It has the right, through its board of directors or senior management, to give instructions to the organs of management of its subsidiaries.[78] It is also the obligation of the management of the subsidiary – unless they are appointed by other shareholders of the subsidiary or the Memorandum of Association– to comply with the instructions forwarded by the management of the parent.

This is not by itself a problem given the necessity of entrepreneurial reality. The matter is that the parent company has a stake –greater in the operation and existence of its subsidiary– owing to the investment it assumed beyond its stake on the entire group. Therefore, application of statutory and jurisprudential single entity safeguards such as independent legal personality and limited liability –developed before the concept of group corporations was

[73] See Article 563 of the Code and Section 172 of UK CA, for further discussion on director's fiduciary duty,

[74] Institution of hierarchy considers corporations as public institutions involving public interests on which the state is required to intervene. *See* Considine, *supra* note 5, p. 50.

[75] See Articles 552 and 556 of the Code.

[76] Consdine, *supra* note 5 p 51; *See* also Janet, *supra* note 41, p.112.

[77] *See* Articles 558, 559 & 562.

[78] Id., Art. 556.

not yet imagined– to group companies could be problematic.[79] This creates possibilities that the parent company gives instruction on how to perform its business for the interest of the entire group; it may also allocate new opportunities to the subsidiary and the subsidiary may fall into insolvency which the parent will be called for rescue.[80]

Though the parent may rely on the group interest argument and the need for a strategic interest from the center, the reality, however, is that "the integrated decision-making process is not at least theoretically accepted for companies to establish their own governance structure within their geographic and business area".[81] In practice, parent companies' directors formulate policies to the group allowing subsidiaries to adapt to their business.[82] In some countries, case laws have been established to govern corporate groups. The question is whether these separate corporations truly operate as essential components of the group, or whether they function as independent businesses.[83] In the US approach, for example, the parent company's exercise of control over day-to-day decision-making of a subsidiary is widely believed as one form of unacceptable exercise of control that will lead to the imposition of liability (or other legal consequences) on the parent.[84]

In bankruptcy law, in particular, there is a movement towards the recognition of enterprise liability for evaluating intra-group claims according to fiduciary standards.[85] There are also provisions for upsetting the preferences to insiders (including related companies) and the emergence of a doctrine of substantive consolidation in which the bankruptcy proceedings of interrelated companies are consolidated and administered jointly.[86]

Under the Code, the right to give instruction is stated without the corresponding obligation on the part of the parent. It, therefore, means that it

[79] Blumberg, *supra* note 68, pp. 193; *see* also Davies *et al*, *supra* note 1.
[80] Davies *et al*, *supra* note 1
[81] Janet, *supra* note 41
[82] Ibid
[83] Blumberg, *supra* note 68 at p 193
[84] Ibid.
[85] Ibid.
[86] Ibid.

is difficult to apply fiduciary standards like that of the US[87] or reporting and supervisory obligations as in Germany.[88]

Except in limited matters such as exploiting the business opportunity of the company or the general approval requirements by the minority shareholders in the subsidiary,[89] the Code fails to state the reasons when this power of instruction will require compensation to the subsidiary or its minority shareholders or creditors. The range of such instructions can be quite open-ended, and could include orders to relinquish corporate opportunities, make discount deliveries, transfer proprietary information, and perform services without compensation.[90] Another problem may arise when the parent is not subject to co-determination, while the subsidiary is; under such settings, the burdens of co-determination on the subsidiary are essentially side-stepped.[91]

Even what constitutes corporate opportunity is not clear. And interventions such as the transfer of asset may also be more detrimental to outside creditors and shareholders[92] as it can result in dilution of asset value for outside shareholders and increased risk for creditors, among other things. It means, therefore, directions given to the management of the subsidiary shall be fair and contribute to the interest of the minority shareholders of the subsidiary. Where the intervention inhibits this fairness principle what recourses will the minority shareholders have? Where the parent company exploits the corporate opportunity of the subsidiary and if it diverts potential profit interests of the subsidiary's shareholders, what remedying mechanisms should the parent be subjected to? The Code is silent in this respect.[93] The US corporate governance system requires a transaction between a dominant shareholder and the company be subjected, among other things, to the dominant shareholder's

[87] For example, under Delaware Common Law, both the legal representative of the parent and the directors of the subsidiary must meet the standard of care of a "prudent and reasonable manager" when performing their duties in connection with the domination agreement. Ibid.

[88] The controlling person shall compensate the damage suffered by the members (partners, shareholders) of such controlled person, and it shall do so separately from the obligation (duty) to compensate detriment (damage) to the controlled person. German Code, section 66.

[89] Commercial Code, *supra* note 18, Article 560.

[90] Cahn & Donald, *supra* note 11, pp. 840-860.

[91] Ibid

[92] Maria Maher & Thomas Anderson (1999), *Corporate Governance: Effects of Firm Performance and Economic Growth,* OECD Publishing, p 35.

[93] Detailed analysis is made below under Sections 4 to 6.

responsibility to prove the fairness of the transaction which should also fall within the range of reasonableness.[94]

4. 2 Disclosure requirements

Under the Code, the management of the parent company should reveal the facts of control to the subsidiary so that it will be able to give directions and assume potential responsibilities.[95] If control arises from an agreement between the parent and subsidiary, the requirement of notification of the same might not be applicable. However, the removal of control rights will still be required irrespective of the manner of control from either management. The parent should be notified of the rights of shareholding by the subsidiary in the former[96] because the law clearly prohibits cross-ownership let alone where one of the companies –the parent– has a controlling share.

The purpose of the prohibition is clear, i.e., creditors and minority shareholders may be affected if the capital of either of the companies is affected. This sub-provision, however, seems to allow cross holdings of shares when the subsidiary is a foreign company on which a disclosure requirement is not mandatory.[97] The prohibition of cross holdings will otherwise be applied for the law prohibits cross holdings above 5% cumulative.[98]

The obligation of the subsidiary to disclose its ownership in other companies, however, emanates from protecting the interest of the parent company itself. It has the right to ascertain the business and operation of the subsidiary in general. It seems, therefore, Article 554(2) has plurality of purposes and should be entertained in line with Article 555 and the following provisions regarding the rights of the parent company. These powers of the parent company to seek and obtain any information from a subsidiary is subject to the rules of incorporation of the subsidiary or interested third parties.[99]

A problem may also arise, either in the ordinary course of business or as a result of questionable or illegitimate strategies, when the parent company avoids financial liabilities by relying on the separate corporate personality of

[94] Model Business Corporation Act (2007). *American Bar Association*, Fourth Edition, Section 8.6.
[95] Commercial Code, *supra* note 18, Article 554.
[96] Id., Art. 554(2).
[97] Ibid.
[98] Id., Art. 555.
[99] Id., Art. 557.

a particular subsidiary.[100] In formal legal terms, a parent company is not generally liable for the debts of an insolvent subsidiary unless there is evidence that improper transactions or managerial decisions have been carried out with a view to shifting debts or other financial obligations onto the subsidiary and thus avoiding overall group liability.[101] The rejection by the parent to assume the liability of the subsidiary may taint the reputation of the group as a whole. In fact, in practice, most large groups do not act in this way and will guarantee the debts of a potentially insolvent subsidiary or provide a less formal 'letter of comfort' to satisfy its auditors that it can be accounted for as a going concern.[102] But where the liabilities are very large, for example, where there has been a major accident or incident causing substantial liabilities in tort, these companies may seek to rely on the separate status of the subsidiary.[103]

In any case, this does not mean that the subsidiary cannot benefit from the goodwill opportunity of the group. Nor does the parent abstain from intervening in the business of its subsidiary. However, either case will have consequences in the interests of creditors and shareholders. Though non-appointment of directors and managers of the subsidiary by the parent allows the former to disregard the instructions of the parent, as discussed above, the leverage they are supposed to have is unquestionable given the controlling power of the parent company.

4. 3 Right to squeeze out

Another right of the parent is the right to squeeze out the shareholders of the subsidiary when the parent controls more than 90% of the capital and voting shares of the subsidiary by purchasing the remaining shares from these other shareholders.[104] The parent, however, should comply with the requirements of redemption under Article 294. It should comply with the requirement of proper notice, the price and terms of redemption and the appointment of an expert valuator. An appraisal right of shareholders of the subsidiary may be inferred from the Code's provisions.[105]

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[100] Tom Hadden (2012). "Accountable Governance in Corporate Groups: The Interrelationship of Law and Accounting", *Australian Accounting Review* No. 61 Vol. 22 Issue 2 2012 (117-129).
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Commercial Code, *supra* note 18, Article 558.
[105] Id., Articles 292, 294.

5. Directors' Fiduciary Duties and Strategic Interest

The most important issue that complicates the matter in corporate groups is the mismatch between the subsidiary company directors' fiduciary obligations and the group's strategic interests. The argument is that managers must focus only on the company they are serving at the moment of decision-making.[106] The extent of the legal adaptation to reality is that the interests of the group may be of relevance in determining the interests of the company and "whether an intelligent and honest" director of the company "concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company".[107]

The issue of fiduciary obligation is central, because "if a shareholder, being a parent corporation, directs the control and placement of assets, then in allowing that situation to exist, the directors must be *prima facia* in breach of their duties."[108] Even if the directions given concur with the "honest opinions of the directors of the subsidiary," the very existence of, and acquiescence to, those directions is arguably close to a breach of duty.[109] The justification behind this proposition is that unless the corporation, and its directors, are independent of outside influence, the theory of the corporation as a separate legal entity breaks down.[110]

Legal prescriptions, however, do not always guarantee practical upholding. In most large multinationals, the structures for managerial decision-making are based on "functional or product divisions" (divisional approach) that are typically overlaid upon, and often cut across, the formal legal structures justified for its expedition to the coordination of different activities.[111] But it also results in the systematic neglect or disregard of the formal rules and obligations of company law in most jurisdictions.[112] Although this approach may be seen as lessening the centralization of group management, it is far from the practical reality of the way in which groups are managed, and it is thus of very doubtful utility.[113]

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[106] Janet, *supra* note 41, p. 43.
[107] Id., p, 44.
[108] Considine, *supra* note 5, p. 50.
[109] Ibid.
[110] Ibid.
[111] Hadden, *supra* note 94, p. 120.
[112] Ibid.
[113] Janet, *supra* note 41, p. 44.

Under the Code, the management of the subsidiary or the non-controlling shareholder of the same is required to comply with the direction power of the parent. However, they should prove the fulfillment of certain conditions in order to be relieved from liability and considered to have not acted in breach of their fiduciary duties. These conditions require proving that:

- the decision is in the interests of the group;
- the management, acting based on the information available to them and that would be available to them if they complied with their fiduciary duties before taking the decision, may reasonably assume that the damage will, within a reasonable period, be balanced by gain;
- the damage is not such as would place the continued existence of the company in jeopardy.[114]

The management of the subsidiary may comply, at its own risk, with instructions from the parent company if the conditions set in Sub-Article (1) are not satisfied.[115] This provision seems to add to the managerial autonomy of the company despite uncertain execution given the alignment of interests between the parent and directors appointed by it in practice. Another concern is that directors of the subsidiary are exposed to serve multiple principals since the Code recognizes and even obliges these directors to receive and honor directions from the parent company.

But who will have a dominant power of approval and renunciation in the subsidiary in the face of a controlling parent shareholder? What constitutes approval and how should it be counted? All these are not clear from the Code. Article 556(3) of the Code is not clear as to what "… not bound by the instruction of the parent" means. Nor is this issue addressed under Article 563. Moreover, a problem may arise where the sacrifice of the opportunity affects creditors of the subsidiary since the Code simply focuses on the continued existence of the company than the creditworthiness of the company.

This provision can be a ground for disregarding the corporate veil of the subsidiary company though the process of making it effective seems unlikely since the affected parties (minority shareholders and creditors of the subsidiary) do not have a mechanism of recourse. Moreover, the parameters for considering the decision to be "in the interest of the whole" are not clear whether due consideration is given to those parties likely to be affected. With the lack of practice in piercing the corporate veil in Ethiopia, such a legal gap will eventually harm creditors and shareholders alike.

[114] Commercial Code, *supra* note 18, Article 556.
[115] Id., Article 563.

Moreover, the parent company does not have a mandatory rescue obligation if the subsidiary falls into insolvency whether or not the insolvency results from a wrongful trading or exploitation of the corporate opportunity of the subsidiary by the parent. A subsidiary company managed according to instructions issued by its parent –even in the interest of the group– can only be subject to fundamental restructuring or winding up procedure which shall be initiated by the latter.[116] The parent will only be liable to third parties for the debts of the subsidiary incurred after such crisis point or if the debts resulted from the harmful instructions to which the liquidators or the trustees of the subsidiaries will invoke.

Under the German system, when the parent company issues binding instructions to the directors of the controlled company, it will in return be required to compensate the controlled company for any loss as a result of its control and also to pay a fair dividend to minority shareholders or to buy them out at a fair price.[117] Unlike German law, the Code entitles creditors holding not less than 10 % of the debts of the subsidiary to request the liquidator or trustee to exercise the right to redress on behalf of the claimants with regard to any unpaid debts.[118]

Chances may be that the administrative interdependence will inhibit the obligation of the subsidiary company's directors towards the company which appointed them. This should entail the potential to hold the parent and its directors liable by and large as the subsidiary's directors where the interference becomes damaging to minority shareholders and creditors. Moreover, the subsidiary directors face an elevated burden of responsibility due to this interference, even when the outcome is detrimental to the subsidiary's ongoing viability. It should be noted that, this does not automatically obligate the parent company to intervene for the subsidiary's rescue.

The fate of dissolution cannot be mitigated except with the possibility of reorganization and preventive restructuring with the consent of the creditors.[119] The parent company will be liable for unpaid debts of its subsidiary if it has managed the latter to its detriment and in violation of the interest of the group.[120]

[116] Commercial Code, *supra* note 18, Art. 564.
[117] Hadden, *supra* note 96, p.120.
[118] Commercial Code, *supra* note 18, Art. 564.
[119] Id., *see* articles 558 *ff*.
[120] Id., Art. 564(3).

It seems that in the former case a justification for group interest is acceptable unless the parent company fails to take immediate measures of restructuring or liquidation. The burden is, therefore, imposed on the directors of the subsidiary company to take great care of their company's and creditors' interest. The reality, however, may be different on the ground that the parent backed by legal protections may abuse its rights and power. It may also encourage companies to involve in businesses that are bogus, exploiting the interests of the subsidiary and its stakeholders. In the US system, principles of agency law are applied to justify piercing the liability of the parent by disregarding the corporate entity; this applies when "dominion is so complete and interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent".[121]

6. Group Interest *versus* Minority Shareholders Protection

Where subsidiaries are partly owned, the important issue of minority shareholder protection will arise. The general rules on minority shareholder protection are insufficient if a controlling shareholder has substantial business interests besides the stake in the controlled corporation for two reasons: *first*, the controlling shareholder may have the incentive to damage the corporation for the sake of promoting these other business interests, and *second*, because it may be difficult to detect whether the controlled corporation has in fact been damaged if it is engaged in business with other companies dominated by the controlling shareholder.[122]

Victims can be minority shareholders of either the subsidiary or the parent though the former are more vulnerable. According to Cox & Eisenberg, parent corporation's minority shareholders will also be affected, when their veto rights with respect to "corporate actions requiring supermajority approval can effectively be undermined by setting up a holding structure where the assets are owned and the business activities are conducted by subsidiaries while the parent corporation merely acts as a holding company."[123] The parent's voting rights in the subsidiaries are exercised by, or under the direction of, the parent's directors usually elected by no more than a simple majority of the votes where a majority shareholder has leverage to control.[124] Thus, by virtue of its influence over the parent's management, a dominant shareholder of the parent company can control decisions on matters in subsidiary corporations

[121] Blumberg, *supra* note 68 p. 192
[122] Cahn & Donald*, supra* note 11, p. 850
[123] Cox & Eisenberg, *supra* note 52.
[124] Cahn & Donald, *supra* note 11 p. 853.

that could have in many circumstances been vetoed by the parent's minority had the assets remained at the parent level.[125]

Under German law, where shareholders decide on the distribution of profits, this right will be exercised by the parent's management if the business is conducted and the profits are earned by a subsidiary, rather than by the parent itself.[126] Retention of profits in the subsidiary can be used to starve out the parent's minority shareholders; absent a dominant shareholder, the parent's management could also use it to control the group's internal financing.[127] These dominant shareholders with effective control over the management are known as "shadow directors"[128] under English Law.

Under the Code, the shareholders of the parent have the right to information and the right to request a special investigation. In particular, they have the right to appoint one or more inspectors to investigate; the right to inspect and take copies of documents of the balance sheets, profit and loss accounts and inventories; reports, minutes, resolutions, executive pay and register of shareholders.[129] However, the problem is severe for the shareholders of the subsidiary.

One mechanism that these minority shareholders can secure their interests is through approval rights, with interested shareholders excluded.[130] In some other jurisdictions shareholders may be given the right to vote for the directors of their choice, and still, in other jurisdictions controlling shareholders have a fiduciary duty to other shareholders.[131] Under Ethiopian law, when the parent company tries to exploit the corporate opportunity of a subsidiary, these shareholders have the right to approve.[132] The directors of the subsidiary have also such right.

Shareholders of the subsidiary that hold voting shares that represent ten percent of the capital have the right of investigation like the shareholders of the parent company. Therefore, if they believe that acts prejudicial to their interests are committed by the parent, they have the right to inform the

[125] Ibid.
[126] Ibid, see also German Stock Corporation Act section 60
[127] Cahn & Donald, *supra* note 11 p. 853.
[128] See section 251 of the UK Company's Act (2006).
[129] See Articles 559 *cum*. 355, 358, 381, 382
[130] OECD (2012), Related Party Transactions and Minority Shareholder Rights, *OECD Publishing*. http://dx.doi.org/10.1787/9789264168008-en
[131] Ibid.
[132] Commercial Code, *supra* note 18, Article 563.

Ministry of Trade and Industry (the current Ministry of Trade and Regional Integration) to appoint inspectors to investigate the affairs of the company.[133] This enables these shareholders to challenge the resolutions, such as transactions or re-investment that may be prejudicial to their interest, in the parent company.

The problem, however, arises when these resolutions are to the interest of the group, particularly, of the parent but disadvantageous to these shareholders. In weighing the interests various issues would arise: What parameters will the court employ? What payoffs will these shareholders receive in return? The law is not clear. The matter gets more complex since Article 358 makes reference to holding companies –not parent companies which still can be considered as different.

In the German Code, when such instruction is detrimental to the subsidiary, the controlling person shall compensate the damage (detriment) –that arises therefrom– to the controlled person and shareholders separately.[134] The members of the management of the parent will be severally and jointly liable for discharging the obligation to settle.[135] Unlike German law, the Ethiopian Commercial Code articulates the obligation to compensate the subsidiary or its creditors narrowly that are applicable to debts that occur as the consequence of the instruction.[136]

The issue that needs attention is whether provisions such as Article 364 – that prohibit the general meeting to pass a resolution and that may have a clear effect of giving undue benefit to some shareholders– can be applied. This is because the wronged shareholders in the present case are shareholders of the subsidiary, not the parent which could have raised such issue to challenge the resolutions according to Article 391(2).

Yet one can argue that the resolution of the subsidiary based on the instruction given by the parent can be challenged by the same shareholders. The problem is that the Code gives intense power to the parent company and the latter has a majority shareholding in the subsidiary. The subsidiary is, for all practical purposes, a company to which the rules of Share Company and PLC will be applied. However, not all rules are applicable to such a company given the special nature of the parent-subsidiary relationship.

[133] Id., Articles, 561, 559, 355 and 358.
[134] German Stock Corporation act section 317.
[135] Ibid.
[136] Commercial Code, *supra* note 18, Article 564.

Still, arguments can be raised invoking Article 395 of the Code on conflict of interest and related party transactions. Such transactions can shift resources from the subsidiary to the parent company which is detrimental to the interests of the minority shareholders and creditors of the subsidiary. Such transactions can be abused by insiders such as executives and controlling shareholders.[137] These acts directly override the capital maintenance rules that are otherwise applicable to the transferring company.[138]

Under German Law, minority shareholders and creditors can depend on at least three safeguards: *First*, the parent must compensate the subsidiary for all losses incurred during the duration of the agreement (if influence resulted from the contract), regardless of their cause. *Secondly*, the minority shareholders of the subsidiary may demand to either receive a guaranteed dividend or to be bought out by the parent at a fair price. *Third*, the creditors of the subsidiary can demand the posting of security for outstanding debts upon the termination of the agreement.[139] Other remedies include compensations, appraisal remedies or treating the enterprise as a single entity.

In Germany, "enterprise" is considered as "any entity engaged in commercial activities of a dimension making it reasonable to suspect that the entity might promote these other activities at the expense of the controlled corporation".[140] The practical effect of these provisions is to consider the group and its directors as a single entity and serve within it, as well as to provide specific safeguards to protect the most vulnerable constituencies in this arrangement.[141] Moreover, the US Model Business Corporation Act (MBCA) extends appraisal rights to minority shareholders where transactions with interested parties/conflict of interest transactions are conducted.[142]

Under the Commercial Code, shareholders of a subsidiary can request the parent company –holding more than 90% of the shares holding votes– to buy their holdings i.e. sell out rights.[143] Moreover, under a transaction of a material nature, the requirements of board approval, examination by an impartial auditor and shareholder approval may be applied.[144] Therefore, these rules on

[137] OECD, *supra* note 130, p. 11.
[138] Cahn & Donald, *supra* note 11, p. 854,
[139] Ibid.
[140] German Stock Corporation Act section 18 cum 291, 319.
[141] Cahn & Donald, *supra* note 11 p. 853.
[142] Model Business Corporation Act 2000/01/02 Supplement, (2003), 3rd Edition, *American Bar Foundation,* section 13.02.
[143] Commercial Code, *supra* note 18, Article 562 *cum* 292
[144] Id., Articles 306, 307. The provisions deal with holding companies.

the approval and examination of related party transactions may assist shareholders to secure their interests. The protection under German law is clearly stronger because some rules are available for these shareholders such as rules on disclosure of inside information or publicly announcing information necessary to assess a material related transaction's fairness, the identity of the related party and its relation to the company no later than the time of the conclusion of such transaction.[145] If the law allows a shareholder who is a related party to take part in an approving vote, safeguards must exist to prevent the related party from causing approval against the opinion of the majority of unrelated shareholders or independent directors.[146]

Another concern can be when the parent company commits to offset its profits against losses of the subsidiary or divert all or part of the profit of the subsidiary into the coffers of the parent and vice versa, thereby adversely affecting minority shareholders.[147] Such agreements are frequently entered into as a prerequisite for taxation of the parties on a consolidated basis.[148] However, such agreements should be approved by a 75 percent majority of the votes cast by the dominated or profit-transferring company's shareholders.[149]

An interesting query is whether the parent company, a controlling shareholder in the subsidiary, should be subject to liability as per Article 295 of the Code when it is found abusing its controlling power in the company. If it is so, why did the Code in its group company-related rules fail to refer as it did to some of the provisions (Article 358, 355…)? Even if it failed to do so, does the nature of group companies in Ethiopia and the purpose for their legal recognition and protection require otherwise? Article 295 renders the controlling shareholder and the company jointly and severally liable when the former is found to have committed:

- an unlawful act that jeopardizes the interests of the company, shareholders or creditors of the company;
- intermingles the property of the company with that of the shareholder;

[145] Cahn & Donald, *supra* note 11, p. 852.
[146] Ibid.
[147] Ibid.
[148] Ibid.
[149] Ibid. Moreover, under German Law, prior to the shareholder vote, the Vorstand must prepare a report on the contents of the agreement, focusing particularly –in the case of a profit transfer agreement– on the amount of compensation to be given for profits diverted. Unless the subsidiary is wholly owned, enterprise agreements must be examined by auditors and should be entered into commercial register.

- blurs the distinction between the identity of the company and that of the shareholder or uses the company as a façade to pursue his own interests and goals or those of third parties;
- deliberately releases, regarding the financial status of the company, information that can mislead the creditors of the company;
- makes use of the assets of the company for himself or the benefit of a third party without making an arm's length payment or without the knowledge or decision of an appropriate management body and
- causes the payment of dividends in excess of that permitted under the law.

Within the ambit of single-entity corporations, it is discernible by looking at this article that the Code recognizes the obligation of shadow directors. The problem, however, is that the burden to prove the commission of the above acts is not clear. Nor is it quite clear whether this provision is relevant in the case of group companies. Can shareholders who are entitled to request information and special investigation as per Article 559 cum 355, 358 and 381 require the court to hold the controlling shareholder/the parent company liable? What matters can be covered by this special investigation? The documents that can be inspected are listed under Article 381 including resolutions, minutes, financial statements, register of affiliated persons and reports of directors and auditors. These documents can lead these shareholders to ascertain whether one of the acts listed above is committed or not. However, Article 355 presupposes the liability of the management arising out of acts that jeopardize the interests of minority shareholders. It is plausible if the management is found to be liable for its unlawful acts in the interest of the controlling shareholder by which the former is made an agent to the latter.

However, the most common problems will be when the acts that give rise to the disadvantage of the minority shareholders appear under Articles 306, 328, 382, 394, and 395 where the minority shareholders are either empowered to prove the liability of the directors or request an ex-ante safeguard which at last will be subject to approval by the general meeting of shareholders. Though the Code fails to refer to single entity principles as listed above, the law can be interpreted in a way that entitles minority shareholders of the subsidiary to challenge the controlling shareholder under Article 295.

Moreover, the minority shareholder protection under Article 361 will also entitle such vulnerable shareholders to challenge resolutions of general meetings which obviously will reflect the interest of the majority vote holder, the parent in this case. Taking cognizant of the Code's treatment of the holding company and parent company interchangeably, applying the safeguarding mechanisms stipulated under the provisions that state the holding company's

obligations will be pivotal. Considering the subsidiary as either a Share Company or PLC, the specific protections extended to minority shareholders and accompanying obligations imposed on shadow directors such as under Article 295 contribute to the alleviation of potential problems peculiar to minority shareholders of the subsidiary. Such a nuanced interpretation will enable the minority shareholders of the subsidiary to exercise some important safeguards.[150] These safeguards that can be broadly classified into derivative rights and inherent rights are briefly discussed in the following section.

7. Derivative and Inherent Rights of Shareholders

7.1 Derivative rights

Shareholders of the subsidiary can exercise derivative rights to challenge a related party transaction between the parent and subsidiary company on the ground of serious damage to the latter or fraud.[151] Similar to the German Law, this transaction should be first approved by the directors of the concerned company. Article 306(4) prohibits the directors having a conflict of interest from voting regarding the approval of the transaction. Which directors are these? What about the directors appointed by the parent company or even the parent company itself as a controlling shareholder?

It is a fundamental principle that no one shall be a judge in his/her own case, and it can be argued that a shareholder or a director whose transaction has brought about a conflict of interest should not vote on the approval or rejection of the transaction. In fact, the fraudster party, and members of the board of directors who knew or should have known the commission of the fraud or the fact that the dealings would cause serious damage to the company shall be jointly and severally liable for damages incurred by the company as a result of the dealings.[152]

The related parties are listed under Article 306(6) and include directors, auditors, and shareholders who have purchased at least ten percent of the shares of the company and holding or subsidiary to the company concerned. This derivative right is also recognized under Article 328(3) where shareholders representing ten percent of the capital can bring an action against a party (which may include director/s) whose default causes damage to the company within three months from the time when the company should have

[150] For example, rights under Articles 306, 307, 328, 357, 358, 361, 382, 385, 391, 395 and Articles referred under Article 559.
[151] Ibid, Article 306.
[152] Ibid.

brought a case. An important clause is that despite the company's initiative to discontinue the proceeding against the responsible directors, the minority shareholders holding ten percent of the capital have the right to oppose the adoption of the resolution.[153]

Minority shareholders are also entitled to request information from their company or its parent company where they believe that damage to the subsidiary has occurred;[154] or they may propose an appointment of a special investigator.[155] Where the ordinary general meeting has rejected the proposal, shareholders representing one-tenth of the capital of the company may apply to the court which shall order such appointment or require an explanation.[156]

7.2 Inherent shareholder rights

Minority shareholders can exercise rights on their own behalf and interest against the parent company, its directors or a sham or façade subsidiary. Beyond what they can exercise, the rights specified under Articles 559 cum 355 and 381, cause for inspectors to be appointed and investigate the misdeeds of directors, controlling shareholders or other related parties. The court or another relevant authority can also appoint inspectors to conduct an investigation where it has good reason to believe that the operations of the company, *inter alia*, reveal: (1) fraud committed or likely to be committed on creditors of the company; (2) acts prejudicial to the rights of certain shareholders; (3) illegal or fraudulent activities; or (4) acts which constitute a criminal offense.[157]

The parent company as a shareholder or even a director acting on his own behalf or on behalf of a third party may not –in matters that involve direct or indirect conflict with the interest of the company– vote on resolutions relating to their duties, liabilities and conflict between the interest of the company and their own interest.[158] In particular, a director or any other person, who stands to benefit from an agreement involving a conflict of interest with the company, may not vote at the general meeting considering the approval of such agreement, even if he happens to be a shareholder.[159] In such a case where the agreement related to a transaction with affiliated persons is

[153] Id., Article 328(6)
[154] Id., Article 382(2)
[155] Id., Article 396.
[156] Ibid.
[157] Id., Article 357.
[158] Id., Article 385.
[159] Id., Article 395.

concerned, the subsidiary company itself, shareholders and even creditors can apply for invalidation of the agreement. This also applies when the resolution of the general meeting is contrary to law or the Memorandum of Association. Any interested party whose interest is jeopardized by a resolution adopted may apply to a court to set aside such resolution within ninety consecutive days from the date s/he knew of the adoption of the resolution.[160]

8. Subsidiary Insolvency and Creditors' Protection

The parent company has, among other things, the right to give instruction to the subsidiary, shift assets and/or exploit its corporate opportunity. These acts can affect the subsidiary and even expose it to insolvency. While activities of subsidiaries are conducted in the interest of the whole group, liability arising from these activities is limited to the assets of the individual subsidiary.[161] The Code does not impose mandatory rescue obligation on the parent[162]. This will affect the interests of creditors and minority shareholders alike.

Moreover, unlike the experiences in other countries, the Code does not enable the application of the principle of corporate veil except where the subsidiary company, which has been managed according to instructions issued by its parent shall hold the latter liable for any unpaid debts of the subsidiary incurred after the said crisis point.[163] However, if the parent company acts without delay for the restructuring or liquidation process of the subsidiary, it will not be liable even to creditors. This is problematic given the reason for the loss to the creditors emanates from the intervention of the parent in the affairs of the subsidiary even if it did it in the interest of the group.

The only possibility that the court can pierce the veil for the creditor's interest is when the parent company has managed the subsidiary to the detriment of the subsidiary and in violation of the interest of the group where it shall be held liable for any unpaid debts of the subsidiary which are the consequences of the harmful instructions.[164] The Code is not, however, clear whether a parent company's acts or the subsidiary company's obedience to the instructions of the former can raise grounds for treatment as "alter ego, piercing the corporate veil, single business entity or agency to make it liable to the debts of the subsidiary" which are common law rules in the US and UK jurisdictions so that courts can enforce mandatory shareholder/director rules

[160] Id., Article 391(2).
[161] Cahn & Donald, *supra* note 11, p 850.
[162] Articles 560 and 564.
[163] Id., Article 564(2).
[164] Article 564(3).

to be observed in group companies.[165] These principles generally apply if the parent has disregarded corporate formalities or, has actively participated in or exercised control over, the subsidiary's operations so that the subsidiary is effectively a mere instrument of its parent.[166]

Similar to the 'alter ego' and 'piercing of the corporate veil' doctrines, substantive consolidation permits the court to disregard the separate nature of two or more corporate entities by allowing the bankruptcy court to permit the assets and liabilities of affiliated debtors to be treated as a single pool.[167] Some countries follow the facts of unconscionable abuse of legal personality[168], employees' protection[169], tax liabilities[170], intervention in the existence of a company and intentional tort acts (public policy)[171] grounds to disregard the parent company's defense of entity doctrine.

Jurisdictions such as UK, Germany and Canada justify piercing the corporate veil of the parent company to secure the liabilities of its subsidiary when certain contractual terms are violated. Under English law, a parent entity (domestic or foreign) of a limited company cannot be held liable for the debts of that subsidiary upon its insolvency unless it has contractually agreed to accept liability.[172]

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[165] Dennis F. Dunne and Gerard Uzzi (2022). *Restructuring and insolvency in the United States: Overview*, Milbank LLP, Thomson Reuters, 2022 at 15.

[166] Ibid.

[167] Ibid.

[168] In South Africa, if the court finds that the incorporation, use of, or any act by or on behalf of the insolvent subsidiary constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, it can declare that the company will be deemed not to be a juristic person in respect of any right, liability or obligation of the company or of a shareholder. Lyndon Norley *et a*l (2022), Adam Harris, Juliette de Hutton, Aanisah Ramroop, Daisy Fakude, *Insolvency in south Africa*, Thomson Reuters, at 21.

[169] David F W Cohen, Clifton Prophet and Thomas Gertner (2022), *Restructuring and insolvency in Canada: Overview*, Thomson Reuters, at 18

[170] Under tax legislation, it is also possible for the parent to become liable for the insolvent subsidiary's tax liabilities if the parent company has received assets from the subsidiary for less than the fair market value. Ibid, p.18.

[171] In Germany, anyone, including a shareholder and a parent entity, can be liable for intentional damage contrary to public policy. Anyone (including a shareholder) is, for example, liable for interventions jeopardizing the existence of the company. Georg Streit *et al* (2022), *Restructuring and Insolvency in Germany: Overview*, Thomson Reuters, at 18.

[172] James Terry et al (2022). *Restructuring and Insolvency in the UK (England & Wales): Overview* (Akin Gump LLP, Thomson Reuters) at 21.

In Ethiopia, there is no clear law in this respect. One can reason that since a contractual agreement has been adopted as a ground for control[173] the mere fact of agreement between the parent company and its subsidiary can include acceptance of liability by the former upon the subsidiary's insolvency. In Germany, suretyship, guarantee, 'hard' letter of comfort, intercompany domination and/or profit and loss transfer agreements or other contractual obligation are grounds for disregarding the corporate veil of the parent company during insolvency.[174]

An immense power bestowed on the parent company regarding control and direction of its subsidiary with little safeguards for creditors and minority shareholders becomes detrimental to and can aggravate the insolvency of the subsidiary. This emboldens, according to, Lord Walker, "risk-averse individuals to use artificial corporate structures in order to insulate themselves against the responsibility to an insolvent company's unsecured creditors".[175]

As discussed above, the application of Article 295 in the case of group companies can alleviate such legal loopholes. The provision can be invoked especially when the parent shareholder engages in an unlawful act –that jeopardizes the interests of the subsidiary and its creditors of the company and/or blurs the distinction between the identity of the company and itself, or uses the company as a façade to pursue his own interests and goals or those of the third parties.[176] Under such situations, applying the principle of *piercing the corporate veil* will alleviate the problem and parallel Ethiopia with other countries.

9. Conclusion

Entities within a corporate group are commonly referred to as parent-subsidiary or holding-subsidiary entities across various jurisdictions. The Ethiopian Commercial Code (2021), much like the German Law, delineates specific regulations for the governance of these group entities, encompassing both domestic and foreign subsidiaries. However, the Code falls short of the standards set by the German Stock Corporations Act and comparable regulations in other nations. It does not establish sufficient protective measures for subsidiaries and their stakeholders.

[173] The Code recognizes contract as a ground of control the subsidiary. *See* Article 552(2) & (3)(b).
[174] Georg Streit *supra* note 171 at 18.
[175] Cahn & Donald *supra* note 11, at 850.
[176] Article 295(1) & (3).

Although certain provisions within the Code draw from the regulatory framework for single-entity companies to safeguard the interests of minority shareholders in subsidiaries, it overlooks key principles of creditor protection and minority shareholders' rights. Furthermore, the Code does not sufficiently address challenges pertaining to aligning the fiduciary responsibilities of subsidiary directors with overarching group strategy, balancing group interests against those of minority shareholders, and managing conflicts between subsidiary insolvency and creditor rights.

The Code seems to prioritize the unique characteristics of group companies by establishing specific rules for them. This limits the applicability of single entity company regulations, restricting its relevance to only a select few provisions of the latter, potentially jeopardizing the rights of more vulnerable stakeholders. Such an oversight may compromise the integral interests of subsidiaries, their minority shareholders, and creditors, which could have otherwise been fortified through the wider application of general corporate governance principles. To rectify these shortcomings, a more expansive interpretation of the rules that govern corporate groups is recommended, coupled with a broader application of single-entity company provisions. Such an approach would significantly enhance the derivative and inherent rights of shareholders.

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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.
7. Weak consumption of research products in the legal professional community and in government institutions, and poor state of constructive feedback.
8. Inadequate attention to relevance of research to the real life or actual problems of the society.

Vision of law schools

Law schools shall have vision towards elevating the standard and quality of legal education to the level of leading law schools in other countries, and towards preparing graduates who will have optimum impact in Ethiopia's development, democracy, good governance and social justice.

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Law schools shall promote the intellectual and social conditions of Ethiopia by providing equitably accessible quality legal education and training programs through teaching, research and service to prepare competent and responsible members of the legal profession who actively contribute towards rule of law, democracy, human rights, good governance, social justice, equality, tolerance and development.

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