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Bahir Dar University Journal of Law

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In This Issue በዚህ እትም

በ ባህር ዳር ዩንቨርሲቲ ህግ ት/ቤት በ ዓመት ሁለት ጊዜ ፣ የ ሚሠተምየ ሕግ መጽሔት

A bi-annual law journal published by the Bahir Dar University School of Law

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Established in 2010

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Bahir Dar University Journal of Law

ቅጽ ፩ ቁጥር. ፪		ነ ሐሴ ፪ሺ፪
Vol. 1 No. 2		**August 2010**

Message from the Editorial Committee

Let Us carry it forward!

The Editorial Committee of BDU is delighted to present you the second issue of the first volume of the *Bahir Dar University Journal of Law*. The Editorial Committee extends its gratitude for those people who made it happen.

At this stage the Editorial Committee would like to make an undisguised appeal for sustained contribution of manuscripts. It is essential that the community of legal professionals and public and private institutions be supplied with research outputs on matters related to law. For those of us in the academic circle doing it is our destiny. It is also essential that the practicing legal professionals research and reflect upon the law in action. The scientific presentation and dissemination of ideas by individuals from within and without the academic world is vital to nurture a developing culture of legal discourse, enhance the creation of new knowledge and help to develop the legal system. It is only then that we will be able to scale up the heights of quality justice. In this regard the continued publication of the *Bahir Dar University Journal of Law* is an invaluable forum and let us carry forward the humble beginning!

The Editorial Committee, thus, calls upon members of the academia, practitioners, judges and members of the legal profession in general to submit contributions on various legal issues pertaining to Ethiopian laws. The *Journal* welcomes research articles, comments on cases which standout for any important reason, reflections on current legal issues and book reviews. (Submission guidelines are appended at the end pages of this issue)

Law School Full Time Staff

No	Name of Instructor	Sex	Qualification
1.	Addisu Damtie	M	LLB, LLM- PhD candidate
2.	Alebachew Birhanu	M	LLB, LLM -Lecturer
3.	Amdebrihan Ayalew	M	LLB, LLM -Lecturer
4.	Belayneh Admasu	M	LLB, LLM- PhD Candidate
5.	Benyam Tafese	M	LLB, LLM- Lecturer
6.	Elias Hizkeal	M	LLB- LLM candidate
7.	Ermias Ayalew	M	LLB, LLM- PhD candidate
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10.	H/gabriel Gedecho	M	LLB, LLM- Lecturer
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13.	Kokebie Wolde	M	LLB, LLM- Lecturer
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15.	Molla Ababu	M	LLB, LLM- PhD candidate
16.	Muluneh Worku	M	LLB, LLM- PhD candidate
17.	Nega Ewunete	M	LLB, LLM- PhD candidate
18.	Temesgen Sisay	M	LLB-Asst. Lecturer
19.	Tessema Simachew	M	LLB-Asst. Lecturer
20.	Tilahun Weldie	M	LLB, LLM- Lecturer
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27.	Mekdes Tadele	F	LLB, LLM, PhD Candidate
28.	Mizanie Abate	M	LLB, LLM, PhD Candidate
29.	Nega Mirete	M	LLB, LLM Candidate
30.	Selamawit Bogale	F	LLB, LLM Candidate
31.	Yonas Tesfa	M	LLB, LLM, PhD Candidate
32.	Zelalem Demelash	M	LLB, LLM Candidate
33.	Amanu Mekonen	M	BA, MA - Lecturer
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35.	Yelfign Ayenew	F	BA, MA - Lecturer
36.	Yohannes Mersha	M	BA, MA - Lecturer
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38.	Zewdu Mangesha	M	LLB-Gradu. Asst II
39.	Alemu Dagnew	M	LLB-Gradu. Asst II
40.	Desalegd Tigabu	M	LLB-Gradu. Asst II
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1.	Gashaw Zewdu	M	LLM
2.	Dessie Seyoum	M	LLM
3.	Geremew G/Tsadik	M	LLM
4.	Yeneneh Simegn	M	LLM

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Bahir Dar University Journal of Law

ቅጽ ፩ ቁጥር ፩	ነ ሐሴ ፪ሺ፪
Vol. 1 No. 2	August 2010

Content

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School of Law, Bahir Dar University[1]

Brief Description

School of Law,
Bahir Dar University

Established in: 1997

Academic Programs:

LLB - Regular, Evening, Distance (Project) & Summer in-service

BA - in Governance and Development Studies- Regular and Evening

LLM - in Environment and Natural resources Law

MA - in Gender and Development Studies

Publication:

Bahir Dar University Journal of Law

Heads (Individuals who served as Department Head, Dean and Director):

Tadesse Kassa (Department Head and Later Faculty Dean)

Balew Mersha (Department Head)

Belachew Mekuria (Department Head and later Faculty of Law Dean)

Muluneh Worku (Faculty of Law Dean)

Worku Yaze (Dean of Faculty of Law and Currently re-named Director of Law School)

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[1] Prepared by Kokebe Wolde, Coordinator of the Postgraduate, Research and Community Service of the School of Law, and by Worku Yaze, Director of the School of Law, Bahir Dar University.

I. Short History of the School

The Law School of Bahir Dar University is relatively one of the youngest yet most vibrantly developing Law Schools in Ethiopia. It is established with the mission of producing adequately trained legal professionals in the field that actively work for the enhancement of democracy, good governance, tolerance, equality, social justice and economic development of the country through quality teaching, research and public service. It aims to contribute its share towards the promotion and realization of the values of democracy, rule of law, human rights and freedoms, good governance, etc. In practice, the School is now well known for its nascent efforts in producing well qualified professionals, providing professional services and conducting research works that have real impacts in the life of the Ethiopian society. It is very committed to continue its efforts to contribute its share of responsibility in guaranteeing the proper dissemination of basic ideals of law, universally acknowledged human rights and democratic principles.

Historically, law teaching in Bahir Dar University commenced in 1997. By then diploma level law courses used to be offered by part-timer law instructors coming from the nearby justice institutions of the Amhara National Regional State at Bahir Dar in the Continuing Education program of the University. Later in 2001, the *Department of Law* was established with a handful of full-time LL.B graduates of the Law Faculty of Addis Ababa University within the then Faculty of Business and Economics.

The department soon increased its full-time staff and expanded its programs. It went on giving trainings in regular, extension and summer programs in diploma as well as degree levels. Following its better performance within the university and increase of its staff and student population, the department attained a *faculty* status in 2004. Following the business re-designing and institutional transformation

measure (BPR) of the University, the Law Faculty is re-organized and re-named as School of Law in July 2009.

With this short span of time, this young Law School has contributed a lot to the justice sector of the country. It has trained, educated and graduated a mass of regular students drawn from all over the country in its regular Advanced Diploma and Degree Programs. It has trained a lot of people living in and around Bahir Dar under in its diploma and degree extension programs. It has also given tailor-made trainings to many people working in the various justice institutions of regional states in the country in its diploma as well as Degree summer and Distance (with face-to-face component) programs. In this regard the unique contribution of the School to the justice institutions of the Amhara, Benishangul-Gumuz, Afar and Gambella regional states of Federal Ethiopia has been so remarkable. The first two regional states' justice institutions have continued in this partnership work with the University and the School. At this moment the School is training some 386 justice personnel at LLB Degree level, in its distance and summer in-service programs.

II. Organizational Structure

Within the organizational set up of Bahir Dar University, the Law school is accountable to the Vice Presidents of the University. Within this organizational structure, the School is autonomous in many respects. It prepares its own budget and administers upon approval. It runs its own day-today activities by its own. The highest decision making organ at the Faculty/School level has been, and still is, the Academic Commission and the Dean/ Director of the School runs day-to-day activities. Most activities of the School are accomplished by the various units of the School in close consultation and supervision of the Director. There are a number of units within the School: Research and Publication Unit; Continuing Education Unit; Distance and Summer Education Program; Human Rights Centre; Legal Aid Centre;

Program Management and Marketing Case Team; Customer Relations and Information Case Team; Scholarship and Projects Unit; Seminar and Public Lecture Unit; and Moot Court Center.

The School also hosts the Department of Gender and Development Studies. The Department has a Department Council (DC), the highest decision making body at the department level, and a Department Head, who runs the day-to-day activities of the Department. Preparations are underway to enable this department to develop into a self sufficient institute having its own autonomy.

III. Academic Staff Profile

The School has young, very energetic and ambitious academic staff, some of whom have rich experiences in the legal practice before they joined the School. Including those on study leave (but excluding two expatriate staff- one professor and one assistant professor, whose term of employments expired recently) the School has a total of 41 full time instructors, four of whom are female. The School often employs part-timers from the nearby justice institutions particularly for the extension programs.

Of the full-time instructors, twenty-four are second degree holders. Eleven staff members are further pursuing their PhD studies while eight other members are studying for their LLM degrees abroad and within the country. In terms of academic rank the School has at the time of writing twenty-four *Lecturer*s, twelve *Assistant Lecturer*s and five just recently employed *Graduate Assistant II*s.

IV. Academic Programs

Currently, the Law School offers trainings both in the undergraduate and Masters' programs. The undergraduate programs are:

- LLB Degree in Laws

- BA Degree in Good Governance and Development Studies.

The two postgraduate programs are[2]:

- MA in Gender and Development Studies
- LLM in Environmental and Natural Resources Law.

The School runs undergraduate Regular, Extension, Summer, Distance[3] (with Face -to- Face component) LLB Programs, and Regular and Extension BA Programs in Good Governance and Development studies. There are about 718 regular, 324 extension, 125 summer and 256 Distance (with Face -to- Face component) undergraduate students making a total of 1423 students. It has also started to offer trainings in masters' degree programs in Gender and Development Studies and in Environmental and Natural Resources Law. There are 10 regular, 22 Summer MA students in Gender and Development Studies and 7 regular LLM students in Environmental and Natural Resources Law.

V. Teaching and learning

There is an exemplary harmonious relationship between the academic staff and law students. Conducting interactive classes as per the university's schedule and other extraordinary arrangements is a well established practice. Most instructors give individual and group assignments and usually send their regular and extension students to the nearby justice institutions with a view to enable them acquire the necessary skill and knowledge.

The School often encourages students to participate in national and international moot court competitions. So far, our students have exhibited good performance in the various national and international moot court competitions. There is also a well established Law

[2] Also, LLM in Criminal Justice is expected to begin in the very near future.

[3] This is different from the LLB program being offered by the University under the Distance Education Program (which is or used to be open to all interested applicants that meet admission requirements).

Students' Union which is playing crucial roles in supporting the teaching-learning process and related activities.

VI. Research and Publication

At the Bahir Dar University School of Law there is a growing trend of the staff to engage in conducting research works and writing articles and case comments. The research activities are conducted either with the financial assistance and cooperation of partner institutions or with research grants from the School's budget. An important step in the research and publication activity of the School is the launching of the *Bahir Dar University Journal of Law*, a bi-annual legal periodical. The first issue of this Journal is distributed and work is well under way on the second issue. In order to facilitate the dissemination of research results there is plan to host at the University a bi-annual law conference.

VII. Community service and Working in Partnership

The Law School is well known for its community services. Through its Free Legal Aid Center, and financial support from ActionAid Ethiopia, Northern Branch Office at Bahir Dar, it has given free legal aid service to a number of needy persons in and around Bahir Dar. Women, people with disability, people living with HIV/AIDS and generally those who couldn't afford hiring their own lawyer or paying for legal advice have benefited much from the Free Legal Aid Center of the Law School.

The School, in collaboration with ActionAid Ethiopia Northern Branch at Bahir Dar and Amhara Mass Media Agency has given continuous legal awareness to the public at large through radio program. In the past, the School working in collaboration with Amhara Regional State Ethics and Anti-Corruption Commission, with Amhara Development Association (ADA) and with Action Professionals' Association for the People (APAP) and the Law Students' Union (LSU)

had given trainings on various issues related to corruption, budget, gender and human rights to the wider community living in the urban and rural areas of the Amhara Regional State. It intends to reinforce such partnership activities and enhance its community service. Arrangements are well underway to accomplish further useful activities in partnership with the Ethiopian Human Rights Commission.

The Law School has built a good culture of working in partnership with many governmental and non-governmental institutions. Apart from its close ties to the respective Justice Bureau, Supreme Court, Police Commission, Ethics and Anti-Corruption Commission and Prison Commission of the various regional states, especially of the Amhara Regional State, it has well established relationships with the Ethiopian Human Rights Commission, the FDRE Institution of the Ombudsman, Federal Democratic Republic of Ethiopian Justice and Legal System Research Institute, and Amhara National Regional State Women's Affairs Bureau. In partnership with and with financial support of the Institution of the Ombudsman, Amhara Regional State Justice Bureau, Amhara National Regional State Women's Affairs Bureau and ActionAid Ethiopia (Northern Branch), it has conducted various research works on various themes.
The Law School had been a beneficiary of Nuffic /NPT-Ethiopia/ Project. With a grant from the Netherlands Government, it has upgraded a substantial number of its staff qualification from LLB degree to LLM degree; and, it has acquired a lot of valuable and up-to-date law books from Europe. Through a subscription of this project, there is a good deal of an online law journals' access of the staff and law students which is expected to extend until 2012.

VIII. Looking to the future

The Bahir Dar University School of Law is set to become a research school. In accordance with the national strategic plan, it has

started downsizing its undergraduate intake and is working towards becoming a research and postgraduate School and a center of community services.

Environmental Democracy in Ethiopia: Emphasis on Public Participation in Environmental Impact Assessment Process

Dejene Girma Janka*

Abstract

The concept *environmental democracy* refers to a participatory form of environmental decision-making. Thus, in a system where there is environmental democracy, the public will be able to engage in decisions that will have impacts on the environment. On the other hand, different instruments at international, regional, and national levels have been emerging with a view to ensuring public participation in environmental decision-making processes. This is so because, nowadays, there is a general consensus that public participation in making environmentally fateful decisions will contribute to the effective protection of the environment. In Ethiopia, too, there are laws, policies, regulations, etc. which aim at ensuring environmental protection. Since environmental democracy is of paramount importance for effective environmental protection, this article intends to explore the extent to which these laws, policies, regulations, etc. can accommodate the needs of environmental democracy by focusing on public participation in the environmental impact assessment process. It will also explore the extent to which the public is participating in environmental impact assessment process in practice. The article argues that despite the fact that Ethiopia has put in place a policy framework to ensure public participation in the environmental impact assessment process thereby opening door for environmental democracy and there is also some sort of public participation in the environmental impact assessment process in practice, environmental democracy in Ethiopia is still at its early stage. In order to show the correctness or otherwise of this argument, the methods the writer has used to gather information are literature review, legal and other instruments' analysis, and interviews.

A. Introduction

Environmental democracy refers to a system that requires the participation of everyone with a stake in the handling of environmental issues. Thus, environmental democracy favours and requires the participation of the

* LL.B, LL.M, Ph.D Candidate, lecturer at the Faculty of Law of Jimma University. This article was presented on the workshop prepared by the University Utrecht in collaboration with the Faculties of Law of Jimma University and Bahir Dar University. Thus, it benefited form the comments given during the workshop. I am grateful to those who commented on the paper. More importantly, I am really grateful to those who edited the paper and gave me constructive comments.

public on decisions that will have impact, be it positive or negative, on the environment. For instance, the adoption of environmental laws, policies and programmes and the implementation of projects, public or private, are some of the matters pertaining to the environment. Environmental democracy, therefore, requires the participation of the public (stakeholders) in decisions involving these matters.

Fortunately, the concept environmental democracy is now obtaining wider acceptance. For instance, international instruments like the Rio Declaration contain provisions that require and facilitate public participation in environmental decision-making thereby promoting environmental democracy. At the regional level, one may consider the Aarhus Convention which, *inter alia*, focuses on public participation on decisions involving environmental matters which encourages and facilitates environmental democracy. At the national level, too, countries have been making laws and policies which aim at ensuring public participation in environmental decision-makings which in turn can facilitates environmental democracy. On her part, Ethiopia has also put in place policy framework (laws, policies, and others) to protect the environment starting from the promulgation of its current Constitution in 1995. Although the limit of environmental democracy goes far beyond environmental impact assessment process, this article will limit itself, due to practical limitations, to the consideration of the extent to which this policy framework accommodates the needs of environmental democracy by focusing *only public participation in environmental impact assessment process* and *the extent to which the public has been participating in environmental impact assessment in practice*. Moreover, as matter of practical limitation, this article does not purport to consider the laws, policies, programmes, and other documents of regional governments in the field of environment although they are undoubtedly relevant to environmental democracy in Ethiopia. Further, instead of looking at Environmental Impact Assessment (EIA) reports submitted to the Federal Environmental Protection Authority (EPA), the writer has

opted to interview the officials at the Federal EPA, who deal with such reports, and some stakeholders to know whether or not public participation in the EIA process actually exists on the ground.

Bearing the above provisos in mind, the article is divided, in order to adequately explore its theme, into five sections; while the first section is the introductory part, the second section deals with environmental democracy and public participation, the third section deals with policy framework for public participation in the EIA process in Ethiopia (and, hence, for environmental democracy), and the fourth section deals with the practice of public participation in the EIA process in Ethiopia to see the extent to which environmental democracy exists on the ground. Then, the final section contains the conclusion and recommendations which will wind-up the discussion.

B. Environmental democracy and public participation

Modern environmental thought emerged in the decade following 1962: the publication of *Silent Spring* (the "clarion call" on pesticides poisoning from Rachel Carson) and the 1972 Stockholm Conference on the Human Environment (which created the basis of the United Nations Environment Programme).[4] During this period, the environmental movement and its underlying philosophies were becoming a global phenomenon.[5] Almost four decades later, environmental issues are still seen as global phenomena. Indeed, environmental issues are now one of the priority areas the international community is paying attention to. This is so because population growth, advancement in technology, and change in life

[4] See Rachel Carson: **Silent Spring**, Boston, 1962, mentioned in Giulia Parola, **Towards Environmental Democracy,** Faculty of Law, University of Iceland, 2009 (unpublished), p 19 and Giulia Parola, **Towards Environmental Democracy,** Faculty of Law, University of Iceland, 2009(unpublished), p 19.

[5] Ibid

style have been causing major environmental problems[6] such as pollution, habitat destruction, species extinction, chemical risk, and high energy production which have global dimension.[7] Of course, any environmental degradation caused by natural or anthropogenic factors is generally self-rectified by nature itself. Thus, environmental problems occur when nature becomes unable to rectify environmental degradations on its own,[8] whereas the current environmental problems are more serious either due to their magnitude or type thereby making it difficult for nature alone to rectify them.[9]

Can *environmental democracy* be of any help to overcome the current environmental problems? At this point one must note that this writing does not deal with the political model that is better for environmental protection;[10] rather, it proceeds on the assumption that

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[6] In generic sense, environmental problems are sometimes called environmental 'pollution'. See P.C.Mishra and R.C. Das, **Environmental Law and Society: A text in Environmental Studies**, Macmillan, India, 2001, p 17.

[7] Stephen R. Champman, **Environmental Law and Policy**, Prentice Hall, Columbus, Ohio, 1998, p13. Some writers argue that there are five big causes of environmental problems: these are population growth, wasteful resource use, poverty, poor environmental accounting, and ecological ignorance. See G. Tyler Miller, **Sustaining the Earth**, 7th ed, Thompson Brooks/Cole, 2005, p 11

[8] H.V. Jadhav and S.H. Purohit, *Global Warming and Environmental Laws*, 1st Edition, Himalaya Publishing House, Mumbai, 2007, p 17

[9] For example, the *Bhopal gas tragedy* (India) of 1984 due to the discharge of toxic gas and the *Chernobyl* Incident (USSR) of 1986 due to large-scale radioactive contamination alone resulted in the death of thousands of human lives. H.V. Jadhav and S.H. Purohit, cited at note 5, p. 17

[10] For example, some writers argue that authoritarian or anarchist model is a better model for environmental protection. According to authoritarian perspective, the protection of environment and long term human survival require authoritarian politics. This is so because environmental crises require extraordinary concentration of power capable of suppressing human needs, whereas authoritarian system allows a state to have concentrated power and use it to suppress human wants that, if left unchecked, would overwhelm the carrying capacity of the earth. On the other hand, authoritarian model claims that

democracy is a better model to address environmental problems[11] and then consider why public participation in environmental decision-

democratic government is not determined enough to do so because it lacks the concentration of power necessary to suppress the needs of citizens to protect the environment. See W. Ophuls, **Ecology and the Politics of Scarcity: A Prologue to a Political Theory of the Steady State**, San Francisco 1977; R. Heilbronner: **An Inquiry into the Human Prospect**, New York 1974; Paehlke, **"Democracy, bureaucracy, and environmentalism", Environmental Ethics**, 1988, p. 291; J. Passmore, **Man's Responsibility for Nature: Ecological Problems and Western Traditions**, New York 1974; K.J. Walker, "**The Environmental Crisis: A Critique of Neo-Hobbesian Responses**," Polity, vol. 21, 1988, p. 67–81; and D. Torgerson: **"Constituting Green Democracy: A political project"**, The Good Society, Vol 17, N. 2, 2008, p.18, all cited in Giulia Parola, cited at note 1, p 20. On the other hand, Anarchist perspective is a view that says environmental crises can be overcome through "institutional transformation toward a pattern of decentralized, egalitarian and self-managing local communities attuned to ecological constraints and complexities". So, according to this approach, the cause for environmental problem is not uncontrolled human desire advanced by authoritarian perspective but hierarchical social structures that are capable of distorting the human potential to create cooperative communities that can live in harmony with nature. See Kenny, "**Para*doxes of Community" in Democracy and Green Political Thought*,** eds. B. Doherty and M. de Geus, London 1996, p. 23 and D. Torgerson: **"Constituting Green Democracy: A political project**", *The Good Society*, Vol. 17, N. 2, 2008, p. 18, cited in Giulia Parola, cited at noted 1, p 20

[11] Although some have argued that democracy leads to environmental policy inaction, many scholars think that democracy improves environmental quality. A lack of democracy is at the root of many ecological problems. Some scholars argue that political rights and freedom of information help the promotion of environmental groups, raising public awareness and encouraging environmental legislation. Democracy is more reactive to the environmental needs of the public than other systems. See J. Rocheleau, **"Democracy and Ecological Soundness", *Ethics and the Environmental***, Vol. 4, 1999, p.38; C. B. Schultz and T.R. Crockett: **"Economic Development, Democratization, and Environmental Protection in Eastern Europe"**, *Boston College Environmental Affairs Law Review*, vol. 18, 1990, p. 53-84; R. A. Payne: **"Freedom and the Environment"**, *Journal of Democracy*, vol. 6, 1995, p. 41-55; V. Kotov and E. Nikitina, **"Russia and International Environmental Cooperation" in *Green Globe Yearbook of International Cooperation on***

making is necessary and the extent to which such participation exists in Ethiopia. That being said, what is *environmental democracy*? One may try to define the term *environmental democracy* by first looking at the meanings/features of the two words-democracy and environment-separately. To begin with, *democracy* is a fluid concept that defies any single and universally acceptable meaning.[12] However, it is a system of government that is characterized by popular control.[13] That means, democracy is a system of government that allows people to decide on their fate by controlling decision-makers,[14] whereas participation is one of the mechanisms the public can use to control decision-makers.

Environment and Development, eds by H.O. Bergesen and G. Parmann, Oxford, 1995, p. 17-27; E. Neumayer, **"Do Democracies Exhibit Stronger International Cross Sectional Analysis"**, *Journal of Peace Research*, 2002, p. 139-164; E. B. Weiss and H. K. Jacobsen: **"Getting Countries to Comply with International Agreements"**, *Environment,* vol. 41, 1999, p. 16-23. E. Berge: **"Democracy and Human Rights: Conditions for Sustainable Resource Utilization" in: *Who Pays the Price? The Socio cultural Context of Environmental Crisis***, ed B.R. Johnson, p. 187-193, all cited in Giulia Parola, cited at noted 1, p 22-23

[12] For example, the following are some of the definitions of the concept *democracy* different scholars offer: democracy refers to 'a political system in which power is shared by all'; democracy refers to 'a political system where the will of the whole people prevails in all important matters'; democracy refers to 'a system in which there is a government we can get rid of when we want to'; democracy refers to 'a system by which ordinary citizens exert a relatively high degree of control over their leaders'; democracy refers to 'a political system which supplies a regular constitutional opportunities for changing governing officials'; and, democracy refers to 'a system which ensures the responsibility of officials'. See Tatu Vanhanen, **The process of Democratization: A Comparative Study of 147 States, 1980-1988**, Crane Russak, New York, Washington DC, London, 1990, pp 7-9. These different definitions have different points to emphasis. However, if we closely scrutinize them, we will see that *popular control* is one of the features they share.

[13] Indeed, some have argued that *popular control* is one of the underlying or core principles of democracy. David Beethan, **Democracy and Human Rights**, Polity Press, UK and USA, 2000, p 4-5

[14] Tatu Vanhanen, cited at note 9, p 8-9

Therefore, democracy allows the public to participate in the making of decisions that affect their interests. On the other hand, *environment* can be defined as everything that surrounds us, both the natural world in which we live as well as the things produced by us.[15] Thus, it comprises the biosphere (the actual livable space covering the earth), the atmosphere (the air component of the environment), the hydrosphere (the water component of the environment), and the lithosphere (the soil component of the environment).[16]

By conflating the points raised in relation to both concepts, *environmental democracy* could be defined or understood as a system where the public controls those who make decisions that affect the environment or its components. Thus, public participation in environmental decision making becomes an important element of environmental democracy. Other writers have also defined the term environmental democracy in more or less similar fashion. For example, Michael Mason defines environmental democracy as a participatory and ecologically rational form of collective decision-making.[17] According to Hazen, environmental democracy is the notion that holds that environmental issues must be addressed by all those affected by their outcome, not just by governments and industrial sectors.[18] She adds that for those whose daily lives reflect the quality of their environment, participation in environmental decision-making is as important as participation in education, health care, finance and government.[19] Parola also defines Environmental democracy as a

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[15] P.C.Mishra and R.C. Das, cited at note 3, p 1 and H.V. Jadhav and S.H. cited at note 5, p. 8

[16] H.V. Jadhav and S.H. Purohit, cited at note 5, p 8

[17] M. Mason, **Environmental Democracy**, Earthscan Publications Ltd, London, 2006, p 1.

[18] SUSAN HAZEN, **Environmental democracy**, (1998) available at http://www.unep.org/ourplanet/imgversn/86/hazen.html, accessed on 13 May 2010

[19] Ibid

system where communities manage their immediate environment through deliberative and participatory institutions.[20] Based on these definitions, therefore, it could be concluded that public participation in environmental decision-making is a glaring feature of environmental democracy.

However, in order to facilitate the participation of the public in environmental decision-making, governments' transparency is of paramount importance.[21] In other words, in order to exercise its right to participate in decision-making, the public needs to get, from the government, the information on which decision is to rest. Moreover, the public needs to get the chance to give their opinions and influence decision. This is why some writers argue that access to information motivates and empowers people to participate in an informed manner, whereas lack of access to information hinders the public from making meaningful participation in the decision-making process. In this regard, actually, governments pledged, in the 1992 Rio Declaration on Environment and Development, to open environmental decision-making to public input and scrutiny, which is a manifestation of environmental democracy.[22]

At this juncture, one may wonder why public participation is held so important to environmental democracy. First, environmental issues are best handled with the participation of all concerned citizens, at all levels.[23] For instance, public participation enables decision-

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[20] For more on this point, see Giulia Parola, cited at note 1, p 26-28

[21] Accountability is also one of the features a government is supposed to have to facilitate the use of the right to participate in decision-making process. See Monika Kerdeman, **What Does Environmental Democracy Look Like?** Available at http://www.wri.org/stories/2008/04/what-does-environmental-democracy-look-like, accessed on 13 May 2010

[22] Parola argues that informed and legally empowered citizen is the most important aspect of environmental democratization. Giulia Parola, cited at note 1, p 24-25.

[23] Principle 10 of the 1992 Rio Declaration. The principle further stipulates that at the national level, each individual shall have access to information concerning the

makers to address issues that are perceived as important by the public; brings traditional knowledge into the decision-making process which will improve the quality of a decision; and ensures that the impact of a given decision on the environment is properly assessed.[24] Second, public participation in environmental decision-making enhances government's ability to respond to public concerns and demands, to build consensus, and to improve acceptance of and compliance with environmental decisions.[25] Third, it is in the nature of democracy to involve the public in decisions that are likely to affect their interests, in this case, their environment. Therefore, the importance of public participation in environmental democracy lies beyond question. Accordingly, involving the public in decisions that could have impact on the environment is a manifestation of environmental democracy in a given system.

Obviously, everyday decisions that could have effect on the environment are made beginning from making strategies (policy formulation) to project implementation. Thus, in a system where there is environmental democracy, the public has the right to participate in the making of these decisions. On the other hand, environmental laws require that the formulation of strategies and the implementation of projects be preceded by *environmental impact assessment* (EIA). Here, EIA refers to a process of identifying, in advance, the impact of a given action (strategy or project) on the environment with the view to

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environment that is held by public authorities…and the opportunity to participate in decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available.

[24] See, for example, the discussion of Ross Hughes on stakeholders' participation in the EIA Process; Ross Hughes, **Environmental Impact Assessment and Stakeholder Involvement**, included in Annie Donelly, Barry Dalal-Crayton, Ross Hughes, **A Directory of Impact Assessment Guidelines**, 2nd ed, International Institute for Environment and Development, 1998, p 21-22

[25] For more on this point, see Joseph Foti and others, **Voice and Choice: Opening the Door to Environmental Democracy**, World Resource Institute, 2008, p. x

avoiding or minimizing undesirable environmental consequences.[26] Thus, EIA involves decision making at both strategic and project levels. For example, by using EIA, one can conclude that the environmental impact of a given strategy or project will be greater or less than its benefit thereby leading to the conclusion that the strategy or project be rejected or adopted. Environmental democracy, therefore, favours the participation of the public in the EIA process as it involves making decisions that may affect the environment. In other words, environmental democracy requires involving the public in the EIA process when EIA is done and its report is reviewed or evaluated.

At this juncture, it appears necessary to first consider who does EIA and who evaluates EIA reports. In some countries like the USA, conducting EIA is the responsibility of federal agencies.[27] Thus, if EIA is required for a given strategy or project, the concerned federal agency has to do prior EIA before proceeding with a course of action such as issuing license. However, in many countries, EIA is done by a proponent.[28] In relation to strategies a proponent is any organ of government that initiates a strategy and seeks its approval, whereas in relation to a project a proponent is any person who initiates a project

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[26] See D.K. Asthana and Meera Asthana, **Environment: Problems and Solutions**, S. Chand and Company Ltd, India, 1998, p 336; John Ntambirweki, **Environmental Impact Assessment as a Tool for Industrial Planning, included in Industries and Enforcement of Environmental Law in Africa**, UNEP, 1997, p 75; H.V. Jadhav and S.H. Purohit, cited at note 5, p. 10; and Duard Barnard, **Environmental Law for All: A Practical Guide for the Business Community, The Planning Professions, Environmentalists and Lawyers**, Impact Books Inc, Pretoria, 1999, P 179.

[27] See sec 102 of the US National Environmental Policy Act (1969) and CEQ Regulations 1606.5 of 1999. Some scholars are of the opinion that making government agencies conduct EIA is better by questioning the objectivity of the private sector in the course of doing EIA. See William L. Andreen, **Environmental Law and International Assistance: The Challenges of Strengthening Environmental Law in Developing World**, Columbia Journal of Environmental Law, V 25, No 17, 2000, p 48

[28] Ibid

and seeks its approval. In Ethiopia, the EIA law uses the term *public* instrument, instead of strategy, and defines it as a policy, a strategy, a programme, a law or an international agreement.[29] Thus, policies, strategies, laws and international agreements may be subject to EIA and the proponent; that is, the person that will be responsible for doing EIA in this regard is the government organ that initiates these instruments.

In any case, whosoever conducts EIA, the responsible person must submit its EIA report to the organ that is responsible for evaluation. Who evaluates EIA reports? As far as this issue is concerned, there is consensus that approval is the responsibility of government organ. Thus, government organs (like in the US) or proponents (like in Ethiopia) must do EIA and submit the reports of their EIAs to the responsible government agency (usually environmental agencies) for evaluation.

The point then is at both stages; that is, when EIA is done and its report is evaluated, the public has to be involved. This means, those who do EIA must involve the public in the course of doing EIA, whereas environmental agencies that are tasked with the responsibility of evaluating EIA reports must involve the public in their evaluation process. If this is done, environmental democracy will be facilitated. Is this happening in Ethiopia? Before one tries to answer this query, it is necessary to first figure out whether Ethiopia has put in place adequate *policy framework*[30] that is capable of facilitating public participation in the EIA process at both stages thereby opening door

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[29] See article 2(10) of the EIA Proclamation of Ethiopia, Proclamation 299/2002

[30] In this paper, I use the term *policy* to refer to an intentional course of action designed by government bodies or officials to accomplish a specific goals or objectives. Thus, it includes legislative measures, judicial measures, programmes and guidelines. For more on the meaning and content of *policy*, see generally, Jessica R. Adolino and Charles H. Blake, **Comparing Public Policies: Issues and Choices in Six Industrialized Countries**, CQ Press, Washington DC, 2001, p 10-11

for environmental democracy. Then it would be logical to ask whether the public is actually participating in the EIA process in practice. This point will be taken up after the following section.

C. Policy framework for ensuring public participation in the administration of EIA Process in Ethiopia

The term *public* refers not only to the people that are likely to be affected by a given decision but also to everyone who has a stake in a given course of action.[31] Thus, *public participation* in the EIA process could be defined as the involvement of the public (those with a stake) in decisions involving EIA to share information and knowledge and to contribute to the intended action and its success to ultimately enhance their own interests.[32] With this in mind, one has to ask what the policy framework for public participation in the EIA process in Ethiopia looks like. To begin with, so far, Ethiopia has issued many laws and policies that are meant to ensure environmental protection.

Of these policies and laws, the 1995 FDRE Constitution ('the Constitution' hereinafter), the 1997 Environmental Policy of Ethiopia (EPE), the 2002 EIA Proclamation, and the 2002 Environmental Protection Authority Establishment Proclamation are more pertinent to the administration of EIA. Of course, one of the earliest commitments of Ethiopia to use EIA in environmental decision-making process and also engage the public in such process came into being when it ratified the Convention on Biodiversity in 1994. Article 14(1)(2) of the Convention requires every contracting party to introduce appropriate

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[31] For example, some writers define *public involvement* in the EIA process as a process through which the views of *all interested parties* are integrated into project decision-making.[31] According to this definition, therefore, the term *public* refers to all stakeholders. See **Public Involvement: Guidelines for Natural Resource Development Projects**, Environment and Sustainable Development Division (ESDD), UNESCAP, 1997, p 4

[32] See, for example, Ross Hughes, cited at note 21, p 21-22

procedures requiring EIA of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures and also introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account. However, in this writing, we will focus only on the domestic policy framework. That being the case, do the above-mentioned policy framework in relation to EIA provide for adequate stipulations aiming at ensuring effective public participation in the EIA process thereby facilitating environmental democracy? The following sections will answer this query.

I. FDRE Constitution

The first place to look for the right of the public to participate on matters affecting it interests is the supreme law of the land, the Constitution. In this regard, article 43(2) of the FDRE Constitution, which is the most pertinent provision to the issue at hand, stipulates that *nationals* have the right to participate in national development and, in particular, to be *consulted* with respect to policies and projects affecting *their community*.[33] This means, nationals have the right to participate in the development of the country such as through investment. Particularly, they have the right to be consulted when policies (like laws, programmes, international agreements, etc) are made and projects are (to be) approved.

The above stipulation of the Constitution contains some interesting points. Firstly, the Constitution deals with the right of *nationals*, not of *public* which refers to stakeholders in general. Second, the Constitution deals with nationals themselves selectively as it singles out only those nationals whose community will be affected by a

[33] Emphases added

policy or a project. Therefore, broad-based public participation cannot be claimed with respect to national development, in particular, the right to be consulted with respect to policies and projects. One the other hand, the fact that nationals whose community will be affected by a policy or a project can have the right to be consulted and they form part of the public lies beyond question. Thus, article 43(2) of the Constitution aims at ensuring public participation in its narrow sense. This means, only the nationals whose communities will likely be affected by a strategy (policy) or project that needs EIA can claim participation in the EIA process as of right while stakeholders may be granted the privilege to do so. This can be taken as a step towards promoting environmental democracy. However, it remains far from adequately promoting environmental democracy because some stakeholders which the term *public* refers to, such as experts, NGOs, government organs, and other members of the public are excluded from the coverage of article 43(2). In this regard, some countries provide for the duty of a proponent to consult not only the community likely to be affected but also other stakeholders including members of the public, interested bodies and organizations.[34] For example, in USA, agencies undertaking environmental impact studies are supposed to involve the public or those persons and agencies who may be *interested* or *affected* by a given action.[35] Under our Constitution, however, the duty of a proponent pertains only to the community likely to be affected, not to any interested party.

Anyway, article 43(2) of the Constitution is capable of facilitating environmental democracy but only with respect to limited

[34] Section 11(9) of the EPA law of the Guyana, See Mark Lancelot Bynoe, **'Citizen Participation in the Environmental Impact Assessment Process in Guyana: Reality or Fallacy?',** 2/1 Law, Environment and Development Journal (2006), p 44

[35] See Sec 1506.6 of the 1999 CEQ Regulations on Public Involvement. Emphasis added. The Regulations also provide for ways of involving the public like NEPA-related hearings, public meetings, mailing information to those who request it, etc.

persons. For example, it is unlikely for the people living in Region Five of the country to claim participation, even if they may be interested, in environmental decisions that will affect the community in Region Two of the country. If the provision recognized the participation of the public in its wider sense, it would be possible for the people in Region Five to participate in environmental decisions that affect the people in Region Two. Therefore, one can say that the Constitution, in this case, does not go far enough to guarantee public participation in environmental decision-making thereby facilitating environmental democracy.

The other relevant provision in the Constitution is article 29(3) which deals with the *right of thought, opinion and expression*. Under this article, the Constitution guarantees the freedom of the press and other mass media which includes access to information of public interest. Thus, the Press and other Mass Media can seek information on what the government is doing or is to do in relation to EIA and air their opinions with a view to either alert the public or influence the outcome of a given course of action. Accordingly, to the extent this stipulation enables the press and other mass media to alert the public and/or air their views to influence a given course of action, one may argue that this constitutional provision creates a condition capable of facilitating public participation in environmental matters to eventually facilitate environmental democracy. However, article 29(3) of the Constitution does not seem to deal with the right of the public in broader sense to get access to information of public interest. Of course, article 29(2) of the Constitution guarantees everyone's freedom of expression which includes, *inter alia*, freedom to seek and receive information or ideas of any kind in any form and regardless of frontiers. If this stipulation is given liberal interpretation, which requires committed judicial activism, one may argue that everyone's right to seek and receive information or ideas on matters of public nature/interest is guaranteed. Once again, care must be taken not to confuse *everyone* with the term

public in its broader sense because the term *everyone* under article 29(2) refers to *individuals*, not to other stakeholders such as NGOs and government organs.

In conjunction with the above constitutional stipulations, one has to look at the 2008 Freedom of the Mass Media and Access to Information Proclamation which was enacted to implement, among other things, articles 12 and 29 of the Constitution. This Proclamation contains detailed provisions with regard to the rights of the Mass Media and citizens to access, receive, and impart information held by public bodies.[36] However, in some ways, the Proclamation also seems to follow the same path with article 29 of the Constitution. Subject to a long list of exempted information it contains (see arts 16ff), it deals with the rights of citizens and the Mass Media, not *persons* in general, to access, receive and impart information held by public bodies. Accordingly, it could be said that the coverage of the Proclamation with regard to guaranteeing access to information for all stakeholders to encourage and promote their participation in matters involving the environment is not comprehensive. This is critical in particular when one considers those stakeholders such as NGOs working in the field of environmental protection that are excluded although they can play more significant roles during the EIA process or, generally, when environmentally fateful decisions are made through participation to ultimately promote environmental democracy in the country.[37]

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[36] See, for example, articles 4 and 12, Freedom of the Mass Media and Access to Information Proclamation, Proclamation 590/2008.

[37] With regard to the recognition of the right of citizens to seek, obtain and impart information held public bodies, the objective of the Proclamation, as clearly indicated under article 11, is to encourage and promote public participation in the business of the government to ultimately promote good governance. If good governance is promoted, environmental democracy will certainly be promoted, too.

We can also look at articles 8 and 12 of the Constitution as relevant provisions to environmental democracy although they may be considered thinly related to the concept. First, article 8 declares the sovereignty of the people.[38] If they are sovereign, then, it is (and must be) their democratic right to participate (directly or indirectly, as the case may be) in environmental decision-making. Second, article 12 obliges government (it could be federal or regional) to conduct its affairs transparently. Thus, it is a constitutional obligation of a government to make information accessible to the public on what it does in the interest of transparency. This in turn enables the public to be informed about what the government does and make meaningful participation in decision-makings, in particular, environmental decisions. Hence, like article 29, the above articles could also be taken as capable of paving way for environmental democracy.

II. Environmental Policy of Ethiopia (EPE)

In 1997, Ethiopia adopted its comprehensive National Environmental Policy (EPE) with the view to realizing the right of Ethiopians to live in clean and healthy environment and to bring about sustainable development. In order for these lofty goals to be attained, the policy makes different stipulations, where the requirement that EIA should be used is one of such stipulations. Interestingly, in addition to requiring the use of EIA, the policy demands engaging the public in the EIA process through consultation and it holds that such engagement is an integral part of the EIA process.[39] Thus, the policy, unlike the Constitution, is broader as it recognizes the need to involve the *public* in the EIA process. Accordingly, the EPE creates condition for public participation in the EIA process thereby facilitating environmental democracy.

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[38] Care must be taken not to equate *people* for *stakeholders* for the former is narrow than the latter within the meaning of the Constitution.

[39] Section 4.9 of the 1997 EPE

However, although it may be argued that it is a general document and hence less is expected of it with regard to providing details, the 1997 EPE also suffers from defects in relation to creating conducive environment for public participation (consultation) in the EIA process (and, hence, for environmental democracy) by at least stipulating some minimum conditions. For instance, while the EPE could have done it, it fails to tell us how the public should be consulted (like requesting online comments or arranging workshops to get face-to-face comment), at what stage of the EIA should it be consulted (for example, when it is done; if so, at what stage? Or, when EIA reports is evaluated?), and what language should be used during consultation. Thus, it could be concluded that the EPE is relevant to facilitate public participation in the EIA process, and, hence, environmental democracy, only to the extent it recognizes the need to consult the public during the administration of the EIA. This means, the EPE is also far from creating conducive environment for public participation in the EIA process; yet it has better stipulation than the Constitution which deals only with nationals who belong to the community likely to be affected by a policy or a project as it deals with the public in general.

III. EIA Proclamation

In 2002, the government of Ethiopia adopted the EIA Proclamation, the first of its kind. The Proclamation requires using EIA for some projects and public instruments before they are approved.[40] If so, does it recognize the right of the public to participate in the EIA process of projects and public instruments? The relevant provisions of the Proclamation to answer the question are the following.

[40] According to articles 5 and 13 of the EIA Proclamation No 299/2002, the Federal EPA is required to list projects and public instruments that are subject to EIA and which require prior EIA.

Article 6 Trans-Regional Impact Assessment

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

Article 9 Review of Environmental Impact Study Report

1. ……
2. The Authority and regional environmental agencies shall, after evaluating an environmental impact study report by taking into account any *public comments and expert opinions*, within 15 working days:[41]
    a. approve the project without conditions and issue authorization […]
    b. approve the project and issue authorization with conditions […]
    c. refuse implementation of the project […]

Article 15 Public participation

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

[41] Emphasis added

are incorporated into the environmental impact study report as well as in its evaluation.[42]

The above-mentioned three articles from the EIA Proclamation do have something to tell about public participation in the EIA process. First, article 6 imposes on proponents of projects the duty to conduct EIA in *consultation* with the communities likely to be affected in any region. Two points need emphasis here. First, article 6 imposes the duty to engage (through consultation) the community likely to be affected only in relation to projects. Hence, proponents of public instruments (such as policies and laws) are under no obligation to engage the community likely to be affected by the implementation of their public instruments when they do EIA before the instruments are approved. Second, proponents of projects are required to consult not the public but only the community that is likely to be affected by the implementation of their projects. Therefore, article 6 of the Proclamation deals with public participation in the EIA process in a narrow way; that is, it requires the participation of the *community* likely to be affected (as part of the public) by a *project*. Thus, broad-based public participation, which is required by environmental democracy, at EIA performance stage is not guaranteed. However, the Proclamation seems firm on the need to consult the community[43] likely to be affected by a project because it obliges the Federal EPA to ensure that such consultation has taken place before even starting the evolution of EIA reports.

[42] Emphasis added to both sub-articles

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

At this juncture, it is interesting to note that article 6 of the EIA Proclamation does not recognize the consultation right of the communities likely to be affected by projects but the obligations of proponents to consult them although it could be argued that the flip side of the proponents' obligations shows the right of the communities.[44] Moreover, article 6 does not tell us the stage at which proponents must consult the community likely to be affected by their projects; that is, at the preliminary assessment or preparation of the environmental impact study, or both. Similarly, it does not tell us for how long the consultation of the community should last and how it should take place. Therefore, although article 6 of the EIA Proclamation is clear on the need to engage the community likely to be affected by a project when EIA is done, it is still plagued with inadequacies. Thus, it will not be able to facilitate effective participation of the community likely to be affected by a project unless it is supplemented by other provisions (in subsidiary laws). However, the organs that have been authorized to make supplementary laws to implement the EIA Proclamation (that is; the Council of Minister and the FEPA) have not yet made such laws. This makes it difficult for the community likely to be affected by a project to effectively participate in the EIA process of the projects.

Therefore, the EIA Proclamation does not provide for adequate stipulations that deal with public participation in the EIA process when EIA is done; first it does not deal with the broad-based public; and, second, it deals only with project level EIA, not strategic EIA. Hence, it is far from facilitating broad-based public participation in the EIA process at preparatory stage; and, hence, environmental democracy.

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[44] Actually, one may argue that this right has to be read into the Proclamation because it is recognized by the Constitution, under article 43(2) as discussed before.

The other two articles, article 9 and article 15, provide for the role of the public at EIA report evaluation stage. Article 15(1) obliges the Federal EPA and regional environmental agencies to make EIA report accessible to the *public* and solicit comments on it. Then, article 15(2) obliges these organs to ensure that the comments made by the *public and in particular by the communities likely to be affected* by the implementation of a project are incorporated into the environmental impact study report as well as in its evaluation.[45] Finally, article 9 obliges the Federal EPA and regional environmental agencies to take action on EIA reports, within 15 working days, after evaluating them by taking into account any *public comments and expert opinions*.

An interesting scenario here is the fact that, unlike article 6, articles 9 and 15 of the EIA Proclamation use the term *public,* not *communities likely to be affected*. Hence, their scope of application is wider. Therefore, unlike at the preparation stage, the EIA Proclamation recognizes the need to involve the public in the EIA process at EIA report evaluation stage. That is to say, the authorities that are tasked with the responsibility to evaluate EIA reports and pass decisions thereon are required to seek public opinions as inputs for their decisions. This is a good stipulation capable of facilitating environmental democracy.

However, there are still problems in relation to applying the two articles. First, the articles do not make it clear how environmental organs can make EIA reports accessible to the public and solicit comments. For example, should they use TV, radio, newspapers, public meetings, or make copies of EIA reports available to those who want to comment on them? Some countries require publication of notice in daily newspaper that EIA report has been submitted to environmental organ for evaluation and that the public can give their

[45] In this sense, one can argue that *consultation* seems similar to *participation* because the inclusion of the comments obtained through consultation shows that the public can influence decision-making.

comments.[46] Moreover, articles 9 and 15 do not specify for how long environmental agencies need to solicit public comments. Some countries explicitly specify this time. For example, in Guyana, the duration is 60 days,[47] whereas it is 45 days in the US with the possibility of extension or reduction, as the case may be.[48] In Ethiopia, however, no such duration is fixed. Yet, we know that once they received EIA reports, environmental organs must take action within 15 working days. Thus, it could be concluded that environmental agencies have less than 15 working days to solicit public comments before they take action on EIA reports. This period seems short and it makes public participation at this stage difficult. There are also other problems like the selection of the language to use during report publication and comment solicitation. But, overall, it could be said that the two articles are also plagued with inadequacies thereby making public participation in the EIA process at evaluation stage difficult. This means, they are not capable of facilitating good environmental democracy.

In any case, like the previous instruments, the EIA proclamation has also failed to create adequate and conducive environment for the participation of broad-based public in the EIA process of all actions (strategies and projects) that are subject to EIA and that will affect the environment. Moreover, the provisions of the proclamation that are pertinent to public participation are plagued with inadequacies. Actually, these inadequacies were supposed to be remedied by subsidiary laws such as regulations and directives. Nonetheless, almost a decade later after the Proclamation was enacted, the organs that are authorized/required to make these subsidiary laws; that is the

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[46] Steven Ferry, **Environmental Law: Examples and Explanations**, 4th Edition, Aspen Publishers, Austin, Boston, Chicago, New York, and The Netherlands, 2007, p 86

[47] Section 11(9) of the EPA of the Guyana, See Mark Lancelot Bynoe, cited at note 31, p 47

[48] Steven Ferry, cited at note 43, p 86

Council of Ministers and the Federal EPA,[49] have failed to make such laws thereby making the application of the provisions of the EIA Proclamation, in particular, those relating to public participation difficult.[50] Hence, the EIA Proclamation, although it opens door to environmental democracy like the other instruments, is also far from being adequate to facilitate public participation in the EIA process thereby promoting environmental democracy.

IV. EIA Guidelines

The other instrument that has bearing on public participation in the EIA process in Ethiopia is the Federal EPA guidelines. So far, the Federal EPA issued two procedural guidelines to facilitate the effective use of EIA in decision-making process. The first guidelines were issued in 2000. These guidelines recognize that the participation of interested and affected persons (which is synonymous with *public* in broader sense) in the EIA process is necessary. Moreover, the guidelines stipulate that interested and affected persons (public) should be involved in the EIA process at scoping, EIA performance, and EIA

[49] See articles 19 and 20 of the EIA Proclamation No 299/2002

[50] Six years later, in 2008, the Federal EPA issued directives to implement the provisions of the EIA Proclamation. However, the directives still have two major problems. First, it is limited to listing projects (not public instruments) that require EIA. Thus, it does not address the problems affecting public participation in the EIA process. Second, the directives have not yet become law for two reasons. To begin with, the directives have not been signed by the chairperson of the environmental council; that is, the Prime Minister. Besides, although the publication of directives in Federal Negarit Gazeta is not a common practice in our system, article 2(2) of the Federal Negarit Gazeta Establishment Proclamation of 1995 requires all federal law to be published in the Federal Negarit Gazeta. Then, under article 2(3), it obliges all Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person to take judicial notice of laws published in the Federal Negarit Gazeta. This means, these entities are not obliged to take judicial notice of laws that are not published in the Federal Negarit Gazeta

report evaluation stages. Further, the guidelines provide for the modes of involving the public in the EIA process. For instance, they provide that public meetings; telephonic surveys; newspaper advertisements; interviews and questionnaires; working with established groups; and workshops and seminars can be used as methods of ensuring public participation in the EIA process.[51] Therefore, on the face of it, these guidelines are suitable for facilitating public participation in the EIA process at both stages (performance and evaluation) thereby promoting environmental democracy.

In 2003, the EPA issued the EIA Procedural Guidelines Series 1 of 2003 replacing the 2000 guidelines.[52] Like its predecessor, these guidelines also recognize the importance of public participation in the EIA process at various stages. However, unlike the 2000 guidelines, the 2003 guidelines are less clear on the stages at which the public can participate in the EIA process. For instance, while they stipulate that scoping should involve the public, they are silent on the participation of the public when EIA study is conducted and its report is evaluated. Nevertheless, the guidelines could still be construed to require public participation at the other stages of the EIA as well.[53] Hence, it may be

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

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

[53] For example, when EIA is done, proponents should involve stakeholders even if the guidelines do not expressly require this for two reasons. First, the evaluating authority is supposed to consider the extent of public participation in the EIA process for approval. This implies that proponents are expected to involve the public when they conduct EIA study for failure to do so may result in the rejection of their reports by the approving authority. Moreover, the guidelines require the decisions of evaluating agencies to be *consultative* and *participatory*, an expression that could be understood as referring to consulting and engaging the public in

concluded that, like its predecessor, the 2003 guidelines also create suitable condition for public participation in the EIA process thereby facilitating environmental democracy.

However, although both guidelines relatively create conducive environment for public participation in the EIA process (and, hence, for environmental democracy), they do not have force of law. As a result, they are like soft rules governing the conducts of concerned parties such as proponents and environmental organs. More importantly, however, neither of the two guidelines was approved by the Environmental Council, the organ that is competent to approve the instruments the Federal EPA prepares. Thus, in legal sense, let alone the 2000 guidelines, the 2003 guidelines themselves are at draft stage despite the fact that the Federal EPA seems to use it as though they were approved. Consequently, one cannot speak with certainty that, the 2003 guidelines are capable of facilitating effective public participation in the EIA process. Of course, environmental agencies can make the guidelines have force of law even if they are at draft stage by using them during evaluation and also requiring proponents to use them strictly when they do EIA. In default such measures, let alone guidelines which are at draft stage, even those guidelines which are approved will remain less forceful to ensure public participation in the EIA process to eventually facilitate environmental democracy in the country.

V. Environmental Protection Organs Establishment Proclamation No 295/2002

In 2002, Ethiopia enacted the Environmental Protection Organs Establishment Proclamation No 295/2005 with the view to providing institutional framework for environmental protection. Accordingly, the Proclamation has re-established the Federal EPA, and it also requires

decision-making. Hence, it could be argued that the 2003 guidelines are also capable of facilitating public participation in the EIA process.

the establishment of regional environmental agencies and sectoral environmental units. These organs have been given the responsibility to ensure environmental protection. Thus, since environmental protection involves public participation, they are obliged to ensure public participation in environmental decision-making. For instance, the Federal EPA is required to issue environmental standards, guidelines and other necessary documents to ensure environmental protection. Thus, it can make instruments that require public participation and ensure their implementation. Regional environmental agencies on their part are required to, among others things, enforce federal environmental standards such as the 2003 EPA Procedural Guidelines which require public participation in the EIA process. Further, sectoral environmental units are required to ensure that their sectors comply with environmental protection requirements. Thus, when EIA is required, they are required to ensure that it is done and in the way it is required to be done such as by involving the public in the EIA process. Therefore, one may conclude that Ethiopia has put in place an institutional framework that is capable of ensuring the working of its policy framework to protecting the environment. On the other hand, as it is an integral part of environmental protection endeavours, this institutional framework can (and should) ensure public participation in environmental decision-making which will eventually facilitate environmental democracy.

To wind up, the FDRE Constitution, the 1997 EPE, the EIA Proclamation, the Environmental Protection Establishment Proclamation, and the Federal EPA Procedural Guidelines (even if they are still at draft stage) are some of the relevant instruments that provide for the necessary frameworks (policy and institutional) Ethiopia has so far put in place to ensure public participation in the EIA process. However, except the guidelines, the other instruments do not contain adequate stipulations to guarantee effective and adequate public participation in the process. Moreover, the stipulations they

contain in relation to public participation in the EIA process are plagued by gaps and inadequacies. On the other hand, subordinate laws that are supposed to be made to implement the general stipulations of these instruments and also to fill their gaps and rectify their inadequacies have not been made yet. Accordingly, the instruments remain far from being adequate to facilitate public participation in the EIA process thereby promoting environmental democracy. On the other hand, while the Federal EPA's 2003 Guidelines are relatively better suited to facilitate public participation in the EIA process and promote environmental democracy, they still are at draft stage. Similarly, even if they were approved, guidelines lack force of law to bind everyone since they are institutional rules unlike other instruments such as regulations or proclamations. Therefore, it could be said that although Ethiopia is in the right track towards ensuring environmental democracy through public participation in the EIA process, it is yet to travel long way with regard to providing adequate policy framework to that end.

D. Practice of Public Participation in the EIA Process (Environmental democracy on the ground)

As we have seen in the preceding section, however inadequate they might be, Ethiopia has laws, policies, and guidelines which in one way or another recognize the importance of public participation in the EIA process. Therefore, there is a policy basis for environmental democracy. That being said, the issue worth raising and entertaining remains the practice of public participation in the EIA on the ground.

First, as the previous discussions have shown, both the Constitution and the EIA law authorize (require) the participation of the public in environmental decision-making at both strategic and project level. However, according to the Federal EPA, there has never

been public participation in the EIA process at strategic level.[54] This is so because so far no EIA has ever been made for public instruments as the existing policy framework does not address this issue adequately. For instance, although the EIA proclamation requires the Federal EPA to issue directives that specify which public instrument should be subject to EIA and which should not be, the EPA has not issued such directives. As a result, it is not possible to require EIA for public instruments before decisions are taken on them. What this, in effect, means is that the provision of the EIA Proclamation that requires EIA for public instruments will be suspended until the Federal EPA issues directives that determine public instruments that must be subject to EIA. Therefore, in the absence of EIA for public instrument (that is, strategic EIA), it would not be possible to talk about the participation of the public in the EIA process at strategic level. This in turn indicates that environmental democracy on the ground, in the sense of public participation in the EIA process at strategic level, is yet to be a reality despite the fact that the law recognizing the relevance of public participation at this stage was made almost a decade ago.

On the other hand, according to the information I obtained from the personnel at the Federal EPA, the system of EIA is working in Ethiopia, putting aside its effectiveness, at project level.[55] Accordingly, it is possible to talk about public participation at project level. Indeed, some argue that in some countries most public participation in

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

[55] Public Lecture by Dr. Tewolde Berhan Gebre Egziabher, Director General, Ethiopian Environmental Protection Authority, 7 May 2009; Interview with Ato Solomon Kebede, cited at note 49; interview with Ato Abraham Hailemelekot, EIA Expert, Federal EPA, 24 August 2009; and interview with Ato Wondosen Sintayehu, Acting Head, Environmental Policies and Legislation Department, Federal EPA, 24 August 2009

environmental decision-making occurs at project level.[56] Do we have public participation in the EIA process at project level in Ethiopia? Project level participation of the public may be classified into two: participation when EIA is done by a proponent and participation when EIA reports are evaluated by authorities. As we have seen before, the policy framework in Ethiopia allows the public/communities likely to be affected by a project to participate in its EIA process at both stages. The following sub-sections will illustrate what the reality is like.

I. At performance stage

Although proponents should involve the public particularly the communities that are likely to be affected when they do EIA, it is difficult to conclude that such participation meaningfully exists in practice. In this regard, the Head of the Federal EPA EIA Department mentioned the absence of binding and detailed instrument pertaining to public participation in the EIA process as a cause for the inadequacy of public participation in the EIA process at this stage. For example, the existing binding instruments do not resolve many relevant issues such as issues relating to how proponents should communicate with the public, for how long, and at what stage.[57]

There are also other interesting points pertaining to the participation of the public in the EIA process at preparation/performance stage. First, although doing EIA requires multi-disciplinary experts, EIA is sometimes done by a single person who sits in his/her office and ticks in a checklist table. Under such circumstance, there is no way that the public participates in the EIA

[56] For example, in Hungary, the level at which most public participation in environmental decision-making occurs is at the project level, although environmental organizations do also have the legal right to participate in the development of environmental policies, laws, and regulations. See Alexios Antypas, **A new age for environmental democracy: the Aarhus Convention in Hungary**, [2003] 6 Env. Liability, p 2020-203

[57] Interview with Ato Solomon Kebede, cited at note 51

process simply because there is no EIA. Second, when EIA is actually done, most proponents do not involve the public in the process. Instead, they forge the names, comments, signatures and other necessary information and frame up minutes of meeting with the public and then submit their EIA reports to the concerned authorities for approval. Here, too, the right of the public to participate in the EIA process of a project that may affect their interest becomes illusory. Third, regional environmental agencies do not ensure, although they have the responsibility to do so, the participation of the public in the EIA process at preparation stage for various reasons such as lack of independence. This is also bad because proponents will not worry about involving the public in their decisions. All these problems, coming together, will make public participation in the EIA process at this stage illusory. It should, however, be noted that the Federal EPA has been trying to resolve the problems by using different mechanisms such as requiring proponents to video the public during participation.[58]

Therefore, it could be concluded that although there is a policy framework for public participation in environmental decision-making at EIA preparation stage, the practice shows that such participation is limited.

II. At evaluation stage

The second stage at which the public can participate in environmental decision-making in relation to EIA is when EIA reports are evaluated. As stated before, the EIA Proclamation obliges the Federal EPA and regional environmental agencies to make EIA reports accessible to the public and solicit comments thereon. The practice also shows that the Federal EPA has been involving broad-based public (including NGOs and government agencies with stakes) in its

[58] The information in this paragraph was obtained by interviewing Ato Solomon Kebede, cited at note 51

evaluation process. For example, it was indicated that EIA reports are sent out to stakeholders for their comments before the Federal EPA passes its decision.[59] Moreover, some stakeholders also testify that sometimes the Federal EPA requests them to comment on EIA reports before it makes final decision although they still believe that their involvement in the process at this stage is limited.[60] The Federal EPA also admits that there is still a problem with regard to engaging broad-based public (stakeholders) in the evaluation of the EIA reports. As a result, sometimes, the Federal EPA decides on EIA reports without involving stakeholders. Here, the major reasons given by the Federal EPA include failure of some stakeholders to give prompt comments on EIA reports (as the EPA has only 15 working days to take action on such reports) and lack of guidelines on public participation (who is *public*, how to involve the public, for how long, in what language, etc).[61] Hence, it could be concluded, based on the testimonies of the EPA and some stakeholders, that there is (limited) public participation, at least in the EIA process of some projects, at evaluation stage. However, the participation still remains inadequate for various reasons.

Therefore, as the preceding discussions have shown, public participation in the EIA process in practice is very limited both when EIA is done and its report is evaluated. When this is coupled with the

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[59] Public Lecture, Ato Solomon Kebede and Ato Wondosen Sintayehu, at Akaki Campus, AAU, 17 November 2009

[60] Interview with Ato Yeneneh Teka, Director, Wildlife Development and Protection Authority, 31 August 2009; interview with Ato Fanuel Kebede, Senor Wildlife Expert, Ethiopian Wildlife Development and Protection Authority, 31 August 2009; and interview with some people at the Ethiopian Institute of Biodiversity Conservation, who demanded anonymity, on 1 September 2009; The two agencies are highly interested in having EIAs done and are properly evaluated because development activities not preceded by proper EIA will jeopardized the accomplishment of their missions.

[61] Interview with Ato Solomon Kebede, cited at note 51

inadequacy of the policy framework to ensure public participation in the EIA process, effective public participation in the EIA process will become illusory thereby negatively affecting the prospect of having good environmental democracy. As a result, it could be argued that environmental democracy in Ethiopia is still at its early stage.

E. Conclusion and Recommendations

As this article has tried to reveal, public participation, although not its only element, is an integral part of environmental democracy. Thus, a system that facilitates effective public participation in environmental decision-making concomitantly promotes environmental democracy. In Ethiopia, there is a policy framework for public participation in the EIA process, one of the areas that involve environmental decision-making. However, this policy framework is inadequate to ensure effective public participation in the EIA process. Moreover, the practice shows that although there is some form of public participation in the EIA process at both preparation and evaluation stages, they are very limited. One of the major reasons contributing to the absence of adequate public participation in the EIA process is the absence of adequate policy framework. Therefore, it is recommended that the concerned government organs, in particular, the Council of Ministers and the Federal EPA should make the necessary laws to fill the gaps and remedy the inadequacies in the existing policy framework. More specifically, first, the Council Minister should issue regulations to cure the inadequacies in the EIA Proclamation and to facilitate its effective implementation in general and its provisions pertaining to public participation in the EIA process in particular; second, the Federal EPA should also issue directives which can facilitate the effective implementation of the EIA proclamation such as by determining the public instruments that should be subject to EIA to ultimately promote public participation in the EIA process. The issuance of such laws will enable the public to

participate in the EIA processes of projects and public instruments which will in turn facilitate environmental democracy. Moreover, regional state environmental agencies and the Federal EPA should try to ensure that proponents genuinely involve the public in the EIA process and they should also involve the public when they evaluate EIA reports. Finally, in the interest of public participation, and, hence, environmental democracy, the Federal Parliament must revise its EIA Proclamation. It should, in particular, consider the part of the Proclamation that obliges environmental protection organs to take action on EIA reports in fifteen working days as this requirement may hinder effective public participation thereby affecting environmental democracy. At this juncture, as the country has other equally competing interest, that is, promote investment, the amendment to the fifteen days requirement should take the form of granting environmental protection organs the discretion to reduce or increase it on case by case basis. Hence, the fifteen days requirements can be maintained to avoid procrastination by environmental protection organs.

An Integrated approach to the Enforcement of Socio-Economic Rights: Enforcing ECOSOC Rights through Civil and Political Rights

Kokebe Wolde

Abstract

Nearly three decades have elapsed since the International Covenant on Economic Social and Cultural Rights (ICESCR) has been adopted and entered into force. However, the lack of clarity in the wordings of the document coupled with the weaker terms of obligation it puts on states parties and the concomitant confusion as to the legal status of socio-economic rights have contributed to the weak record in the implementation of the rights in the real life of societies in the respective states parties to the covenant. This short article is intended to explore the possibilities of enforcing socio-economic rights by integrating them with civil and political rights which enjoy relatively good level of protection. I will argue that while the integrated approach has its own inherent limitations and cannot be the ultimate solution to the problem of non-enforcement of socioeconomic rights, it has also immense potential for the enforcement of socio-economic rights as illustrated by the work of some national, regional and international judicial and quasi-judicial organs.

I. Introduction

Three decades have elapsed since the International Covenant on Economic and Cultural Rights (ICESCR) that comprehensively deal with economic, social and cultural rights has been adopted and entered in to force. There are as well other international and regional instruments that embody a myriad of economic, social and cultural rights. Practical implementation by states parties, however, remains unsatisfactory and fraught with obstacles. In order to accommodate the position of the various states parties with different ideologies and traditions, the instruments, particularly the ICESCR, are drafted in too general, vague and imprecise terms. Furthermore, unlike the International Covenant on Civil and Political Rights (ICCPR), the wording chosen for state obligation under Art.2 (1) of the ICESCR, the most comprehensive document on socioeconomic rights, is weaker. The lack of clarity in the wordings of the ICESCRs coupled with the weaker terms of obligation it puts on states parties and the

concomitant confusion as to the legal status of socio-economic rights have contributed to the weak record in the implementation of the rights in the real life of individuals apart from the important economic reason that interwoven the implementation of same.

One important way to get out of this predicament is to look for the enforcement of economic, social and cultural rights through civil and political rights. The idea is that if we look through the prism of civil and political rights we can also reach at economic, social and cultural rights. The practice has already been set by some treaty bodies and national courts, for example in the Council of Europe, the Inter-American System, India and South Africa. The Indian Supreme Court, for instance, has in a number of cases interpreted the right to life as to include the right to basic necessities like adequate nutrition, shelter, health care, education, etc.

It is, therefore, the purpose of this article to explore the possibilities of enforcing economic, social and cultural rights through civil and political rights which have enjoyed relatively good level of protection. The writer will first highlight the evolution of and international standard setting on socio-economic rights followed by an exploration of the problems surrounding implementation of same. An exposition of the integrated approach as an alternative solution to the problem of enforcement and exploration of salient practices in this regard will constitute the main body of this article, followed by concluding remarks.

II. Origin, Development and Nature of Economic, Social and Cultural Rights under International Law and the Problem of Enforcement: An Over View

A. An Over View of the Evolution of Economic, Social and Cultural Rights

The idea of economic, social and cultural rights relates to the conditions necessary to meet essential human needs such as food,

shelter, education, health care, and gainful employment which are vital for the dignified existence of human beings. They include the right to adequate food and nutrition, water, highest attainable standard of health, clothing, adequate housing, the right to education, the right to work and rights at work, right to social security, as well as the cultural rights of minorities and indigenous peoples. Generally, these are social welfare rights meant to ensure the highest attainable standard of living for every individual human being.[1]

The historical origin and development of these set of rights, just like their current state of enforcement, is obscure and controversial. However, we can speak with certainty that they are no younger than civil and political rights, although they have not enjoyed the necessary domestic and international protection which civil and political rights have enjoyed to a certain extent.

Perhaps the original concern for human existence with dignity has its roots in the tradition of the various religions whose teaching promote care for the needy and for those who cannot look after themselves.[2] Almost all of the major religions have concern for the oppressed and indigents.[3]

The issue of social welfare which socio-economic rights represent has also been a subject of philosophical analysis and political theory in the 18th and 19th centuries by various thinkers like Karl Max, Immanuel Kant and John Rawls.[4] Later the Great Economic Depression that hit the Western world in the 1930s has made imperative the need

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[1] Trubek, David M., Economic, Social and Cultural Rights in the Third World: Human Rights and Human Needs Program, *in*, Meron, Theodor(ed.), *Human Rights in International Law: Legal and Policy Issues*, Clarendon Press, Oxford, 1984, p.205

[2] Steiner, H. And Alston, P. *International Human Rights in Context: Law, Policy and Morals*, Second Edition, Oxford University Press, New York, 2000, p.242.

[3] Shupack, M., The Churches and Human Rights: Catholic and Human Rights Views as Reflected in Church Statements, *Harvard Human Rights Journal* (6) 1993, p. 127.

[4] See Steiner, H. And Alston, P., *Supra* note 2, p. 242.

to focus on social protection turning the liberal state based on Adam's *laissez Faire* to welfare state.

We have also actual case where activists of social justice and social welfare tried to realize and disseminate the same idea. The introduction of social insurance schemes in 1880s by Chancellor Bismarck in Germany was a land mark instance in this regard.[5] Personalities such as Robert Owen of England and Daniel le Grand of France in the early 19th century urged for the necessary measures to be taken to safeguard the health and interest of the working class and even took the initiative by their own.[6]

Although legislations relating to the protection of workers began to be issued as early as 1802 in England and in France in 1841[7] a major breakthrough in the development of socio-economic rights took place in 1919 when the International Labour Organization was established by the Treaty of Versailles with the responsibility of achieving social justice, not just out of concern for human dignity but only to bring lasting peace.

The first formal recognition of economic, social and cultural rights per se at the international level happened in 1948 when the United Nations General Assembly adopted the Universal Declaration of Human Rights(UDHR)[8], an instrument that contain all the gamut of human rights. However, it was with the adoption of the International

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[5] Ibid; See also Eide, A., Economic, Social and Cultural Rights, *in*, Symonides, J., (ed.), *Human Rights: Concepts and Standards*, UNESCO Publishing, Aldershot, Burlington USA, Singapore, Sydney, 2000, p. 114.

[6] Eide A., *Supra* note 5, p. 114; See also Servais, J. M., *International Labour Law*, Kluwer Law International, The Hague, 2005, pp. 21-22.

[7] Servais, J. M., *Supra* note 6, pp. 21-22

[8] Universal Declaration of Human Rights, 1948, reprinted in Brownlie, I., and Goodwin-Gill, G.S., (Editors), *Basic Documents on Human Rights*, 5th ed, Oxford University Press, Oxford, New York, 2006, pp. 24-28.

Covenant on Economic, Social and Cultural Rights (ICESCR)[9] in 1966 that we have an internationally legally binding (only for states who ratify) instrument concerning socio-economic rights. It is important, however, to note that normative statements concerning economic, social and cultural rights are not limited only in the text of the 1966 ICESCR. In addition to the ICESCR, the Convention on the Rights of the Child (CRC)[10]; the International Convention on the Rights of Migrant Workers and Their Families (ICRMWF)[11]; the Convention on the Elimination of All Forms of Racial Discrimination (CEARD)[12]; Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)[13]; and even the International Covenant on Civil and Political Rights ICCPR[14] (on rights of the child and family rights) embody various socioeconomic rights. In addition to this universal instruments, regional instruments like the American Declaration of the Rights and Duties of Man[15]; the American Convention on Human Rights[16]; the Additional Protocol to the American Convention on

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[9] International Covenant on Economic, Social and Cultural Rights, 1966, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 348-357.

[10] Convention on the Rights of the Child, 1989, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 429-447.

[11] International Convention on the Protection of the Rights of All Migrant Workers and Their Families, 1990, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 462-495.

[12] International Convention on the Elimination of All Forms of Racial Discrimination, 1966, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 400-404.

[13] Convention on the Elimination of All forms of Discrimination Against Women, 1979.

[14] International Covenant on Civil and Political Rights, 1966, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 375-378.

[15] American Declaration of the Rights and Duties of Man,1948.

[16] American Convention on Human Rights, 1969, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 933-954.

Human Rights in the Area of Economic, Social and Cultural Rights[17]; the African Charter on Human and Peoples' Rights[18]; and the European Social Charter[19] as revised in 1996 incorporate a myriad of social, economic and cultural rights.

As pointed out in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights[20], just like other human rights, the economic, social and cultural rights incorporated in the various instruments impose three fold obligations on states parties to the respective instruments: the obligations to respect, protect and fulfill.[21] Accordingly, the state has to refrain from acting to the prejudice of the free enjoyment of socio-economic rights; has to protect the enjoyment of the rights from interference by third parties and fulfill all what is necessary to enable the full enjoyment of economic, social and cultural rights. As indicated in the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights[22] and well explained in General Comment 3[23] of The Committee

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[17] Additional protocol to the American Convention on human Rights in the Area of Economic, Social and Cultural Rights, 1988, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 955-962.

[18] African Charter on Human and Peoples' Rights, 1981, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 1007-1020.

[19] European Social Charter, 1961, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 645-661.

[20] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Reprinted in *Human Rights Quarterly* (20), 1998, p.691.

[21] See also Nowak, M., *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers, Leiden/Boston, 2003, p. 48

[22] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights,1986, Reprinted in *Human rights Quarterly* (9), 1987, pp.122-135, Para. 17.

[23] Committee on Economic, Social and Cultural Rights: Report on Fifth Session, Supp. No.3, Gen. Comment 3, U.N. Doc. E/1991/23 (1990),at WWW <http://www.ohchr.org/english/bodies/cescr/comments.htm > (Consulted 16 Nov. 2008)

on Economic, Social and Cultural Rights (CESCR), in discharging these obligations states have to use all appropriate means, including legislative, administrative, judicial, economic and educational measures as appropriate depending on the nature of the right. Thus obligations of conduct and obligations of result are called of the state for the full realization of socio-economic rights. An obligation of conduct refers to a specific action/omission required of a state, whereas an obligation of result obliges a state to take action/omission, whichever is appropriate, in order to achieve a specific result vital for the enjoyment of socioeconomic rights.[24]

Despite the existence of adequate international standards on economic, social and cultural rights actual enforcement, however, remains unsatisfactory and fraught with obstacles. The main problem to the implementation of socioeconomic rights seem to emerge from the reactionary and unwitting attitude that economic, social and cultural rights are not enforceable legal rights, which prevailed for a long time among scholars, commentators and national governments.[25] As result it was widely held that socio-economic rights are non justiciable or no judicial vindication of those rights was possible, thus estranging them from the principal means of enforcement in times of violation. There are various arguments that are forwarded to show that indeed economic, social and cultural rights are not enforceable legal rights.

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[24] Weissbrodt, D., Fitzpatrick, J., and Newman, F., *International Human Rights: Law, Policy, and Process*, 3rd Edition, Anderson Publishing Co., Cincinnati, Ohio, 2001, pp. 89-90.

[25] Nowak, *Supra* note 21, p.81; Also Eida, *Supra* note 5, p.112; Tinta, M.F., Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond traditional Paradigms and Notions, *Human rights Quarterly*(29), 2007, pp. 432-433; Kunnemann, R., A Coherent Approach to Human Rights, *Human rights Quarterly*(17), 1995, p. 333.

The first point forwarded to explain that socioeconomic rights are not enforceable legal rights is that these rights are merely aspirational or programmatic principles without any serious obligation and as such they are not human rights properly speaking.[26] This argument is based on Article 2(1) of the ICESCR which provides for 'progressive realization' of the rights provided for in the covenant.[27] This phrase, and indeed the whole of Article 2(1) of the ICESCR has led many to hold the position that economic, social and cultural rights do not impose an immediate obligation but are guidelines for state action in areas of social welfare.

Even in the event that their legally binding nature is admitted it is maintained that they impose positive obligation on the state which oblige the state to carryout costly activities.[28] This means it will be in the discretion of the state to identify priorities and take action within the means available at its disposal, which in effect, means that it would not be possible to demand enforcement in the event of violation of these rights.

The other argument that is forwarded to show that socio-economic rights are not enforceable legal rights is the alleged indeterminate and vague content of the rights. This point in part has to do with the general way in which the rights are stated in the ICESCR. It is also often stated that "they are by nature, open-ended and indeterminate, and that there is lack of conceptual clarity about them."[29] It is often asserted that it will be difficult for judges to decide when such rights have been violated.[30]

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[26] Kunnemann, S*upra* note 25, p.333; Also Nowak, *Supra* note 21, p.81.

[27] International Covenant on Economic, Social and Cultural rights, *Supra* note 9.

[28] Tinta, *Supra* note 25, p. 433.

[29] Dennis, M.J., and Stewart, David, P., Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Right to Food, Water, Housing, and Health? Cited in Wiles,E., Aspirational

These and other arguments are made to show that economic, social and cultural rights are not enforceable legal rights. Although, it is not the purpose of this short essay to dig exhaustively in to these arguments and show their pitfalls, it is possible to point out that they are based on an artificial classification of human rights and misunderstanding of the nature of obligations that human rights give rise to the state.

There is this traditional artificial classification of human rights in to civil and political on the one hand and economic, social and cultural on the other hand. This tradition of classifying human rights in to two groups goes back to the time of the drafting of the ICCPR & ICESCR. At the time when the world started to recognize human rights in 1948 all the rights were spelt out in a single document- the UDHR- reflecting the natural interdependence and indivisibility of human rights. Later as the world proceed to set out the details of the rights and the corresponding obligation of states in the form of covenant, a decision was made to divide them in to two sets. While civil and political rights were made to form one group, a separate set of rights called economic, social and cultural rights were put in to a separate document. In fact the classification was not watertight. Some human rights (eg. The rights of minorities) are found in both covenants, while typical social rights (eg. Family right & the right of the child) are found incorporated in the ICCPR. The division which has complicated reasons behind[31] has affected the way the world looked at and worked towards the implementation of human rights in the second half of the 20th century.

Principles or Enforceable Rights? The Future for Socioeconomic Rights in National Law, *American University International Law Review* (22:35), 2006, p.50.

[30] Wiles, *Supra* note 29, p. 50.

[31] Trubek, *Supra* note 1, p. 211.

Today, there is an increasing volume of scholarly opinion against this classification of human rights.[32] It is now widely upheld that such classification is against the very nature of human rights which are indivisible, interdependent, and interrelated. After all, it should be noted that, as outlined in the preamble to both covenants, the moral foundation of human rights is the human dignity inherent in all human beings. So it does not make sense to create differentiation and division of the norms derived there from. Indeed as Tinta has succinctly put it "as human beings exist in reality as a whole, [human] rights are intertwined and interwoven, existing as living organisms."[33] And it is that same fallacy that defied this truth that is denounced at the Vienna Declaration and Program of Action.[34]

Dividing the undivided, interrelated and interdependent was not the only problem. Once human rights were classified in to civil and social they were ascribed different nature and legal character. It is said that civil and political rights impose negative obligation on the state requiring simply refraining from interfering in the exercise of the rights. Thus it was held civil and political rights are immediately applicable legal rights.[35] On the other hand economic, social and cultural rights are considered as imposing positive obligation requiring the state to take positive action. This led to the denial of the fact that economic, social and cultural rights are legal rights.[36] Instead it was taken for granted that socio-economic rights are merely

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[32] Tinta, *Supra* note 25, p. 435; Kunnemann, *Supra* note 25, pp. 325-331; Koch, I. E., Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective, *The International Journal of Human Rights*(10), 2006, p. 406.

[33] Tinta, *Supra* note 25, p. 435.

[34] World Conference on Human Rights: Vienna Declaration and Programme of Action, 1993, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 138-163.

[35] Tinta, *Supra* note 25, pp. 432-433.

[36] *Id*. P. 432.

aspirational principles for progressive realization subject to resource availability. This has served as pretext for government ambivalence.

This discourse, however, is based on a misunderstanding of the nature of the obligation that human rights give rise to. In legal theory it is well accepted that human rights indivisibly give rise to obligation to *respect*, *protect* and *fulfill*[37] which, speaking in the language of positive/negative means that all human rights impose positive as well as negative obligation. Yes it is true that there are socio-economic rights whose realization requires time and the adoption of policies and programs, but there are also a lot of them that can be guaranteed for citizens immediately.[38]

To sum up, the artificial separation of human rights in to civil and social and the different characterization they are given has been the central problem in the implementation of socioeconomic aspect of human rights. The conceptual confusion in this area is now getting cleared up by activists and commentators to some extent alleviating the problem. This is evident from the developing jurisprudence in the area of socio-economic rights adjudication in national and international (regional) judicial bodies. Apart from a direct invocation of socio-economic rights, addressing socio-economic issues through civil and political rights has become an important strand in the endeavour to address the problem in the implementation of economic, social and cultural rights. An examination of the plausibility and efficacy of this kind of approach will follow.

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[37] Nowak, *Supra* note 21, p.48.; Koch, *Supra* note 32, p. 406.

[38] The list of these rights is available at General Comment 3 of the Committee on Economic, Social and Cultural Rights, *Supra* note 23, Para. 5.

III. An Integrated Approach as an Alternative Solution to the Problem in the Implementation of Socio-economic Rights

A. Nature of the Integrated Approach

The integrated approach is all about integrating (bringing into) socio-economic rights in the interpretation and application of civil and political rights. The integrated approach requires using the dynamic process of interpretation and judicial activism in delineating the scope of civil and political rights in a fashion that would be inclusive of economic, social and cultural rights.

The validity of this approach lies in the indivisible, interrelated and interdependent nature of human rights. The implication of the notion of indivisibility of human rights is that we cannot dissect the right to life from the right to health or the right to food. It does not give sense to say a person that you will not be tortured but wait starved. Political and civil rights cannot be consumed or at best cannot make sense without education or means of survival. The nature of human rights is such that it is difficult to address a single right in isolation without having implication or repercussion on other rights. The most striking truth in relation to this is that the various rights appear interrelated in real cases. This creates good opportunity to approach the cases from the perspective of civil and political rights rather than from the point of the contentious economic, social or cultural right.

An important point worth noting, as revealed from the jurisprudence of national courts and treaty bodies, is the fact that the various socio-economic rights seem to be more akin to the right to life. If an economic or social right is discussed in a civil and political rights forum, almost invariably it is done in relation to the right to life. This

may be because of the fact that the right to life "is the right from which all other rights flow."[39]

Although far from being adequate, there are important developments in integrating socio-economic rights in to civil and political rights. Treaty bodies as well as national judicial organs are increasingly giving effect to economic, social and cultural rights through interpretation of civil and political rights. Surprisingly, this is happening in many parts of the world including the developing world where the issue of resource availability (management?) is often mentioned as a problem for the realization of socio-economic rights. The writer will now turn to examine the developing jurisprudence in this area. It is just an illustrative approach to show how it works and how useful it is.

B. The Integrated Approach in Action

Lesson from the Works of the Human Rights Committee (HRC)

The Human Rights Committee (hereinafter referred to as HCR) was established by Article 28 of the ICCPR to monitor the implementation of the Covenant. The Committee is composed of 18 experts in the field of human rights who are nominated by and elected in the meeting of states parties to the covenant but who act in an independent capacity.[40]

The HRC performs a number of activities with a view to discharging its responsibility of monitoring the effective implementation of the covenant. The most important of these activities are the consideration of periodic reports submitted by states parties to the Covenant;[41] the adoption of General Comments that serve as an

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[39] Jayawickrama, N., *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, Cambridge, 2002, p.243.

[40] ICCPR, *Supra* note 14, Arts. 28 & 30.

[41] ICCPR, *supra* note 14, Art. 40.

interpretative instrument in the application of the Covenant by states parties to the Covenant;[42] and the consideration of individual communications on alleged violation of the Covenant under the procedure established by Optional Protocol 1 to the ICCPR.[43] The HRC has used these major tasks as an opportunity to expound the contents of the rights contained in the ICCPR. In this way the HRC has developed an important body of jurisprudence that has an important direct effect to the enforcement of socio-economic rights.

The HRC in its two general comments[44] it issued on the right to life under Article 6 of the ICCPR has emphasized that the right to life should not be interpreted narrowly. The HRC in its General Comment 6 pointed out that[45]

> *"[t]he expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures [...] especially[...] adopting measures* ***to eliminate malnutrition and epidemics****."* (Emphasis added)

This gives even more sense when we realize the fact that 'more and more people die on account of hunger and disease than are killed'.[46] Moreover, as it is widely accepted that the right to life is more than mere existence,[47] it is appropriate to read into this right an

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[42] ICCPR, *Supra* note 14, Art. 40(4)

[43] Optional Protocol to the International Covenant on Civil and Political Rights, 1966, reprinted *in* Brownlie and Goodwin-Gill, *Supra* note 8, pp. 375-378.

[44] Human Rights Committee, *General Comment 6, Article 6* (sixteenth Session, 1982) and General Comment 14(Twenty—third Session, 1984), at WWW <http://www.ohchr.org/english/bodies/hrc/comments.htm > (Consulted 26 November 2007).

[45] General Comment 6, Supra note 44, Para.5.

[46] Dinstein, y., The Right to Life, Physical Integrity and Liberty, in Henkin, L.,(Editor), *The International Bill of Rights*, Colombia University Press, New York, 1981, p.115.

[47] Jayawickrama, Supra note 39, pp. 256-260.

entitlement to basic human needs like those covered by socio-economic rights.

Another set of rights under the ICCPR which the HRC considers as having economic, social and cultural dimension are the rights of the child under Article 24. In its General Comment 17 the HRC noted that the measures necessary to ensure that children fully enjoy the other rights enunciated in the ICCPR economic, social and cultural such as economic or social measure to reduce infant mortality and to eradicate malnutrition.[48] In the same General Comment the HRC has indirectly indicated the intimacy between cultural right and freedom of opinion and expression when it remarks that[49]

> *"...every possible measure should be taken to [...] provide them [children] with a level of education that will enable them to enjoy the rights recognized in the Covenant, particularly the right to freedom of opinion and expression..."*

In its concluding observation of the fourth periodic report of Canada the HRC pointed out that "homelessness has led to serious health problems and even to death" and recommended the state party "to take positive measures required by Article 6 to address this serious problem."[50]

In *E.H.P v Canada* which concerned a claim that disposal of radio-active nuclear waste in Port Hope, Ontario, causes cancer and genetic defect threatening the life of present and future generation of

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[48] Human Rights Committee, General Comment 17, Article 24(thirty-fifth Session, 1989), para. 3, at WWW <http://www.ohchr.org/english/bodies/hrc/comments.htm > (Consulted 27 November 20 07).

[49] *Ibid*

[50] Human Rights Committee, *Concluding Observation on Fourth Periodic Report of Canada* (1999), Para. 12, at WWW <http://tb.ohchr.org/default.aspx> (Consulted 27 November 2007).

residents, the HRC in its admissibility decision noted that "the present communication raises serious issues with regard to the obligation of states parties to protect human life"[51] implying that the protection of the right to life cannot be meaningful without the protection of the right to health of the individual human beings.

It may be because of the fact that individual complaint under the Optional Protocol is "a deficient mechanism to address socio-economic deprivation"[52] the instances where the HRC addressed socioeconomic issues under the individual complaint procedure are rare. Instead the HRC has addressed the socio-economic dimension of the right to life in the several of the Concluding Observations it made on states parties periodic reports.[53] One thing, however, is clear from these illustrative works of the HRC: socio-economic rights are an integral part of civil and political rights and that it is possible to give effect to socio-economic rights through the interpretation of civil and political rights.

Lesson from the Inter-American System for the Protection of Human Rights

The Inter-American Court of Human Rights and the Inter-American Commission of Human Rights are the principal institutions of the Inter-American Human Rights System. These institutions address issues of human rights violation in their contentious procedure under the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man.

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[51] Human Rights Committee, *E.H.P V Canada*, Communication No. 67/1980, U.N. Doc. CCPR/C/OP/1 at 20 (1984), at WWW <http://www1.umn.edu/humanrts/undocs/html/67-1980.htm > (Consulted 28 November 2007).

[52] Joseph, F. et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd edition, Oxford University Press, Oxford, New York, 2004, p.186.

[53] *Ibid*

In a number of their decisions they rendered on issues of violation of human rights and compensation thereof, both the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights have demonstrated the justiciability of economic, social and cultural rights. And a lot of this is done through creative interpretation of civil and political rights putting in full light the original indivisible, interdependent and interrelated nature of human rights.

The Inter-American Court of Human Rights has adopted creative approach in its endeavour to address the justiciability of economic, social and cultural rights through the interpretation of civil and political rights. The dynamism of the court's approach in this regard is seen from the way it applied general principles of international law on interpretation of international law in a bid to tackle the problem surrounding the justiciability of socio-economic rights. In its advisory opinion in relation to the right to information on consular assistance, the court noted that[54]

> "*...the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty (paragraph 2 of Article 31), but also the system of which it is part (paragraph 3 of Article 31).*"

This, in effect, and as hinted out by the Court, means that not only all the relevant instruments of the regional Inter-America System, but also other international standards like the ICCPR and other instruments has to be taken into consideration as they constitute the system within which the Inter-American System of Protection of Human Rights is inscribed.[55] In explaining the rationale for adopting

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[54] Inter-American Court of Human Rights, Advisory Opinion, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, OC-16/99, Inter-Am. Ct. H.R.(Ser.A) No.16, para.113, at WWW <http://www.corteidh.or.cr/opiniones.cfm > (Consulted 29 November 2007).

[55] Tinta, *Supra* note 25, p.443.

this kind of approach the Court noted the importance of an 'evolutive interpretation' in international human rights law as it has been instrumental in the development of this body of law.[56]

Having this in mind, the court had a number of occasions to address complicated cases. In one of its landmark decisions which concerned street children in Guatemala who were victims of violence, including torture and killing by state agents,[57] the court had the opportunity to apply its dynamic method of interpretation to give effect to economic, social and cultural rights by approaching the case from the vantage point of civil and political rights. The Court, which analyzed the case broadly in light of the American Convention on Human Rights and the Convention on the Rights of the child as well as the General Comments of the Human Rights Committee, found double transgression of the right to life. In the words of the Court:[58]

> "*First, such states do not prevent them [the children] from living in misery [in the street], thus depriving them of the minimum conditions for dignified life and preventing them from the 'full and harmonious development of their personality, [...]. Second, they violate their physical, mental and moral integrity and even their lives.*" (Emphasis added)

In paragraph 144 of the same case the Court emphatically stated that

> "*In essence, the fundamental right to life includes not only the right of every human being not to be deprived of*

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[56] The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Supra note 54, Para. 114.

[57] Inter-American Court of Human Rights, Reparations and Judgements, *Villagrán-Morales et al. v. Guatemala (Case of the "Street Children"*), Judgment of May 26, 2001. Series C No. 77, at WWW <http://www.corteidh.or.cr/casos.cfm > (Consulted 29 November 2007).

[58] *Id*., Para. 191.

> *his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence*." (Emphasis added)

The Court, which seem to have used the terms 'dignified life' 'decent life' 'dignified existence' and 'decent condition of life' interchangeably, pronounced education and health care as the core elements of the notion as it applied to children, in an advisory opinion it delivered upon a request by the Inter-American Commission of Human Rights.[59] In particular it highlighted on the importance of the right to education as it "contributes to the possibility of enjoying a dignified life..."[60]

The point that one can draw from this work of the Inter-American Court is that the right to life is not about mere existence as an organic matter. It is more than that and encompasses the right to live in dignity which requires the fulfillment of basic economic, social and cultural needs. Consequently, states have the obligation to provide and ensure the enjoyment of basic social, economic and cultural needs as part of their international obligation to ensure the right to life for their subjects.

In another important decision the Court made in the case of *Yakye Axa Community v. Paraguay*[61], it interpreted Article 4(the right to life) and Article 21(the right to property) of the American Convention on Human Rights to address the economic, social and cultural rights of

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[59] Inter-American Court of Human Rights, Advisory Opinion, *Juridical Condition and Human Rights of the Child*, OC-17/02, August 28, 2002. Series A No. 17, Para. 80,84,86.

[60] *Id*. Para. 84.

[61] Inter-American Court of Human Rights, Merits, Reparations and Costs, *Case of the Yakye Axa Indigenous Community v. Paraguay*, June 17, 2005. Series C No. 125, at WWW <http://www.corteidh.or.cr/casos.cfm > (Consulted 30 November 2007).

the indigenous community affected by denial of access to land and basic rights on it.

In the case of *Juvenile Re-education Institute v. Paraguay*[62] the same Court has noted that the state "in its role as the guarantor of the right to life" has an inescapable obligation to provide individuals with "the minimum conditions befitting their dignity as a human being,"[63] which the Court indicated that in the case of minors under state custody it includes education and health care[64] which the court found unfulfilled in the particular case. The Court reiterated the point further and declared that the actions that a state is called upon to take to give effect to its obligations under Article 19 of the American Convention of Human Rights (which deals with the rights of the child) goes beyond mere civil and political rights and include economic, social and cultural aspects that form part of the right to life[65].

Lesson from the European Court of Human Rights

The European Court of Human Rights (ECHR) is the leading European organization for the protection and promotion of human rights in the Council of Europe. The Court is established by The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)[66] to ensure observance of the obligations undertaken by European states parties to the Covenant and the Protocols thereto.

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[62] Inter-American Court of Human Rights, Decisions and Judgements, *Case of the Juvenile Re-education Institute v. Paraguay*, Judgment of September 2, 2004. Series C No. 112, at WWW <http://www.corteidh.or.cr/casos.cfm > (Consulted 30 November 2007).

[63] *Id*., Para. 159.

[64] *Id*., Para. 161.

[65] *Id*., Para. 149.

[66] The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, together with Protocols nos. 1, 4, 6, and 7 as amended by Protocol no. 11, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 610-623.

Although the Convention focuses on such civil and political rights as the right to life, liberty, security of the person, privacy, freedom of conscience and religion, peaceful assembly, free association, and fair trial, the ECHR has been able to read socio-economic elements in to these rights through its doctrine of 'evolutive interpretation,' a method of interpretation that the court adopted for a long time in order to fit the Convention to new conditions occurring overtime. In this regard the Court in *Tyrer v. United Kingdom*[67], *Marckx v. Belgium*[68], *Loizidou v. Turkey*[69] among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.

The Court has utilized this approach to integrate socio-economic rights with civil and political rights. For instance in the case of *Airey v. Ireland*[70] the Court after noting that many of the rights contained in the European Convention on Human Rights have implication of social or economic in nature and as such there is no water-tight division separating the former from the later, decided that

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[67] European Court of Human Rights, *Tyrer v. United Kingdom judgment* of 25 April 1978, Para. 31, at WWW <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3717441&skin=hudoc-en&action=request> (Consulted 29 November 200).

[68] European Court of Human Rights, *Marckx v.Belgium*, judgment of 13 June 1979, Para. 41,at WWW <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3717441&skin=hudoc-en&action=request > (Consulted 29 November 200).

[69] European Court of Human Rights, *Loizidou v. Turkey* (Preliminary Objections) judgment of 23 March 1995, Para. 71, at WWW <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3716814&skin=hudoc-en&action=request> (Consulted 29 November 200).

[70] European Court of Human Rights, *Airey v. Ireland*, Judgment of 9 October 1979, at WWW <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3722577&skin=hudoc-en&action=request > (Consulted 29 November 200).

the state should provide free legal aid even in civil law suits (which is a social benefit, in the instant case a divorce proceeding) when it is necessary to ensure effective access to justice. The Court passed this decision despite a provision in the European Convention on human Rights which provide for free legal aid only for persons charged with criminal offence.[71] The idea of the Court behind this decision is that as the Convention "...is designed to safeguard the individual in a real and practical way"[72] on matters covered by it, it should be interpreted to that end even if that may have the effect of extending its scope into the sphere of social and economic rights. If a right has to be protected meaningfully that is the way it should be done. And that is perfectly in line with Article 31(1) and 31(2) (c) of the Vienna Convention on the Law of Treaties[73] which provide that the terms of a treaty must be interpreted in their context and in line with object and purpose of the treaty.

Similarly, in the case of *Lopez Ostra*[74] the Court had the opportunity to decide whether the measure taken by Spain to protect the right to respect for home and family (a right under Article 8 of the European Convention on Human Rights) against environmental pollution from a waste treatment plant situated twelve meters from the applicant's house was adequate. The Court found that the state has not afforded redress for the nuisance and inconvenience to which the applicant was suffering. Here clearly the Court goes beyond a mere civil right issue under article 8 to a social sphere, that is the right to

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[71] European Convention on Human Rights, *Supra* note 66, Article 6(3) (c).

[72] Airey case, Supra note 70, Para. 26.

[73] Vienna Convention on the Law of Treaties, 1969, at WWW <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf > (Consulted 30 November 2007).

[74] European Court of Human Rights, *Lopez Ostra v. Spain*, Judgment of 9 December 1994, at WWW <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3727060&skin=hudoc-en&action=request > (Consulted 30 November 2007).

health, and this is warranted by the need to protect the right in real and practical way giving full meaning to the right.

In yet another important decision of the Court in the case of *D V. The United Kingdom*[75] the provision of the European Convention on Human Rights on prohibition of torture or inhumane or degrading treatment or punishment (Article 3) was extended to cover the situation of an AIDS victim person under expulsion to a country that cannot provide treatment and comfort to an AIDS patient. The effect of the decision is that the United Kingdom would have to provide the cost of treatment and comfort of the patient for the time period he has yet to live, the clear implication of which is that the fulfillment of the right to be free from inhumane treatment requires the fulfillment of social elements, like the right to health care in this particular case.

Lesson from National Courts

The integrated approach to the enforcement of economic, social and cultural rights through civil and political rights has as well been adopted by many national judicial organs. And that is exactly the mystery which enabled the Indian Supreme Court to enforce series of socioeconomic rights declared otherwise as mere Directive Principles of State Policy (DPSP) in Part IV the Indian constitution and in the face of an express constitutional provision prohibiting their justiciability.[76]

The Supreme Court has in a number of cases interpreted civil and political rights (particularly the right to life) in such a way as to include economic, social and cultural human needs. It was in the

[75]European Court of Human Rights, *D v. The United Kingdom*, Judgment of 2 May 1997, at WWW <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3728576&skin=hudoc-en&action=request > (Consulted 30 November 2007).

[76] Constitution of India, 1950, Article 37, at WWW <http://indiacode.nic.in/coiweb/welcome.html > (Consulted 2 December 2007).

famous case of *Francis Coralie Mullin* that the Court boldly declared that,[77]

> "*The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms* [...]."

Against this ground work the Supreme Court has continued enforcing different socio-economic rights in a number of decisions it made since then through its broad interpretation of the right to life. For instance in the case of *Olga Tellis v. Bombay Municipal Corporation*[78] the Supreme Court held that right to life and personal liberty required that pavement dwellers be provided with alternative accommodation before eviction.

The South Africa Constitutional Court is another national judicial organ that adopted the integrated approach to address social inequality that is entrenched in the South African society. The South African Constitution incorporates a number of legally enforceable socio-economic rights together with the generic obligation that "the state must take reasonable legislative and other measures, within its available resource to achieve the progressive realization of these rights." [79] The Constitutional Court has used the integrated approach to

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[77] Supreme Court of India, *Francis Coralie Mullin V. The Administrator, Union Territory of Delhi* (1981), at WWW <http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=10150 > (Consulted 2 December 2007).

[78] Supreme Court of India, *Olga Tellis v. Bombay Municipal Corporation* (1985), at WWW <http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=9246 > (Consulted 2 December 2007)

[79] Constitution of the Republic of South Africa, 1996, Article 26(2) and Article 27(2), at WWW

set aside the argument of authorities that they are fulfilling their obligation progressively, and gave effect to socio-economic rights in specific cases. For instance in one of its land mark decisions in the case of *Government of the Republic of South Africa and Others v. Grootboom* the Court held that human dignity, freedom and equality guaranteed by the constitution requires that housing be provided immediately to the most needy in crisis situation.[80]

Although it is just like a droplet in the bucket in light of the problem, treaty bodies and judicial organs around the globe are using the integrated approach to give effect to economic, social and cultural rights. The cross reference to the jurisprudence of one another is striking feature of this development. It is interesting to see the Inter-American Human Rights Court and the Human Rights Committee referring to the jurisprudence of the European Court of Human Rights and the South African Constitutional Court referring to the work of the Indian Supreme Court.

This does not, however, mean that this approach has got no limitations. In the first place it does not provide a complete solution to the problem of legal enforceability of socioeconomic rights. The justiciability of socioeconomic rights through the integrated approach applies only where these rights appear as necessary fulfillment elements in civil right cases.[81] In other words if it cannot be show that a person's socioeconomic claim relates to some sort of civil or political right, the integrated approach cannot give a solution. However wide

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<http://www.constitutionalcourt.org.za/site/theconstitution/english.pdf > (Consulted 2 December 2007)

[80] Constitutional Court of South Africa, *Government of the Republic of South Africa and Others v. Grootboom*, At WWW <http://www.constitutionalcourt.org.za/site/thecourt/history.htm#cases > (Consulted 3 December 2007)

[81] Koch, I.E., The Justiciability of Indivisible Rights, *Nordic Journal of International Law*(72), 2003, p. 23

we may stretch civil and political rights there are socioeconomic rights that cannot in any event be integrated into it. Mention can be made of the right to take part in cultural life, protection of the family and freedom of marriage that hardly form part of fulfillment elements in civil or political right after stretching them to their conceptual limit. Even more badly, the criteria of courts for determining whether a given socioeconomic claim forms part of the fulfillment elements of a given civil or political right is not predictable.[82]

IV. Concluding Remarks

As pointed out in the introductory part, the purpose of this essay is to show the integrated approach as an alternative solution to the problem that thwarted the enforcement of economic, social and cultural rights embedded in international law. Accordingly, it has been shown that it is possible to enforce these set of rights by integrating them in the interpretation of civil and political rights. The fact that human rights by nature are interrelated, interdependent and indivisible lends this approach legal validity although the effective utilization of it depends on judicial activism and creativity. Practice has also shown that this approach works out properly except that it is not widely used.

It should, however, be borne in mind that while its immense potentials cannot be ignored the integrated approach has its own limitations which cannot be rectified. So, it may only help but cannot be the ultimate solution to the problem of non justiciability that interwoven the implementation of socio-economic rights.

The unavoidable limitations of the integrated approach make us to be aware that accepting socio-economic elements in civil rights cases is different from accepting socio-economic rights as such. This being the truth it is important to remember the importance of further cultivating and developing the international movements to clear up the

[82] *Ibid*

confusion as to the legal nature of socio-economic rights. In this regard introducing individual and collective complaint procedure under the ICESCR will have an important effect.

The TBT Agreement and Global Environmental Concerns: Re-evaluating LDC's Reaction to Eco-Labeling Programs

Ermias Ayalew*

Abstract

Concerns of environmental protection are at the forefront of numerous global forums. Especially in the context of international trade and other development practices, the subject attracts huge debates among scholars, interest groups and policy makers aligning themselves in to differing positions. The TBT agreement is one of the WTO laws which turn out to be at the heart of the trade and environment debates. There are different perceptions about the relationship between the agreement and the global environmental protection efforts. Eco-labeling programs are one of the typical tools widely adopted to ensure environmental protection and natural resource conservation. There is no debate as to whether eco-labeling practices can fall under the TBT agreement. Much of the controversy arises in relation to the scope of application of the agreement in relation to eco-labeling. Developing countries, as opposed to developed trading partners, are seriously concerned about whether or not the agreement covers production process methods that does not impact the final output of a commodity. Developing countries choose the agreement's narrower scope. In this article I will disprove the argument that non-product related process and production methods are outside of the scope of the TBT agreement. I will divulge, based on analysis of relevant laws, that the TBT agreement governs eco-labeling programs regardless of whether or not the relevant production-process method affects the environment only through the final product. I will also argue and try to demonstrate why the agreement's wider scope is in the best interest of developing countries. Finally, I will recommend developing countries to re-evaluate their position concerning the TBT agreement.

Introduction

Members have been in serious disagreement about the relationship between the WTO rules and eco-labeling programs based on process and production methods unrelated to products.[1] This issue

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[1] Process and production methods unrelated to products (referred as NPR-PPMs here in after) are those production methods or harvesting techniques that may affect environment with out their effects being reflected in the final product.

has been raised more in the context of the agreement on technical barriers to trade.[2] At one extreme of the debate are developing countries that reject the scope of the TBT agreement to include eco-labeling programs based on NPR-PPMs.[3] These countries base their argument on both the textual interpretation and the negotiating history of the agreement. The fear that eco-labeling programs may be used for disguised protectionism, coupled with limited economic capability and lack of technical expertise to comply with requirements of various eco-labeling programs, make them to hold strong position against the wider scope of the TBT agreement.[4] On the opposite side of the debate are found developed countries arguing that the scope of application of the TBT agreement is extended to cover eco-labeling programs based on NPR-PPMs.[5] The Doha-declaration assign the committee on trade and environment (CTE here in after) to study the issue of labeling requirements for environmental purposes and to make recommendation as to whether there is a need to clarify their status

[2] Agreement on Technical Barrier to Trade, here in after referred to as TBT; see World Trade Organization, Trade and Environment at the WTO, available at www.wto.org . Accessed on 23 March 2008

[3] Id.

[4] Atsuko Okubo, Environmental Labeling programs and The GATT/WTO regime, Georgetown International Environmental Law Review, 1999, p. 600.

[5] Dr. Wendy Hollingsworth, Eco-Labeling and International Trade, Trade Hot Topics Commen waelth, Issue No. 21 availabe at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B4228B06C-6A9A-434D-BEB3-BAE1CD5C36B1%7D_trade%20hot%20topics%2021.pdf ,accessd on 22 march 2008

under WTO rules and whether there is a need for further negotiation.[6] The committee is far from bringing solution to the issue.[7]

In this article I will argue that the scope of application of the TBT agreement extends to Eco-Labeling programs based on NPR-PPMs. I will also try to argue that the wider scope of application of the TBT agreement is not more prejudicial to the interest of developing countries as compared with the situation where eco-labeling programs are out side of the scope of the agreement. However, it does not mean that the wider application of the TBT agreement perfectly suits the situations of developing countries.

Part I of the article will provide general background on the purpose and nature of the TBT agreement. Part II will provide the conceptual understanding of PPM and related concerns. Part III will provide back ground discussion on eco-labelling programs and the TBT agreement. Part IV will focus on the textual interpretation and the negotiating history of the relevant provisions of the TBT agreement. Part V will concentrate on the relative advantage that developing countries may have with the wider scope of application of the TBT agreement. Part VI will deal with policy objectives which justify eco-labeling based on NPR-PPMs under the TBT agreement.

I. Purpose and nature of the agreement on Technical Barrier to Trade (TBT)

The coming in to effect of the General Agreement on Tariff and Trade (herein after the GATT) in 1947 has immense contribution

[6] Doha WTO Ministerial Declaration at Para. 32, WT/MIN(01/) /DEC/1, 20 December 2001, available at http://www.wto.org./english/thewto_e/minist_e/min01_e/mindecl_e.htm#32.3

[7] Erik P. Bartenhagen, The Intersection of Trade and the Environment: an Examination of the Impact of the TBT agreement on Eco-Labeling Programs, Virginia Environmental Law Journal Vol. 17, No.52, 1997-98, P. 78

towards the culmination of tariff barriers to international trade.[8] Contracting parties to the GATT have given significant tariff concessions that helped to dismantle one of the then existing hurdle to free movement of goods between countries. A significant increase in the extent of access to international market has perceived to be one of the principal outcomes of the GATT. Although contacting parties have undertaken the reduction of excessive tariffs on their imports and exports, protectionist [9] interests compelled them to find escape routes to promote favouritism towards local producers. As the GATT rules were principally meant to fight against tariff barriers, contracting parties had to look for non-tariff barriers that might help them to put obstacles for foreign producers and suppliers who sought for access to international market. The numerous non-tariff barriers were put with the objective to reduce the competitiveness of foreign goods in the importing countries' markets.

Technical barriers, such as product standards and quality regulations, were the principal mechanisms applied mainly for protectionist purpose. Adding to that problem was the fact that technical regulations and standard are not treated in detail under the GATT rules. The trade-disruptive acts, that the GATT has purported to remedy, have persisted through non-tariff technical barriers, which demanded additional legal regime. After prolonged compromises in the Tokyo round of trade negotiations, a plurilateral agreement (only some of the GATT members are signatories) was concluded in 1979. This early agreement, dubbed as the "standard code", has served as a base for the WTO's TBT agreement. Both the standard code and the TBT agreement were meant to strike the proper balance between

[8] High tariff was a significant negative factor for trade between countries before the coming in to effect of the General Agreement On Tariff and Trade (GATT) in 19 47

[9] Protectionism refers to an act of affording protection or of favouring of domestic businesses and industries against foreign competition by imposing high tariffs or restricting imports etc.

importing countries' legitimate interest to have technical regulations and standards on goods flowing to their market, on the one hand, and exporting and supplying countries' concern on protectionism, on the other. In other words, the standard code and the TBT agreement have been founded on the premise that importing countries have the right to regulate goods imported in to their territories to achieve legitimate policy objectives different from protectionist purpose.

The TBT agreement, under article 2.2, provides a non-exhaustive list of regulatory goals that are deemed to be "legitimate" for regulatory purpose.[10] These include: protection of human health or safety, animal or plant life or health, or the environment. The legitimate policy goals that the importing country tries to achieve may be served either by formulating technical regulations or standards. Annex I of the TBT agreement defines what technical regulation and standards are. Accordingly, technical regulation is a document which lays down product characteristics or their related production and process methods with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to product, process or production method.[11] For example an importing country's law requiring all product packaging must be reusable is a technical regulation. Standard, with in the meaning of article 2 of annex I, is similar with technical regulations, in terms of content, except that it is not mandatory requirement.[12] For example, a government guideline defining what products can bear

[10] See the preamble and article 2.2 of the TB T agreement.

[11] Annex I article , TBT agreement.

[12] Standard is defined as " document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for product or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, and packaging, marking or labeling requirements as they apply to product, processes or production method."

"reusable symbol" is a standard, provided that similar products that do not bear the symbol can still be sold in the market.[13]

In parallel with the recognition accorded to importing countries' legitimate policy objective for regulation, the TBT agreement accommodates concerns of exporting countries against protectionism. With the view to avoid discriminations, the agreement adopts the most favoured nation treatment and the national treatment principle.[14] Accordingly, in the preparation, adoption and application of technical regulations, members must ensure that products imported from the territory of another member shall be accorded treatment not less favourable than that accorded to like products of national origin or originating in any other country. A technical regulation is expected not to pose unnecessary barrier to international trade. It should not be more trade restrictive than necessary to achieve legitimate policy objectives. [15] The TBT agreement provides other stringent requirements on countries which want to develop technical regulations.[16]

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[13] This requirement is optional in the sense that exporters may not be denied market access in the importing country's market based on the fact that they do not comply with the latter's requirement of reusable standard. However, goods from exporting countries are not entitled to affix "reusable" labeling without attaining the importing country's standard. If it were technical regulation, however, goods from exporting countries, without complying with the requirement in the regulation, would not be allowed to be sold in the importing country's market.

[14] The Most Favoured Nations Treatment and the National Treatment principles are meant to ensure non-discriminatory treatment between like products of foreign origins, and between national products on one hand and all other like products of foreign origin on the other hand. See Article 2.1 TBT.

[15] See Art 2.2 TBT

[16] It is beyond the scope of this article to make analysis on all these relevant requirements. The writer urges readers to see articles 2.1-2.12 TBT.

II. Overview of PPM

A. What is PPM?

In the context of trade and environment relation ship, process and production method (PPMs) becomes one of the most controversial issues in the international trade regime.[17] Generally applied in the international trade context, PPM refers to the way in which a certain product is produced or a natural resource is exploited.[18] The broad understanding of PPM, therefore, encompasses the issue of environment, labour and human rights during the manufacturing or harvesting stage of a product.[19] With in the specific context of trade-environment debate, PPMs reflects the adverse effect on the environment of a certain production method. PPM rules, regardless of their context in environment, labour or human rights, regulate the production or harvesting stage of products before they are distributed for sale. [20]

The OECD paper classified PPMs in to two broad categories depending on the point at which the environmental effect of a product

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[17] Tetarwal & Mehta *Process and production methods (PPMs)-Implications for developing countries* (2000) CUTS BRIEFING PAPER No. 7 at 1.

[18] *Ibid*.

[19] *Ibid.*

[20] PPM standards can be formulated in a variety of ways. A country may follow a positive list approach in which it sets out specific process and production methods which demands manufacturers to adopt those methods in their production of commodities. The other approach is a negative list approach by which a PPM regulation forbids the use of specific methods of production and allows all other methods. Countries may still specify emission or performance effects that need to be avoided. In some circumstances, it happens to be difficult to make clear demarcation between these different methods as some regulations lie at the boundary of one and another. See OECD Secretariat: *Process and Production Methods (PPMs): Conceptual framework and Considerations on Use of PPM-based trade measure* (OECD/GD (97)137) 1997.

manifests itself.[21] These categories are product related PPMs on one hand and non-product related PPMs (NPR-PPMs) on the other.[22] The classification is meant to identify whether the environmental effect of a certain PPM manifests itself during consumption or manufacturing stage.[23] In other words, the classification is a means to make distinction between a PPM requirement that deals with consumption externalities and those that address production externalities.[24] Accordingly, a product related PPM measure related exclusively with production method that has a negative impact on the final product.[25] Product related PPM measure is used to ensure the safety, quality and usability of products.[26] For example, a PPM requirement which regulates the residue level of pesticides added to fruit during the production stage is

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[21] *Ibid.*

[22] Following the OECD's model, several writers adopt the product related PPMs and non-product related PPMs distinction; See, for example, Bernasconi-Osterwalder *et al Environment and Trade: A guide to WTO Jurisprudence* (2006) 204; Gains "process and production methods: How to produce sound policy for Environmental PPM-Based trade measure?" (2002) 27 *Columbia Journal of Environmental Law (Colum. J. Envtl. L.)* 383 at 396-399.

[23] OECD Secretariat, *supra* note 20.

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

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

[26] Charnovitz, "The Law of Environmental 'PPMs' in to the WTO: Debunking the Myth of Illegality" (2002) 27 *Yale Journal of International Law* at 65.

purely a product-related PPM.[27] The typical characteristics of product related PPM is that the production methods utilized can be directly detectible in the final product.

There are PPM requirements that have nothing to do with the physical characteristics or chemical property of the final product. The product, which the PPM regulation meant to govern, serves the same purpose or assures the same quality as "like" products produced in a different and environmentally-friendly manner.[28] Nevertheless, social or ecological policies make a government to put a regulatory regime on those PPMs.[29] These PPMs are referred as NPR-PPMs as they are nothing to do with the usability and quality of the final out put.[30] These PPM requirements address production externality in the form of restriction on input use in the production or cultivation of product, or requirement to adopt a specified technology.[31]

The OECD paper further classifies NPR-PPMs in to three categories based on the jurisdictional scope with in which PPM may cause adverse environmental effects.[32] Certain PPMs, thought not discernable in the final product through sale, distribution, conception and disposal, may still have environmental spillover beyond the country in which the product is produced. The adverse environmental effect thus may be global, transboundary or national.[33] The spillover of PPM is said to have transboundary effect where it affects, directly or indirectly, plant, animal, human health and life, soil, water, forest etc. of

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[27] See UNEP & IISD, supra note 21; see also Bernasconi-Osterwalder, *supra* note 22, at 204.

[28] OECD Secretariat, *supra* note 20F.

[29] *Ibid*.

[30] The typical characteristic of NPR-PPM is that the method of production used can not be directly detected from the final product. See. Bernasconi-Osterwalder, *supra* note 22, at 204; see also the *Ibid*.

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

[32] OECD Secretariat, *supra* note 20.

[33] *Ibid.*

the physically adjacent countries or shared geographical region.[34] A PPM is said to pose global environmental adverse effect where it affects global commons or resources which are shared by all countries.[35] This latter environmental problem includes ozone layer depletion, climatic change, harm to biodiversity, and effects on endangered species.[36] When the environmental effect of a certain PPM is limited to the country where it situates, it is said to be national.[37] It may include resource depletion, air, water soil pollution and loss of biodiversity.[38] In some instances a PPM may be used in a place where no country exercise jurisdiction under international law, such as the high sea.[39]

B. Controversies over PPM

Trade measures that purport to discipline patterns of production have become the primary focus of international policy debate that threatens to make trade interest and environmental protection antagonistic.[40] Environmentalists claim that most environmental problems trace their root-causes to environmentally destructive PPMs.[41] Environmentalists underscore the need to regulate PPMs for two principal reasons. First, environmentally unsustainable production methods add to environmental stress which may be irreversible.[42] Second, in the absence of regulatory regime which ensures that

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[34] *Ibid.*

[35] *Ibid*.

[36] *Ibid*.

[37] *Ibid.*

[38] *Ibid.*

[39] *Ibid.*

[40] Snap & Lefkovitz, "Searching for GATT's Environmental Miranda: Are "process Standards' Getting "Due process'?" (1994) 27 *Cornell International Law Journal*, at 779.

[41] *Ibid*.

[42] International Institute for Sustainable Development & Center for International Environmental Law: *The State of Trade Law and The Environment: Key Issues for the Next Decades Working Paper*, 2003.

imported products are subject to high environmental standard, the effort to apply high environmental standard to domestic products will be hindered.[43] Higher environmental standards most likely add to cost of production to producers. In a situation where only domestic producers are subjected to higher standards, they may not be able to equally compete with foreign producers that may offer their products with relatively cheaper price. It is logical to assume that no country wants to make its producers less competitive by imposing higher environmental standards without ensuring that producers in exporting countries are subjected to the same standards. Lobbyists of environmental protection argue that efforts to protect environment cannot be realized without successfully regulating PPMs.[44] Snap and Lefkovitz suggested that trade measures are the most effective tools to deal with the environmental externalities of destructive PPMs.[45] Environmentalists often criticize the multilateral trading system for not allowing to distinguish between products produced in a sustainable manner and those produced in unsustainable manner.[46]

The other side of the debate saw opposite view, especially motivated by development concerns. Many developing countries and small trading powers are suspicious that making environmental conditionality on trade will create additional barrier to trade, which in turn, erode the development objectives of trade liberalization.[47] These countries perceive environmental conditions, through PPM measures, as systematic and "veiled" "protectionism" devised by developed

[43] *Ibid*.

[44] Snap & Lefkovitz, *supra* note 40, at 779.

[45] *Ibid.*

[46] The general trend adopted by the GATT and WTO panels treat products as "like" or "similar" in so far as two commodities are similar in respect of their physical characteristics and end use irrespective of their difference in their PPM. See Tetarwal & Mehta, *supra* note 17, at 4.

[47] International Institute for Sustainable Development & Center for International Environmental Law, *supra* note 42.

countries in order to protect their industries from increased competition due to other changes in trade law.[48] For developing countries and LDCs the issue of PPM is closely associated with the question of market access.[49] For example, by demanding exporters to adopt a certain production methods, countries may make it burdensome and expensive for exporters of economically poor countries to sell in importing countries' market. Developing countries also expressed concern that developed countries can use their commercial power to impose their environmental standards on other nations without their consent to those standards.[50] Some environmental standards may not reflect the social, economic and environmental realities of developing countries.[51] Many developing countries worry that allowing PPM-based trade measures may serve a precedent for consideration of other social programs, such as labour standards and human rights.[52] Besides, sovereignty argument is raised, especially in relation to environmental externalities limited to exporting country.[53] The decision as to the method of production must be left to the discretion of the exporting country where the adverse effect of PPM is limited to that country alone. An expression of state sovereignty under general international law includes the authority of a state to decide on matters exclusively with in its territory.

A number of countries developed policies to reduce the various negative effects that PPMs have on environment.[54] These measures may, directly or indirectly affect international trade.[55] These measures,

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[48] *Ibid*; See also Tetarwal & Mehta, *supra* note 17, at 1.

[49] Bernasconi-Osterwalder, *supra* note 22, at 204; Pots, *supra* note 3, at 1-2; see also Tetarwal & Mehta, *supra* note 14, at 1

[50] Tetarwal & Mehta, *supra* note 17, at 5

[51] *Ibid.*

[52] *Ibid.*

[53] *Ibid.*

[54] Bernasconi-Osterwalder , *supra* note 22, at 203.

[55] *Ibid.*

referred generally as trade-affecting PPM measures, include import ban of products produced in environmentally-unfriendly manner, tax schemes based on production methods, border tax adjustment to offset PPM based domestic taxation etc.[56]

V. Conceptual Underpinnings of Eco-Labeling

Eco-labeling is a device that informs consumers about the environmental characteristics of a product.[57] It can, in most cases, be made effective by way of affixing piece of information on the package about its production process including the effect of the product on the environment. Taking lesson from the introduction in Germany of the Blue Angle eco-seal in 1977, a number of countries came up with legislations dealing with eco-labeling.[58] Eco-labeling provides information and assurance to consumers that a product fulfils a minimum environmental standard set by an issuing entity, either public or private.[59] In most instances it involves a "life cycle analysis" by which the issuing entity investigates the overall aspect of a product from 'cradle-to-grave.' [60] Eco-labeling thus concerns not only the final aspects of the product, such as pesticide residue of a product and recyclable nature of the package, but also the process and production methods

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[56] *Ibid*.

[57] Wendy Hollingsworth, Eco-Labeling and International Trade, Trade Hot Topics Commen waelth,Issue No. 21 availabe at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B4228B06C-6A9A-434D-BEB3-BAE1CD5C36B1%7D_trade%20hot%20topics%2021.pdf ,accessd on 22 march 2008.

[58] The Germany Blue Angle program, established in 1977, makes Germany the first country to implement a national eco-labeling program. See for more explanation, The united States Environmental Protection Agency, International Eco-Labeling Programs, available at http://www.epa.gov/innovation/international/ecolabel.htm accessed on 25 March, 2008; see also Bartenhagen at note 7 above, P. 54

[59] Wendy, at note 57 above.

[60] Id.

such as the level of energy consumption and emissions of ozone depleting substance during production stage, and west management. Eco-labeling is predicated on the idea that consumers posses the ultimate decisive force, through their choice, to compel manufacturers to adhere to environmentally friendly approach in their production of commodities.[61]

The relationship between WTO rules and the issue of various environmental measures based on process and production methods become the crux of debate since the establishment of the world trade organization in 1994.[62] The bulk of the controversy focus on the issue whether the existing WTO rules, especially the TBT agreement, cover eco-labeling programs that are devised to differentiate the environmental impact of products based on the process or method in which they are produced.[63] Developing countries persistently counter any argument that extends the application of the TBT argument to eco-labeling programs that target non-product related PPMs.[64] The fear to lose market access in developed countries' market make developing countries to persistently object any likely hood that the TBT agreement applies to NPR-PPMs. Developing countries expressed their concern that Eco-labeling programs based on "life cycle analysis" may be disguised trade restriction whereby access to developed countries' market may be deterred.[65] Besides, they are concerned that the likelihood that the TBT agreement applies to eco-labeling programs

[61] Atsuko Okubo, Environmental Labeling programs and The GATT/WTO regime, Georgetown International Environmental Law Review, 1999, p. 600 Okubo, Environmental Labeling programs and The GATT/WTO regime, Georgetown International Environmental Law Review, 1999, p. 600.

[62] Transatlantic Consumer Dialogue, Breifing Paper and Recommendation on Product Labels and Trade Rules, Doc No. Trade-12pp-03, 2003. Available at www.tacd.org/db_files/files/files-254-filetag.doc , accessed on 24 March 2008

[63] Id.

[64] Id

[65] Wendy, at note 57 above

based on NPR-PPMs may provide unnecessary precedent that the agreement's scope may be extended to use for social and humanitarian considerations such as labour standards.[66] They firmly argue that the negotiating history of the TBT agreement indicates that there was no any intention to legitimizing measures based on social or environmental factors that are totally not intrinsic to the product in question, and that measures based on NPR-PPMs are inconsistent with the TBT agreement and other provisions of GATT.[67]

IV. The TBT Agreement and Eco-Labeling Program

A. The text of the TBT agreement

Whether non-product related PPMs are dealt with by the TBT agreement is one of the most argued topics in the field of trade and environment.[68] A close scrutiny in the scope of the TBT agreement may illuminate the issue at stake. The scope of the TBT agreement extends to technical regulations, standards and conformity assessment procedures. Annex 1 of the agreement gives definition to technical regulations, standards and conformity assessments. Accordingly, a technical regulation is:

> *"Document which lays down product characteristics or their related process and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deals exclusively with*

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[66] Id.

[67] Committee on Trade and Environment, *Report (1996) of the Committee on Trade and Environment*, WT/CTE/1 (Nov. 12, 1996) para. 70

[68] Erik P. Bartenhagen, The Intersection of Trade and the Environment: an Examination of the Impact of the TBT agreement on Eco-Labeling Programs, *Virginia Environmental Law Journal* Vol. 17, No.52, 1997-98, p. 65

> *terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process and production method."*[69]

Standard, on the other hand, is

> *"document approved by recognized body that provides for common and repeated use, rules, guidelines or characteristics for products or related process and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production methods."* [70]

Conformity assessment procedure is *"any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled."*[71]

As can easily been recognized from the above definition, technical regulations are similar with standards except that the former is mandatory while the latter is not. Conformity assessment deals with procedural aspects of the agreement while technical regulations and standards govern substantive requirements.

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[69] Agreement on Technical Barrier to trade, Annex 1.A to the Marrakech Agreement Establishing the World Trade Organizations (April 15, 1994), Annex 1.1

[70] Id., Annex 1.2

[71] Id., Annex 1.3

B. Interpretation of elements of the definitions in the TBT agreement

It is quite straight forward that the TBT agreement applies to labeling program in general.[72] Express reference to "labeling" is made under the definitional part of technical regulations and standards in the necessary annexes. It is not also debatable that the agreement applies to eco-labeling programs in general.[73] A heated debate is going on regarding the relationship between the TBT agreement and eco-labeling programs based on NPR-PPMs. The crux of the issue whether the TBT agreement covers NPR-PPM related eco-labeling lies on the ambiguously worded definitions of technical regulation and standard.[74] The second part of both definitions triggered enormous academic discourse.[75] Some scholars argue that the second part which reads "….It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, ***process or production methods***'' is simply an explanation of the first part of the definition that entirely deals with products and **related** process and production methods.[76] In the view of these scholars the second part should not be construed to extend the scope of the TBT agreement to PPMs that are not intrinsic to the final product.[77] The logical conclusion from this premise seems that the agreement's scope is limited to those PPMs the effect of which is reflected in the final outcome or the product. The TBT agreement, in this view, does not therefore govern mandatory regulations or standards, including eco-

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[72] See Annex 1.1&1.2 of the TBT agreement.

[73] The term labeling in the definition of technical regulation and standard include eco-labeling, among other similar schemes.

[74] Erik, at note 68 above, p.73

[75] Id.

[76] Id. 74

[77] Id.

labeling programs, which regulate processes which do not have any effect on the final out put. Developing countries, almost unanimously prefer this line of interpretation.[78]

The other extreme on the debate saw the argument that the second part of the definitions of technical regulation and standard is not mere elaboration of the first part of the definitions.[79] This, in effect, means that the second part adds elements lacking in the fist part. The logical conclusion of this premise seems that although the scope of the TBT agreement is limited to products and **related** PPMs in pursuance of the first part of the definitions, the second part extends the application of the agreement to NPR-PPMs. The fact that the word "**related"** is mentioned in the first part, but not in the second, seems to lend support for those who argue for wide scope of application of the TBT agreement.

The other very important word, "**also**", in the second part of the definitions which is included only in the Uruguay round of negotiation[80] may also help to decide whether the TBT agreement covers NPR-PPMs. The literal interpretation of the word "**also**" in any statement indicates that there is an addition to what is provided in preceding sentence(s). The fact that the word "**also**" is included, coupled with the absence of the term "**related**", in the second part of the definitions enables to construct a stronger argument that NPR-PPMs are

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[78] Wendy, at note 57 above

[79] Erik, at note 68 above, pp. 73-74

[80] WTO Document. Negotiating History of the Coverage of the Agreement on Technical Barrier to Trade with Regard to Labeling Requirements, Voluntary Standards, Process and Production Methods Unrelated to the Final Products, G/TBT/W/11, 29 August 1995. available at http://www.docsonline.wto.org-G/TBT/W/11~WT/CTE/W/10 accessed on 25 march 2008.

with in the scope of the TBT agreement. For the reasons forwarded above, the writer of this essay concurs with the latter argument.

C. The Negotiating History

Before the Uruguay round of negotiation, the standard code clearly excluded PPMs, both related or unrelated, from its scope as the terms "Technical Regulation" and "Standard" were defined solely in terms of product characteristics. The term "Technical specification" was a common phrase used both in technical regulation and in standard. It was defined as:

> *A specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions. It may include, or deals exclusively with terminology, symbols, testing and test methods, packaging, marking, or labeling requirements as they apply to a product.*[81]

The definition of the term standard in the draft standard code, which the TBT sub-group agreed to be a basis for further work to the agreement, included labeling to the extent that it affected products rather than processes.[82] The United States proposed that "processes and production methods should be subject to the provisions of the Code when they are directly related to the characteristics of a product". This proposal was meant to halt circumvention of obligation under the code by the drafting of technical specifications in terms of processes and production methods rather than in terms of the characteristics or performance of products. The text was therefore carried forward into the Agreement as Article 14.25, which reads:

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[81] Agreement on Technical barrier to Trade, Reprinted in GATT B.I.S.D.(26th Supp.), at annex 1.

[82] WTO Document, at note 80 above.

> *The dispute settlement procedures set out above can be invoked in cases where a Party considers that obligations under this Agreement are being circumvented by the drafting of requirements in terms of processes and production methods rather than in terms of characteristics of products.*

Members differ in their understanding of the implication that the inclusion of article 14.25 has regarding the relationship between the code and PPMs.[83] Subsequent discussions give rise to an express inclusion of PPMs in the TBT agreement; article 14.25 was deleted and article 2.8 was included which established a preference for regulation based on product performance and characteristics than PPMs.

The successive discussion on the TBT agreement reflects that parties were not in agreement regarding the scope of the agreement to the NPR-PPMs. It was with all these successive debate that TBT agreement took its current shape. It is difficult to conclude that parties agreed the wider scope of PPMs or otherwise. This writer is convinced that the text of the definition on technical regulation and standards in the current TBT agreement is relatively clearer than the various documents on the negotiating history. This, in effect, means that examining the negotiating history cannot change the conclusion made under part IV.B above.

V. Why developing countries are against the TBT agreement's wider scope?

The fate of eco-labeling programs on NPR-PPMs remains controversial even a decade after the coming in to effect of the TBT agreement. Developing countries and industries are suspicious of any

[83] See WTO document at 80 above for more detail.

labeling program that targets NPR-PPMs.[84] A Moment contemplation on the strict discipline in the TBT agreement and the current trend in the WTO jurisprudence may give a momentum for developing countries to change their position towards the scope of the agreement to cover eco-labeling programs targeting NPR-PPMs. If the TBT agreement does not apply for NPR-PPMs eco-labeling program, the subject is more likely to fall under the general provisions of GATT.[85] It seems that developing countries firmly believe that the GATT rules totally prohibit trade measures based on PPMs. The ruling in the *Tuna/Dolphin* case lent support for this line of argument.[86] This, in effect, means that the WTO system is totally against measures based entirely on NPR-PPMs. However, The Appellate body in the *shrimp/turtle* case came up with a decision which contradicts the conventional view towards NPR-PPMs.[87] According to the appellate body's ruling, the United States' trade measure which targets the method of production or harvest was not *a priori* inconsistent with the GATT rules, although it found the measure inconsistent with the chapeau of article XX.[88] This fact can show that developing countries may not successfully contest measures targeted on NPR-PPMs any longer. At least they cannot be so sure, after Shrimp/Turtle case that the WTO system is totally against NPR-PPMs. The best that developing countries can do is to weigh up between the TBT agreement and the GATT provisions, as which system is less costly and less painful to them.

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[84] See the discussion under part I. supra to understand the reasons why developing countries are not comfortable with NPR-PPMs.

[85] Wendy, at note 57 above, page 76

[86] See also Robert Howse and Donald Regan, The Product/ Process Distinction: An Illusory Basis for Disciplining "Unilateralism" In trade Policy, *European Journal of International Law*, Vol. 11, No 2, 2000 pp. 249-50

[87] The conventional view being that the WTO rule does not support trade measures based on NPR-PPMs. See *Id*. for more detail.

[88] United States-Import restriction Shrimp and shrimp Products, Reports of the Appellate body, 12 October 1998, WT/DS58/AB/R, para. 121 & 176

Both the TBT agreement and the relevant GATT provisions provide strict requirements for members to take measures to protect the environment. Article XX of the GATT provides that measures shall be non- discriminatory, for non-protectionist purpose and less trade restrictive.[89] In relation to the TBT agreement, members must follow mandatory procedural requirements to prepare or adopt both technical regulations and standards.

Viewing the above attributes of Article XX of the GATT and the TBT agreement, one can conclude that members' right to adopt eco-labeling program based on NPR-PPMs may not be arbitrary whether the issue is with in the scope of either of the agreements. Compared to the Chapeau of article XX, the TBT agreement's procedural requirements are more stringent. I would argue that the fact that the scope of the TBT agreement extends to such eco-labeling programs is not more prejudicial to the interest of developing countries as compared to the fact that the current trend in the appellate body's decision may not denounce NPR-PPM measures as *a priori* WTO inconsistent.

The focus of the argument should be shifted to what policy objectives are legitimate to use eco-libeling under the TBT agreement. The following sub-topic will dwell on this issue with special emphasis on NPR-PPMs.

VI. Legitimatizing Eco-Labeling Under the TBT Agreement

One of the controversies in the heart of PPMs debate is the extent that a member may invoke the TBT agreement to legitimize its actions with respect to some technical regulations or standards. Members have diverse policy objectives that they want to achieve through their

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[89] General Agreement on Tariffs and Trade 1994, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994), on the Chapeau.

regulations. Some members set forth such rules based on single or multiple policy objectives, such as "consumers' right" to get information about the good they purchase. On the other hand, the TBT agreement, both as disciplining and legitimizing measures, set forth strict conditions that members must adhere to while preparing, adopting and implementing their technical regulations and standards. One such important condition is that technical regulations should not be more trade restrictive than necessary to fulfill legitimate objective taking account of the risks that non-fulfillment would create. Article 2.2 of the TBT agreement, provides a non-exhaustive list of legitimate objectives. These objectives are, *inter alia,* national security requirement; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.

Some of the policy objectives on which members base their technical regulation may be contested by other members as if not legitimate with in the meaning of article 2.2 of the TBT agreement. For example a technical regulation which requires labeling of the fact that the process production PPMs employed to manufacture a certain product is unfriendly to bio-diversity in the home country may be considered as illegitimate. The member state which prepares this regulation may invoke "consumers' right to information" about the product they purchase. Even if other aspects of the regulation are not to be refuted, exporting countries may challenge it based on extra-territoriality. The issue is whether it is with in the legitimate policy objective of a member to preserve "consumers' right to information" to demand trading partners to convey information about the environmental nature of PPMs which may not in any ways affect the regulating member.

The extra-territorial nature of the regulation alone may not probably succeed to obliterate "consumers' right to information" about the product they purchase, as arguing otherwise may have the same effect as NPR-PPMs are out side of the scope of the TBT agreement. It

would rather be wise to raise another question as to weather eco-labeling programme to inform consumers about the overall aspects of the product is less trade restrictive with in the meaning of article 2.2 of the TBT agreement. Some WTO members argue that labeling may not be least trade restrictive.[90] They proposed alternatives to eco-labeling such as toll free hotline and informational brochures.[91]

In some instances effects of some PPMs may extend beyond national territories, such as to affect global commons; shared natural resources or migratory species. In these cases an issue may arise whether it is within the legitimate policy objective of a member to prepare or adopt eco-labeling program with respect to these PPMs. The answer to this seems relatively straight forward than the issue of eco-labeling targeting PPMs the effect of which is confined with in the exporting country. It can be said that member states have legitimate interest to protect environment that may directly or indirectly affect them. Nevertheless, the issue of less trade restrictive measure remains arguable. The question is whether eco-labeling is the only less trade restrictive measure available under a given circumstance. It is my view that this question may not be answered in the abstract. Rather it may be resolved on a case by case basis.

With respect to the preparation and adoption of standards, the TBT agreement set forth guide lines that members must comply.[92] Members are required to comply with the code of good practice in the preparation, adaptation and implementation of their standards.[93] Members also have responsibility to influence local government and nongovernmental standardizing bodies within their territories to accept

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[90] Tom Rotherham, Labelling for Environmental Purposes: A review of the state of the debate in the World Trade Organization, 2003, P. 14.

[91] *Id*.

[92] See article 4 of the TBT agreement

[93] Id article 4.1

and comply with the code of good practice.[94] The code of good practice demand members to apply most favoured nation treatment and national treatment principles of GATT in their standards.[95] The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.[96]

The agreement also provides differential and favorable treatment for developing country members.[97] Members have obligation to take into account the special development, financial and trade needs of developing country members in the implementation of the Agreement.[98] In particular, members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take into account of the special development, financial and trade needs of developing country members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country members.[99]

All the above stated facts witness that the aim of the TBT agreement is more of disciplining measures that are thought to be technical barrier to trade. Perceiving the TBT agreement as more of disciplining than legitimizing unnecessary disguised measures may lead developing countries to withhold their firm position against the wider scope of the TBT agreement to apply NPR-PPMs.

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[94] Id.

[95] Agreement on Technical Barrier to trade, Annex 3(D)

[96] Id, Annex 3(F)

[97] See article 12 TBT agreement.

[98] Agreement on Technical Barrier to trade, article 12.1

[99] Id. article 12.3

VII. Conclusion

The trade-environment debate persists for long since the inception of the GATT 1947. One of the subjects that attracted heated debate is the issue of PPM. Both the GATT provisions and The TBT agreement deal with PPM, explicitly or by way of inference, for the purpose of protection of Environment. Eco-Labeling programs are among the various types of measures based on PPM. The ambiguity on the scope of application of the TBT agreement further contributed a lot for the debate to sustain. Moreover, the negotiation history of the agreement is far from being clear. A closer look at the definitions on technical regulation and standards, where the crux of the matter lies, suggests that the issue of non-product PPMs is included in the scope of the application of the TBT agreement. The issue of Eco-Labeling, as the TBT agreement applies to symbols, labeling etc, appear to be controversial as the requirement of "less trade restrictive" measure is central to the agreement. Whether or not a certain Eco-Labeling program is less trade restrictive is an important issue that cannot be answered in the abstract. A case by case analysis is mandatory to decide on the TBT compatibility or otherwise of a specific Eco-labeling program.

Developing countries will benefit if the TBT agreement is found to include both product related and unrelated process and production methods (PPM). The general GATT provisions will apply if the TBT agreement's scope does not include non-product related PPMs. The GATT articles, which provides exceptions for the purpose of environmental protection, do not require special treatment in favour of developing countries while the use of these exceptional provisions. The TBT agreement, however, requires members to take in to account of the special needs of developing countries, especially least developed country members, in the course of preparation, adaptation or implementation of technical requirements and standards.

Managers' Power, *Ultra vires* and Third Parties under Ethiopian Law: a Critique of *Ethiopian Mineral Development SC v GTT Trading*[*]

Hailegabriel G. Feyissa[**]

1. Synopsis of the Case

Ethiopian Mineral Development Share Company [hereinafter, EMD], a public enterprise converted into a share company for privatisation purposes, as per the Privatisation of Public Enterprises Proclamation[1] [hereinafter, the Privatization Proclamation], had a supply contract with GTT Trading. This contract was later cancelled unilaterally by the former. Subsequently, a dispute arose over the legality of the unilateral cancellation of the contract by EMD. As Art 10(4) (2) of the contract envisioned arbitral settlement of disputes arising out of the contract, GTT Trading proceeded to appoint arbitrators with a view to set arbitration in motion. Yet, EMD did not appoint arbitrators, an act which delayed the arbitration process. As a result, GTT Trading approached the Federal First Instance Court to appoint arbitrators on behalf of the dilatory EMD.[2]

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[*] *Ethiopian Minerals Development SC v GTT Trading,* Federal Cassation *Chilot*, Cassation File No. 30727 [Ginbot 19, 2000 EC].

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[1] A Proclamation to Provide for the Privatisation of Public Enterprises, Proclamation No. 146/1998, *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia*, 5th Year No. 26, p. 933 *et seq.* [hereinafter the Proclamation].

[2] As per Art 3344(1) of the Civil Code, a party to an arbitration agreement may demand judicial enforcement of the arbitration agreement if the other party refuses to perform the acts required for setting the arbitration in motion. And, courts who are called upon to enforce arbitration agreements may be required to appoint arbitrators on behalf of the dilatory party; see generally, Art 316 of the Civil Procedure Code along with Art 3334(1) of the Civil Code.

Before ruling on the issue, the Court invited EMD to submit answers to the allegations. In its answers, EMD argued that (1) the disputed matter is not arbitrable, and (2) even if it is arbitrable, EMD is not bound to arbitrate as the arbitration agreement was signed, on behalf of EMD, by the general manager, who did not have the power to bind EMD to arbitration. Not convinced by the arguments of EMD, the Federal First Instance Court ruled in favor of GTT Trading and ordered EMD to select its own arbitrators so that the arbitration could proceed.

On appeal, the Federal High Court upheld the decision of the Federal First Instance Court. Yet, EMD proceeded to the Federal Cassation *Chilot* claiming that the lower courts got the law wrong.

2. Decision of the Federal Cassation *Chilot*

The Cassation *Chilot* agreed with the appellant [EMD] that the two lower courts committed errors of law. Crucially, it maintained that the ruling of the lower courts was not compatible with the articles of association of the company and the Privatisation Proclamation. Also, it held that the general manager, who according to the articles of association of EMD has the power to perform general acts of management including signing contracts, cannot however agree to bind the company to arbitration in the absence of express authorisation to do so.

3. Critique

Currently, there are two types of share companies (SC) under Ethiopian law. The first category of share companies – and, the most common – contains those constituted under the rules of the 1960 Commercial Code. The other group of share companies are those constituted under the Privatisation Proclamation. All are basically

subject to the Commercial Code. However, a share company constituted under the Privatization Proclamation is not subject to certain rules contained in the Commercial Code. For instance, the rules that (1) a share company shall not be formed until at least a quarter of the par value of the shares has been paid up and deposited in a bank, (2) a share company may not be formed by less than five members, (3) a share company shall not remain in business for more than six months after its members are reduced in number below the legal minimum (i.e. five), (4) a share company may only be managed by members of the company, and (5) the directors shall deposit as security their registered shares as is fixed in the memorandum of association, do not apply to share companies formed under the Privatization Proclamation.[3]

In *Ethiopian Mineral Development SC v GTT Trading* an issue arose as to whether general managers of share companies formed under the Privatisation Proclamation could bind the company to arbitration in the absence of express authorisation to do so. As briefed above, the Federal Cassation *Chilot* appeared to hold that they cannot. The *Chilot* reasoned that holding otherwise would be incompatible with (1) the purposes of the law, in particular the Privatisation Proclamation, and (2) the articles of association of the company. In this short critique, the author argues against the holding of the Federal Cassation *Chilot*.

3.1 Do the Commercial Code's Rules on Company Managers Apply to Companies Created by the Ethiopian Privatisation Agency?

[3] See Art 5, the Proclamation *cum* Arts 307(1), 311, 312(1)(b), 315, 347(1) and 349 of Commercial Code.

The holding of the Court that general managers of share companies cannot bind their company to arbitration is apparently predicated on the theory that there are certain legislative purposes that would be distorted if the Commercial Code's rules regarding managers are unqualifiedly applied to share companies formed by the Ethiopian Privatisation Agency for eventual privatisation. Are there? The author doubts so.

The preamble of Privatisation Proclamation reveals that the main purpose of the law is to facilitate "the implementation of the ongoing privatisation program." A further look into Art 3 of the Proclamation indicates that the intention of the legislator is to encourage the involvement of the private sector in the economy of the state. And, it is hoped that the private sector would be encouraged to take on businesses hitherto run by the government if, for example, the would-be-privatised public enterprises are converted into share companies beforehand. Accordingly, the Ethiopian Privatisation Agency is empowered to convert would-be-privatised public enterprises to share companies, notwithstanding the rules contained in Arts 307(1), 311, 312(1) (b), 315, 347(1) and 349 of the Commercial Code.

The inapplicability of the rules contained in the above listed provisions of the Commercial Code to share companies formed under the Privatisation Proclamation is understandable when seen in light of the formation and management of share companies formed for the purpose of preparing public enterprises for privatization. As the shares of such companies are all held by the Government,[4] some rules in the

[4] *Ibid*, Art 5(2).

Commercial Code regarding formation are inappropriate.[5] Besides, some rules regarding shareholders' meetings – the most important method of decision-making in ordinary share companies – and directors are unsuitable[6] to companies formed as per the Privatisation Proclamation; and, hence, they are also deviated from. Otherwise, all other pertinent provisions of the Commercial Code apply *mutatis mutandis* to share companies formed through the conversion of public enterprises.[7]

Do the Commercial Code rules on company managers apply to share companies formed under the Privatisation Proclamation? The answer is certainly, yes. The applicability of the provisions of the Commercial Code (save those expressly declared inapplicable) is clearly spelt out in Art 5(4) (c) of the Privatisation Proclamation. Hence, Art 348(3) of the Commercial Code is applicable to share companies formed under the Privatisation Proclamation.

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[5] Obviously, the Commercial Code's rule that a share company may not be formed by less than five members is irrelevant to companies formed under the Privatisation Proclamation. Similarly, the formality requirement regarding the deposit of a portion of the par value of the shares (Art 312(1)(b), Commercial Code) is inconsistent with the simplification (in the formation of share companies) that the Privatisation Proclamation seeks to bring.

[6] One can, for instance, easily understand the unsuitability of the Commercial Code's rule that a company may only be managed by members (Art 347(1), Commercial Code) to share companies created by converting public enterprises.

[7] Art 5(4) (c), the Proclamation. Incidentally, it appears that the formation and management of share companies formed under the Privatisation Proclamation would be governed by the special rules set in the Proclamation only up until they are privatised.

The Federal Cassation *Chilot* was not apparently indifferent to the argument that Art 348 of the Commercial Code applies with regard to managers of companies formed under the Privatisation Proclamation. Yet, it appeared to maintain that the applicability of this provision would defeat the purpose of the Privatisation Proclamation. Though it is true that share companies formed under the Privatisation Proclamation are not always treated alike ordinary share companies, it is quite hard to comprehend why the *Chilot* held that the lower courts' interpretation of the law was incompatible with the purposes of the Privatisation Proclamation. A close reading of the Privatisation Proclamation does not reveal the existence of any purpose that would render the Commercial Code rules on company managers inapplicable. Rather, it indicates the intention of the legislator to subject mangers of share companies formed under the Privatisation Proclamation to the rules of the Commercial Code. Had the legislator had any intent otherwise, it would have expressly stated it. After all, it has clearly indicated which rules of the Commercial Code are applicable and which are not. In view of this, the *Chilot* should have simply decided the matter in light of the pertinent Commercial Code's rules on share company managers.

3.2 Do Managers Need Express Authorisation to Sign an Arbitration Agreement?

In the opinion of the Cassation *Chilot*, managers of share companies, in general, and share companies formed under the Privatisation Proclamation, in particular, need such authorisation. Crucially, the *Chilot* held that a provision in the articles of association

authorising the manager to generally sign contracts on behalf of the company is not enough to empower the manager to sign arbitration agreements on the company's behalf. However, a close reading of Art 348(3) *cum* Arts 34-35[8] of the Commercial Code seems to reveal otherwise.

As per Art 35(1) of the Commercial Code, the general manger is presumed to have the full power to carry out all acts of management connected with the exercise of the trade, including the power to sign contracts. The Amharic version of the Code is more express in empowering the manager. It states: "ከሦስተኛ ወገኖች ጋራ በሚገናኙ ጉዳዮች ሁሉ...ሥራ አስኪያጅ ከነ ጋደው ሥራ ጋር ነክነት ያላቸውን ማናቸውንም ግዴታዎች ለመፈረም...ሙሉ ሥልጣን እንዳለው ሆኖ ይቆጠራል።።" Two important inferences can be derived from the wording of this provision. First, mangers have the statutory power to sign *any* contracts connected with the exercise of company business. Second, they can do this notwithstanding any lack of express authorisation in the articles of association of the company, as the law regards signing contracts (connected with the exercise of the trade) as acts of management.

It is submitted that the provisions of Art 35(1) are broad enough to empower managers to sign any contracts ["ማናቸውንም ግዴታዎች"] related to the trade of the company, including arbitration agreements. The absence of express authorisation for signing arbitration agreements cannot be a convincing excuse to deny the statutorily recognised

[8] In line with the argument presented in the previous section, these provisions of the Commercial Code are applicable to share companies formed under the Privatisation Proclamation.

general power of managers to sign any contracts related to the trade of the company.

Moreover, it is unclear why the *Chilot* held that express authorisation to sign contracts is not enough to empower the manager to sign arbitration agreements on the company's behalf. It seems that the *Chilot* considers signing arbitration agreements to be like what, in company law, are known as "significant corporate actions." In almost every jurisdiction,[9] including Ethiopia, significant corporate actions are subject to shareholder authorisation.[10] For instance, managers need express authorisation to sell or mortgage the business or immovable property belonging to the company.[11] Similarly, mergers and similar organic changes normally demand shareholder authorisation.[12] Yet, binding the company to arbitrate hardly falls in the category of significant corporate actions. Signing business contracts that contain arbitral clauses is among the most ordinary tasks of company directors and/or managers. And, such acts do not deserve to be treated differently from signing contracts that do not contain arbitral clauses, unless the arbitral clause relates to matters with respect to which applicable laws and company constitutions prevent the company from dealing in.[13] Yet, the existence of such a prohibition is not mentioned

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[9] See, e.g., Kraakman R. et al., *the Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford: Oxford University Press, 2004), pp. 131 *et seq*.

[10] Art 235, Commercial Code.

[11] Art 35(2), Commercial Code.

[12] *Ibid,* Arts 544, 547 and 550.

[13] See, e.g., Redfern A. & Hunter M., *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 2004), at ¶ 3-27, for a comparative overview of the law on corporate capacity to arbitrate elsewhere. Also, see Edwards V., *Ultra vires and directors' authority – an EC perspective,* 16 *the Company Lawyer* 7 (1995), at

anywhere in the judgement of the *Chilot*. Besides, the matter with respect to which arbitration is sought relates to supplies contract – which obviously relates to ordinary trade of the company.

3.3 Could the Provisions in the Articles of Association Be Invoked Against Third Parties?

Managers are required to act in accordance with the company's constitution and any governing law. With regard to the case at hand, the general manger of EMD is authorised by law "to carry out all acts of management connected with the exercise of the trade, including the power to sign any contracts." And, the articles of association of the company reaffirm the power of the general manager to generally sign contracts on behalf of the company. In addition, there appears to be no restriction to this managerial power. Hence, as it has already been argued (1) signing an arbitration contract is an act of management that does not need express authorisation; and, (2) if at all it does, the provision in the company's articles of association are broad enough to empower the general manager to bind the company to arbitration. In this particular section, it is further argued that there was even room for the *Chilot* to rule in favor of GTT Trading irrespective of express restrictions on the power of the EMD manager to bind his company to arbitration.

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202 *et seq*. for an appraisal of a current trend to specify rules that restrict the power of companies to avoid *ultra vires* transactions (e.g. arbitration agreements entered on behalf of the company by unauthorised officers), so as to protect third parties in good faith.

In both common law and civil law jurisdictions, company law restricts the circumstances in which a company may avoid transactions on the ground that its organs exceeded their power in purporting to effect it on behalf of the company.[14] This is done to balance the conflict between the interests of members of the company that the company should not be bound by acts of its officers' undertaken outside the scope of authority determined by the company's memorandum and articles of association, on the one hand, and the interests of third parties that the obligation entered upon by the company should be valid, on the other.[15]

The position of Ethiopian law with regard to the validity or avoidance of company undertakings *vis-à-vis* outsiders is not indifferent to the interests of third parties. There are rules within the Commercial Code of Ethiopia that restrict the ability of companies to avoid liability for *ultra vires* acts.[16]

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[14] See, e.g., La Villa G., the Validity of Company Undertakings and the Limits of the EEC Harmonisation, 3 *Anglo-American Law Review* 346 (1974), at 347 *et seq.*; Bourne N., *Principles of Company Law* (Sydney: Cavendish Publishing Ltd., 3rd ed., 1998), at 155 *et seq.*; Schneeman A., *the Law of Corporations and Other Business Organisations* (Clifton Park: Thomson, 4th ed., 2007), at 197.

[15] La Villa, at 347. Note that laws in numerous states favor the interest of third parties over that of members of the company. Even more, some states have replaced the rule that "third parties have constructive notice of the contents of the company's constitutional document" with a rule that "the validity of a corporate transaction cannot be called into question by anything contained in a company's memorandum or articles of association." (See, e.g., Bourne N., 158; Griffin S., *Company Law: Fundamental Principles*, London: Longman, 3rd ed., 2000, at 113 *et seq.*;).

[16] See, e.g., Arts 289, 363, and 528, Commercial Code.

First, Art 35(1) of the Commercial Code, which applies to share companies formed either under the Commercial Code or the Privatisation Proclamation, reads: "*In his relations with third parties*, the manger *shall be deemed* to have full power to carry out all acts of management..." This provision provides a presumption in favor of third parties dealing with a company. And, it shifts the burden of proving restrictions, if any, in the general power of the manager on the party who alleges it. In the case at hand, the alleging party is EMD, which alleged its general manager's power to sign arbitration agreements was restricted. Yet, EMD did not sufficiently discharge its burden of proof in this regard. Instead of producing any company document or resolution that restricts the power of the general manager to sign arbitration contracts on behalf of the company, it simply argued that its manager needed special authorisation to sign an arbitration agreement. It is regrettable that the *Chilot* subscribed to this not-so-well-founded argument. Crucially, the *Chilot* should have inferred from various pertinent provisions of the Commercial Code that restrictions on the power of managers may only affect third parties when they are entered in the commercial register.[17]

[17] Art 121(g) of the Commercial Code, which applies to share company mangers, provides that the limitation on the powers of a manager to a management of a branch or agency does not affect third parties unless they have been entered in the commercial register. For stronger reason, any limitation on the power of managers to sign contracts must not affect third parties unless entered in the commercial register. Note also that Arts 289(2) and 528(2) reinforce this assertion, as they expressly provide any provisions restricting the power of mangers (of a general partnership and private limited companies, respectively) do not affect third parties, at least unless they have not been entered in the commercial register. Similarly, there is no reason why restrictions on the powers of share company managers

Second, we may further argue that even express restrictions set on the power of the manager may not be invoked against third parties. Art 363(3) of the Commercial Code provides that any restrictions (by memorandum or articles of association and resolutions of shareholders' meeting) on the power of company directors shall not affect third parties in good faith, notwithstanding the rule under Art 120(2) that third parties are deemed to have constructive notice of facts entered in the commercial register. Arguably, Art 363(3) governs *ultra vires* transactions effected by not only directors but also managers [managing directors].[18] Also, inferences made from [arguably] applicable provisions of the Commercial Code seem to imply that *ultra vires* company transactions remain valid *vis-à-vis* third parties, notwithstanding restrictions entered in the commercial register. For instance, Arts 36(2) provides that any restrictions on the power of a manger [excepting the one stated in Art 36 (1)] may not affect third parties notwithstanding their entrance in the commercial register.[19] A

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should be invoked against third parties where the restrictions are not entered in the commercial register.

[18] Assuming that the articles of association of the company specify that directors are responsible as managers of the company, any restrictions on the powers of such managing directors may not affect third parties acting in good faith (see Arts 363(2) *cum* 363(3), Commercial Code).

[19] Note, however, that Art 36 is not directly referred to by Art 348(3) of the Commercial Code and, hence, it is arguably inapplicable with regard to share company managers. Yet, it seems that the provisions of Art 36 are indirectly applicable. For one thing, Art 348(3) refers us to Art 121(g) whose provisions are similar with that of Art 36(1). For another, the rule contained in Art 36(2) is not expressly declared inapplicable by pertinent provisions of the Commercial Code, i.e., Art 348 *et seq*. Moreover, the same rule is spelt out in Art 528(2) of the

comparable provision is contained in Art 528(2) of the Commercial Code which applies to managers of private limited companies. Accordingly, provisions in the articles of association restricting the powers of share company managers may perhaps be ineffective against third parties in good faith, even if entered in the commercial register.

4. Conclusion

In *Ethiopian Mineral Development SC v GTT Trading*, the Federal Cassation *Chilot* set an unfortunate precedent that hampers the interest of third parties dealing with companies. It has done this in complete disregard of a range of statutory rules that work in favor of the validity of *ultra vires* corporate transactions effected by unauthorised mangers.

In a rather unconvincing fashion, the *Chilot* relied on the purposes – which it did not explain – of the Privatisation Proclamation to deny enforcement of an arbitration agreement. Ironically, there is no provision within the Proclamation that expressly or implicitly prohibits managers to bind their share companies to arbitration. Moreover, the holding of the *Chilot* that the manager needed express authorisation to bind the company to arbitration is incompatible with

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Commercial Code – which, of course, only applies to mangers of private limited companies. In the opinion of this writer, a similar rule must apply regarding managers of share companies. In particular, Art 36(2) must apply to mangers of share companies, or it would otherwise be a pointless provision, since pertinent provisions governing mangers of ordinary partnership, joint ventures, general partnership, limited partnership and private limited companies supersede and hence set aside the rules in Art 36(2) [see generally Arts 36, 121, 122, 242, 275, 289, 303, 528 of the Commercial Code]. And, the *Chilot* could also have relied on Art 36(2) to enforce the allegedly *ultra vires* transaction.

the statutory provisions regarding the power of company managers. Besides, the absence of any restriction on the power of the manger to sign contracts coupled with the rule that any restrictions in the power of share company managers may not be invoked against third parties in good faith should have dictated a decision favouring the validity of the arbitral clause contained in the supplies contract between EMD and GTT Trading.

Case Reports

Note

The following reports are cases decided by the Cassation Division of the Federal Supreme Court of Ethiopia. The purpose of publishing the cases is to make them known to the members of the legal profession. The case reports in a single issue of the *Journal* bring together interesting decisions on a give area of law. For this issue judgments on the subject matter of Family Law are chosen.

In selecting a particular judgment for publication the Editorial Committee do not want to imply that the judgment is definitive on any proposition or that it contains erroneous propositions. The cases are chosen for the interesting issue(s) of law they raise.

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መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍርድ

መዝገቡ ለሰበር ችሎቱ ሊቀርብ የቻለው የአሁኗ አመልካች የደቡብ ብ/ብሔ/ክ/መ ጠቅላይ ፍ/ቤት በሰጠው ውሳኔ ላይ ባቀረበችው የሰበር ቅሬታ ምክንያት ማሻሻያ ነው፡፡ የአሁኑ ተጠሪ በቦንጋ ዙሪያ ወረዳ ፍ/ቤት የሕፃን ቢንያም ክፍሌ ወላጅ አባት ስለሆኑኩ ፍ/ቤቱ ለሕፃኑ ሞግዚትና አስተዳዳሪ አድርጎ ይሾመኝ በማለት የቀረበውን አቤቱታ ፍ/ቤቱ መርምሮ የሕፃኑን ሞግዚትና አስተዳዳሪ አድርጎ ሾሞታል፡፡ የአሁኗ አመልካች በፍ/ሕ/ሥ/ሥ/ቁ. 358 መሠረት የአሁኑ ተጠሪ ሕፃኑን ከመመለዱ በስተቀር ምንም ዓይነት እርዳታ አላደረገም፤ ተንከባክቦም አላሳደገም በማለት የተቃወሙ አቤቱታ ያቀረበች ሲሆን ተጠሪ ሕፃኑ ከእናቱ የሚወርሰውን ሀብትና ንብረት ፍለጋ እንጂ ለሕፃኑ ጥቅም ብሎ ስላልሆነ ተጠሪ ሞግዚት እንዲሆን የተላለፈው ውሳኔ ተሽሮ በምትኩ እኔ አከስቱ ላለፉት 12 ዓመታት ተንከባክቤ ያሣደኩት ሞግዚት ሆኜ እንድሾም ይወስንልኝ በማለት ያቀረበችውን መቃወሚያ የወረዳው ፍ/ቤት ሞግዚቶ አባት ላለው ልጅ አመልካች የሞግዚትነት ጥያቄ ማቅረብ አትችልም በማለት መቃወሚያውን ወድቅ አድርጎ መዝገቡን ዘግቷል፡፡ ጉዳዩ በይግባኝ የቀረበለት የከፋ ዞን ከፍተኛ ፍ/ቤት የአሁኑ ተጠሪ ሕፃኑን እስከዛሬ ድረስ ሣያሣድግ አሁን እናቱ ስትሞት ላሣድግ ማለቱ ሀብትና ንብረት ፍለጋ ሊሆን እንደማይል ለመመት የሚዳግት ቢሆንም በደቡብ ብ/ብ/ሕ/ክ/መንግሥት የቤተሰብ ሕግ አዋጅ ቁጥር 75/96 አንቀጽ 235/1 ከወላጆቹ አንዱ በሞት የተለየው ሕፃን በሕይወት ያለው ወላጅ ሞግዚትና አስተዳዳሪ እንደሚሆንለት ስለሚደነግግ የወረዳው ፍ/ቤት የአመልካችን ጥያቄ ወድቅ ሚድረጉ ተገቢ ነው በማለት መልስ ሰጭን አስቀረቦ ሣያከራክር በፍ/ሕ/ሥ/ሥ/ቁ 337 መሠረት መዝገቡን ዘግቶታል፡፡ የከልሉ ጠቅላይ ፍ/ቤትም የተፈፀመ መሠረታዊ የሕግ ሥህተት የለም በማለት የአሁኗን አመለካች አቤቶታ ወድቅ አድርጎታል፡፡

የሰበር ቅሬታ ምክንያቱው የቀረበው ይህንን ውሳኔ ለማስለወጥ ሲሆን ይህ ችሎት መጋቢት 6 ቀን 1998 ዓ.ም. በዋለው ችሎት በዚህ ጉዳይ የሕፃን ቢንያም ክፍሌ አከስት የሆነችው የአሁኗ አመልካች ሞግዚት ለመሆን ያቀረበችውን ጥያቄ የሥር ፍ/ቤቱ ወድቅ ያደረገበትን የሕግ አግባብ ለመሞርመር ሲባል መዝገቡ ለሰበር እንዲቀርብ ትእዛዝ ሰጥቷል፡፡ መልስ ሰጭም መቦሪያ ደርሶት መልሱን ባለማቅረቡ የጽሁፍ መልስ የማቅረብ መቡቱ ታልፏል፡፡

ይህ ችሎት የሰበር ቅሬታ ሞሚልከቻወን ከሥር ፍ/ቤት ሠነዴ እና ከሕጉ ጋር በማናዘብ ሞርምሯል፡፡ የኢፌዲሪ ሕገ መንግሥት አንቀጽ 36 ስለሕፅናት መበት ደንግጓል፡፡ በዚሁ አንቀጽ በንዐስ አንቀጽ 2 መሠረት ሕፃናትን የሚሚለከቱ እርምጃዎች በሚወሰዱበት ጊዜ ሁሉ የመንግሥታዊ ወይም የበጎ አድራጎት ተቋማት እንዲሁም ፍርድ ቤቶችና የአስተዳደር ባለሥልጣናት ወይም የሕግ አውጩው አካላት የሕፅናትን ደህንነት በቀደምትነት እንዲያስቡ በአስገዳጅነት ተሚልከቷል፡፡ ከዚህ በተጨሜሪ ኢትዮጵያ ካፀደቀቻቸው የአለም አቀፍ ስምምነቶች መካከል የሕፅናትን መበት በሚሚለከት 1984 ዓ.ም. የፀደቀወና በሕገመንግሥቱ አንቀጽ 9(4) መሠረት የሀገሪቱ የሕግ አካል የሆነው የሕፃናት መበት ኮንቬንሽን አንቀጽ 3(1) መሠረት ፍርድ ቤቶችም ሆኑ ሌልች አካላት ሕፃናትን የሚሚለከቱ ጉዳዮች ላይ ውሣኔ ሲሰጡ የሕፃናቱን ጥቅምና ደህንነት በዋነኛነት መሚልከት እንደሚባቸው ተሚልክቷል፡፡ እንደሚታወቀው የልጆቻቸው መበትና ደህንነት በሚጠበቅ ረገድ ከወላጆቻቸው የበለጠ ቅድሚያ ሊሰጠው የሚባ ሰው ሊኖር ስለሚችል ሕግ አውጩው በጥሀ ደረጃ የተቀበለው በመሆኑ በሕይወት ያለው አባት ወይም እናት የሕፅን ልጁ ሞግዚት እና አስተዳዳሪ አድርጎ የሞሙአሠራር አገራችንን ጨሮሮ የበርካታ አገራት ተሞክሮ መሆኑ ይታወቃል፡፡ በዚህ መሠረት በፌዴራልም ሆነ በክልል የቤተሰብ ሕጎች ወስጥ ወላጆች ለሕፃናት ልጆቻቸው ሞግዚትና አስተዳዳሪ ስለመሆናቸው በግልጽ የተመሚከቱ ድንጋጌዎች ያሉ ቢሆንም እነዚህ ድንጋጌዎች ተፈፃሚት የሚኖራቸው ሞግዚት ወይም አስተዳዳሪ የተባለው ወላጅ በሕገ መንግሥቱ እንደተመሚከተዉ ለሕፃኑ ጥቅምና ደህንነት እስከሠሩ ጊዜ ድረስ ብቻ እንደሆነ ሊስተዋል የሚባ ጉዳይ ነው፡ በሌላ አነጋጋገር በአባት ወይም በእናት የሞግዚትነት ሽፋን የሕፃናትን መበትና ደህንነት የሚጉዱ ወይም ሊጎዱ የሚቹሉ ሥራዎች ሁሉ በዳኞች ቀሪ እና ፈራሽ ሊሆኑ የሚቹሉበት አግባብ በሕጉ የተለያዩ ክፍሎች ማኘቱ ይህንኑ የሕፃንን መበትና ጥቅም በዋነኛነት ለማከበር የተደነገገ ነው፡ በዚህ ረገድ በየትኛውም ደረጃ የሚኙ ዳኞች ሕፃናትን የሚሚለከቱ ጉደዮችን ሲሚሰሙ ከዝርዝር ሕጎቹ በተጨሜሪ በሕገመንግሥት አንቀጽ 36(2) በአስገዳጅነት የተቀመጠውን የሕፃናትን ደህንነት ከግምት ወስጥ ያስገባ ውሣኔ ላይ እንዲደርሱ የግል ይላል፡፡ ይህን በመተላለፍ የሚሰጡ ሞኛቸውም ውሣኔዎችና ልማዳዊ አመሠራሮች የሕገ መንግሥቱን ኃይለቃል የሚቃረኑ ስለሚሆኑ ፈራሽነታቸው የሚጠራጥር ነው፡

ወደያዝነው ጉዳይ ስናመራ የክልሉ ፍርድ ቤቶች የሕፃን ቢንያም ከፍሌን ሞግዚትነት አስመልክቶ የቀረበላቸውን ጉዳይ ሲሚያሙ ከሕጎቹ ግልጽ ድንጋጌዎች ባሻገር ሕገመንግሥቱ ያስቀመጠውን የሕፃኑን ደህንነትና ጥቅም የሚከበር ሚህ ተግባራዊ ሞድረግ ሲገባቸው በተለይ የአሁኑ ተጠሪ በዚህ ደረጃ የሞግዚትነት ጥያቄ ያነሣው ሕፃኑ ልጅ "ከእናቱ በወርስ ከሚገኘው ንብረትና ሀብት ላይ ተካፋይ ለመሆን አስቦ ስለመሆኑ" የከፍተኛው ፍ/ቤት በሠነዴው ላይ ገልጾ ሕፃኒን ከመለድ ውጭ

ከአስር ዓመታት በላይ ዞር ብሎ ያላየውን፣ ያልተንከባከበውን፣ ያላሣደገውን እንዲሁም ፍላጎቱን እንኳን ያልጠየቁትን ሕፃን በሰላምና በእንክብካቤ ካደገበት ቤት አስወጥቶ በአሁኑ ተጠሪ ሞግዚትነት ሥር ይተዳደር ተብሎ የተደረሰበት መጀምያሚያ የሕፃኑን ደህንነትና ጥቅም ያላገናዘበ ነው፡፡ የሥር ፍ/ቤቶች ከሕጎቹ ግልጽ ቃላት ባሻገር የሕጎቹን አላማኝ መንፈስ በቅጡ ሣያጤኑ የአንቀጾቹን ግርድፍ ቃላት ብቻ በመመልድ ሕገመንግሥቱን በሚጋፋና የሕፃኑን መብትና ደህንነት በሚጻጻ አኳኋን የሰጡት የሞግዚትነት ውሣኔ መሠረታዊ የሕግ ስህተት ያለበት ነው ብለናል፡፡

ውሣኔ

- የደ/ብ/ብ/ሕ/ክ/መ ከፋ ዞን የቦንጋ ዙሪያ ወረዳ ፍ/ቤት ታህሣሥ 17 ቀን 1998 ዓ.ም. በመዝገብ ቁጥር 29/98 እንዲሁም የክልሉ ከፍተኛ ፍ/ቤት በየካቲት 21 ቀን 1998 ዓ.ም. በመ/ቁ. 01001 በተጨማሪ የክልሉ ጠቅላይ ፍ/ቤት መጋቢት 1 ቀን 1998 ዓ.ም. በመ/ቁ14275 የሰጡዋቸው ወልኔዎችና ትእዛዞች ተሽረዋል፤
- የአሀኗ አመልካች ወ/ሪት ፀዳለ ደምሴ የሕፃን ቢንያም ክፍሌ ሞግዚትና አስተዳዳሪ ሆና ሕፃኑ ከሟች ወላጅ እናቱ ከወ/ሮ ፋንታዬ ኃ/ሚክኤል የሚገኘውን ሜዥቸውም የወሮስ ሀብት ተረክቦ ሕፃኑን በመልካም አስተዳደግና ደህንነት ተንከባክባ እንድታሣድገው ተሸመልች፡፡
- መዝገቡ ያለቀለት ስለሆነ ወደ መዝገብ ቤት ይመለስ፡፡

የሚኒበብ የአምስት ዳኞች ፊርማ አለበት

የሰ/መ/ቁ/ 23021
ሐምሌ 12 ቀን 1999 ዓ.ም.

ዳኞች፡ – መንበረፀሐይ ታደሰ
አሰግድ ጋሻው
ተሻገር ገ/ሥላሴ
አብድራሂም አህመድ
ታፈሰ ይርጋ

አመልካች፡ – ወ/ሮ አበባወርቅ ጌታነህ – ጠበቃ አቶምላለህ ተፈሪ
ተጠሪ፡ – ወ/ሮ ዋጋዬ ኃይሌ – አልቀረበም፡፡
መዝገቡ ተመርምሮ ቀጥሎ የተመለከተው ፍርድ ሠጥተናል፡፡

ፍርድ

ይህ የሰበር አቤቱታ ሊቀርብ የቻለው አመልካች የሟች አቶ አሚረ ይልማ ሚስት ናቸው ተብሎ በፌዴራል ከፍተኛ ፍ/ቤት የተሰጠው ውሣኔ በፌዴራል ጠ/ፍ/ቤት ተሽሮ ሚስት አይደሉም ተብሎ በመሰኑ ነው፡፡

ጉዳዩ የተጀመረው በፌዴራል መ/ደ/ፍ/ቤት ሲሆን የአሁን አመልካች የሆኑት ባቀረቡት አቤቶታ የሟች አቶ አሚረ ይልማ ሚስትነቴ ይረጋገጥልኝ በማለት አመልከተው ፍ/ቤቱም የአመልካችን ምስክሮች ሰምቶ በሰኔ 24 ቀን 1995 ዓ.ም. በዋለው ችሎት አመልካች የሟች አቶ አሚረ ይልማ ሚስት ናቸው በማለት ውሣኔ የሰጠ ሲሆን ከዚህ በኋላም የአሁን ተጠሪ ይህንኑ ውሣኔ በመቃወም በሞግዚት አድራጊያቸው በወጣት ወንድወሰን አሚረ ስም አቤቱታ አቅርበዋል፡፡

የአቤቱታውም ይዘት በአመልካች ወ/ሮ አበባወርቅ ጌትነህና በሟች አቶ አሚረ ይልማ የነበረው ጋብቻ የቤተዘመድ ጉባኤ በሰጠው ውሣኔ እና ፍ/ቤቱም በሐምሌ 23 ቀን 1976 ዓ.ም. በሰጠው ትዕዛዝ መፍረሱ የተረጋገጠ ስለሆነና አመልካቿም ከዚህ ጊዜ በኋላ ከሟች ጋር በትዳር ያልኖሩ መሆናቸው ሟች ነዋሪ ከሆኑበት ቀበሌ ለባንክ በተፃፈ ደብዳቤ የተገለጸ በመሆኑ አመልካች ሚስት ሳይሆኑ ሚስት ናቸው ተብሎ የተሰጠው ውሣኔ ሞግዚት የሆነከለትን የወጣት ወንድወሰን አሚረን መቦት የሚካ በመሆኑ ፍ/ቤቱ የሰጠው ውሣኔ ይሰረዝልኝ የሚል ነው፡፡

የተጠሪ መቃወሚያም ለአመልካች ደርሶ በሰጡት ሚስስ ከሟች ጋር የነበራቸው ጋብቻ ፈርሶ እንደነበር ሳይክዱ ከፍቺው በኋላ ንብረት ሳይከፋፈሉ ትዳራቸውን ቀጥለው እንደነበር ከፍቺው በኋላ በደንቡ መሠረት ጋብቻ አልተፈጸመም ቢባል እንኳ ጋብቻ መኖሩን በሀኔታ ሚረዳት እንደሚሆል የተሻሻለው የቤተሰብ ሕግ የሚቅድ በመሆኑ ከፍቺ በኋላም እንደ ባልና ሚስት መኖራቸውን በምስክሮች ሚረዳት ስለሚሆል ከፍቺ በኋላ ጋብቻ አልተፈጸመም በማለት በተቃዋሚ የቀረበውን መቃወሚያ ወደቅ በማድረግ ፍ/ቤቱ ውሣኔውን እንዲያፀናው በማለት ተከራክሯል፡፡

የፌዴራል መጀመሪያ ደረጃ ፍ/ቤትም በግራ ቀኙ በኩል የተቆጡትን ምስክሮችን ከሰማ በኋላ በአመልካችና በሟች መካከል የትዳር ሀኔታ ስለመኖሩ በአመልካች ምስክሮች እንዳልተረጋገጠ በመሠኔው ላይ አስፍሮ ይልቁንም በአመልካች ልጅ በአቶ ዮናስ አሚረ ጥያቄ አመልካች ጋር የነበራቸው ትዳር በፍቺ ከፈረስ በኋላ እስከ እለተሞቷቸው ትዳር እንዳልነበራቸው የሟቿንነዝብ ስለሆነ ጋብቻ

ስለመጀመሩ የትዳር ሁኔታ መኖርን በሚረዳት ፍ/ቤቱ የሕግ ግምት ሊወሰድ እንደሚችል በቤተሰብ ሕግ ቁጥር 97/1/ ላይ የተደነገገ ሲሆን ይህ ግምት በበቂ ሚረጃ ሊፈርስ እንደሚችል በዚሁ አንቀጽ 97/2/ ላይ ስለተመለከተና በአመልካችና በሟች መካከል የትዳር ሁኔታ ስለመኖሩ አስቀድመ የተሰጠው ውሣኔ በበቂ ሚረጃ የተስተባበለ ስለሆነ ቀደም ሲል አመልካች የሟች ሚስት ናቸው ተብሎ የተሰጠው ውሣኔ ተሰርዟል በማለት ፍርድ ሰጥቷል፡፡

ጉዳዩን በይግባኝ የተመለከተውም የፌደራል ከፍተኛ ፍ/ቤት ግራ ቀኙን አከራክሮ ይግባኝ ባይና /አመልካች/ ሟች አሚረ ይልማ በ1966 ዓ.ም. ተጋቡተው በ1976 ዓ.ም. ጋብቻው ከፈረሰ በኋላ ለአራት ወራት ተለያይተው ኖረው ሚስስ ሰጪ ታርቀው እንደነበርና ጋብቻው ፈርሶ ከነበረ በኋላም የንብረት ክፍፍል ተደርጎ እንዳልነበረ በአመልካች ምስክሮች ተረጋግጧል በማለት በውሣኔው ላይ አስፍሮ አመልካችና ሟች መታረቃቸው ከተረጋገጠ የሟረወን ውጪ በተመለከተ የተፋቱ ባልና ሚስት ግንኙነታቸወን ለመጀመስ ቢፈልጉ እንደገና መጋባት አለባቸው ወይንስ በእርቅ ስምማት ወደነበሩበት ይመለሳሉ የሚለወን የቤተሰብ ሕጉ ምላሽ እንደሚሰጥና ነገር ግን በሃገራችን ባሕል መሠረት የተፋቱ ባልና ሚስት ከፍቺ በኋላ ሲታረቁ ድጋሚ ጋብቻ ሲፈጽሙ እንደሚስተዋሉና የእርቅ ስምማቱ በእራሱ እንደባልና ሚስት ለመኖር ሃሣብ ያላቸው መሆኑን የሚያስገነዝብ ሲሆን በተመሳሳይም አመልካችና ሟች በፍቺ ከተለያዩ በኋላ መታረቃቸወን እንደ ባልና ሚስት ሆነው በጋብቻ የመኖር ውጪ ያለው መሆኑን የሚያስገነዝብ ከመሆኑም በላይ ከፍቺወም በኋላ ንብረት ያልተከፋፈሉ ስለሆነና የፌ/መ/ደ/ፍ/ቤት ጋብቻ የለም በማለት የሰጠው ውሣኔ በአግባቡ አይደለም በማለት ሽሯል፡፡

በዚሁ ውሣኔ ቅር የተሰኙትም የአሁን ተጠሪ የይግባኝ ቅሬታቸወን ለፌደራል ጠቅላይ ፍ/ቤት አቅርበው ፍ/ቤቱም በበኩሉ ግራ ቀኙን አከራክሮ አመልካች ከሟች ጋር የነበራቸው ጋብቻ በፍቺ ከፈረሰ በኋላ የሟች ሚስት ነበርኩ የሚሉት አዲስ ጋብቻ ከሟች ጋር ፈጽመው ወይንም ጋብቻው ከፈረሰ በኋላ ታርቀን አብረን ኖረናል በማለት ስለሆነ መታረቅም ሆነ አብሮ መኖር ጋብቻን እንደሚጸጸም አያስቆጥርም የሚል ትችት አስፍሮ የፌደራል ከፍተኛ ፍ/ቤት ውሣኔ በመሻር አመልካች የሟች ሚስት አይደሉም በማለት ውሣኔ ሠጥቷል፡፡

የሰበር አቤቱታም ለዚህ ሰበር ችሎት ሊቀርብ የቻለው ይህንኑ ውሣኔ በመቃወም ሲሆን ችሎቱ የቀረበወን አቤቱታ ሚርሚር ጋብቻው የፈረሰው በፍቺ ወይንስ በሞት የሚለው ነጥብ ለሰበር ችሎት ቀርቦ መባራት እንደሚባው በማሙ ተጠሪን በመጥራት ግራ ቀኙን አከራክሯል፡፡ ተጠሪም በበኩላቸው የፌደራል ጠ/ፍ/ቤት ውሣኔ የሚቀፍ አለመሆኑን በማብዘር አቤቱታው ወደቅ ሊደረግ ይገባል በማለት ተከራክረዋል፡፡

በአጠቃላይ የክርክሩ ይዘት ከላይ የተጠቀሰው ሲሆን ምላሽ ሰጭነት የሚባው የሕግ ነጥብ በአመልካችና በሟች አቶ አሚር ይልማ መካከል የነበረው ጋብቻ በ1976 ዓ.ም. በፍቺ ከፈረሰ በኋላ ሟች እስከሞቱበት 1995 ዓ.ም. ድረስ በመካከላቸው በድጋሚ ጋብቻ ተፈጥሯል ወይንስ አልተፈጠረም የሚለው በመሆኑ ይህንኑ የሕግ ጭብጥ በመያዝ አቤቱታ እንደሚከተለው ተመርምሯል፡፡

አመልካችና ሟች አቶ አሚር ይልማ በ1966 ዓ.ም. ተጋብተው በ1976 ዓ.ም. ጋብቻ በፍቺ የፈረሰ መሆኑን ግራ ቀኙ አልተካካዳበትም፡ በመካከላቸው የነበረው ጋብቻ በ1976 ዓ.ም. በፍቺ ከፈረሰ በኋላ ብዙም ሳይቆዩ ከአራት ወራት በኋላ ተመልሰው ታርቀው አብረው መኖር እንደጀመሩ በፌዴራል መ/ደ/ፍ/ቤት ክርክር ሲደርግ በአመልካች ምስክሮች ተረጋግጧል፡፡

በተሻሻለው የቤተሰብ ሕግ አንቀጽ 94 መሠረት ጋብቻ መኖሩን ማረጋት የሚሆለው በጋብቻ የምስክር ወረቀት መሆኑ የተመላከተ ሲሆን የምስክር ወረቀቱ በሌለ ጊዜ የትዳር ሁኔታ መኖርን በማረጋት ጋብቻ እንዳለ ሚረጋገጥ እንደሚሆል በዚሁ የቤተሰብ ሕግ አንቀጽ 96 እና 97 ላይ ተመልክቷል፡፡

በሌላ በኩልም የተፋቱ ባልና ሚስት በሚኖረቁበት ጊዜ በድጋሚ ጋብቻ ሜጸጸም የሚባቸው ስለማሆኑ በቤተሰብ ሕጉ ላይ አልተመላከተም፡ በእርግጥ ጋብቻ በፍቺ ከፈረሰ በኋላ በድጋሚ መጋባት አዲስ ጋብቻ ከመመሥረት የተለየ ስለሜሆን ድጋሚ ጋብቻ መመሥረትን በተመላከተ በሕግ መደንገግ አስፈላጊ ሊሆን አይችልም የሚል ክርክር ሊያስነሳ እንደሚችል ቢታመንም በተያዘው ጉዳይ አመልካችና ሟች ከ10 ዓመት የጋብቻ ጊዜ በኋላ በ1976 ዓ.ም. ተፋተው ብዙም ሳይቆይ ከአራት ወራት በኋላ ሟች አስከሞቱበት 1995 ዓ.ም. ድረስ አብረው እንደኖሩ በአመልካች ምስክሮች የተነገረው ሲታይ እራሳቸውን እንደ ባልና ሚስት እንደሜቆጥሩና ጎብረተሰቡም ባልና ሚስት ናቸው በሚለት የተቀበላቸው መሆኑን የሚሳይና ይህም በቤተሰብ ሕግ አንቀጽ 96 መሠረት በመካከላቸው የትዳር ሁኔታ መኖሩን የሚስገነዝብ ሆኖ ተገኝቷል፡፡

በመካከላቸው የትዳር ሁኔታ መኖሩ ከተረጋገጠ ደግሞ ጋብቻ ሜጸጸማ በአንቀጽ 97/1/ መሠረት የሕግ ግምት (Legal presumption) መሰድ የሚሆል ሲሆን ይህንን የሕግ ግምት ማፍረስ የሚሆለው በአንቀጽ 97/2/ መሠረት ይህንን በሚደው ወገን አስተማማኝ ማረጃ በማቅረብ ጊዜ ነው፡፡

በዚህ ረገድ በፌ/መ/ደ/ፍ/ቤት ክርክር ሲደረግ አመልካችና ሟች አቶ አሚር ይልማ ሲኖሩበት ከነበረው የቀበሌ አስተዳደር ለኢትዮጵያ ንግድ ባንክ በተፃፈ ደብዳቤ ጋብቻው በፍቺ ከፈረሰ በኋላ ሟች ትዳር ያልነበራቸው መሆኑ የተገለጸ ቢሆንም ይህ ማረጃ ሕጉ እንደሚከይቀው የሕግ ግምቱን ለማፍረስ አስተማማኝ ማረጃ ሆኖ አልተገኘም፡

ውሣኔ

1. የፌዴራል ጠቅላይ ፍ/ቤት በመ/ቁ 21648 በታህሳስ 25 ቀን 1998 ዓ.ም. የሰጠው ውሣኔ መሠረታዊ የሕግ ስህተት ያለበት ሆኖ ስለተገኘ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 348/1/ መሠረት በሞር የፌ/ከ/ፍ/ቤት በመ/ቁ. 32637 በሐምሌ 28 ቀን 1997 የሰጠው ውሣኔ ጸንቷል፡፡
2. በአሚልካች ወ/ሮ አበባወርቅ ጊታነህ በሟች አቶ አሚረ ይልማ መካከል የትዳር ሁኔታ መኖሩ ስለተረጋገጠ አሚልካች የሟች ሚስት ናቸው ተብሎ ተወስኗል፡፡
3. ግራ ቀኙ ወጫቸው ኪሣራ ይቻቻሉ፡፡
4. መዝገቡ ተዘግቷል፡፡

የሚኒበብ የአምስት ዳኞች ፊርማ አለበት፡፡

ነ/ዓ

የሰ/መ/ቁ/ 24625

ጥቅምት 28 ቀን 2000 ዓ.ም.

ዳኞች፡ – አብዲልቃድር መሐመድ

ሐሰን ወልዱ

ተገኔ ጌታነህ

ተሻገር ገ/ሥላሴ

ብርሃኑ አመጣው

አመልካች፡ – ወ/ሮ ሳድያ አሕመድ ቀረቡ።

ተጠሪ፡ – ወ/ሮ ራሕማ ዓሊ – ቀረበ።

መዝገቡን መርምረን የተመከተለው ፍርድ ሰጥተናል።

ፍርድ

አቤቱታው የንብረት ይገባኛል ጥያቄን መሻሻ ያደረገ ክርክር የሚመለከት ነው። ክርክሩ በተጀመረበት የወረዳ ፍ/ቤት ከሣሽ የነበረችው የአሁንዋ አመልካች በተጠሪ ላይ ክስ የመሠረተችው ተከሣሽ የሟች ባለቤቴ ሙሉ ሱሌይማን ንብረት የሆነ ቤት ይዛ ስለምትገኝ የእኔንና ከሟች የወለደኩትን ልጄን ድርሻ ታካፍለን በማለት ነው። ክሱ የቀረበለት ፍ/ቤት የሁለቱንም ወገኖች ክርክር ከሰማ በኋላ፣ ከሣሽና ተከሳሽ የሟች ሚስቶች ናቸው። በመሆኑም የቤቱን ግማሽ ሁለቱ ይካፈሉ። ግማሹን ደግሞ ለልጇ ይሁን በማለት ሲወስን፣ በዚህ ሥሄ ላይ ይግባኝ የቀረበለት የከፍተኛ ፍ/ቤት ግን ቤቱ የተገዛው ሟች እና ተጠሪ ባፈሩት ገንዘብ ነው የሚል ምክንያት በማጠት አመልካች ከቤቱ ልትካፈል አይገባም ሲል ወስኖአል። የመጨረሻውን ይግባኝ የሰሙ የአሚራ ብሔራዊ ክልላዊ መንግሥት ጠ/ፍ/ቤትም የከፍተኛው ፍ/ቤት የሰጠውን ሥሄ አጽንቶአል። አቤቱታው የቀረበው በዚህ ላይ ነው።

እኛም አመልካች ግንቦት 2 ቀን 1998 ዓ.ም. በፃፈችው ማመልከቻ ያቀረበችውን አቤቱታ መሻሻ በሞረግ ተጠሪን አስቀርበን ክርክሩን ሰምተናል። አቤቱታ በሰበር ችሎት እንዲታይ የተወሰነው አከራካሪው ቤት አመልካችና ሙሉ ሱሌይማን በጋብቻ ወስጥ በነበሩበት ጊዜ የተገዛ ሆኖ ሳለ፣ አመልካችና ሙሉ ሱሌይማን አብረው አልኖሩም፡ ቤቱ የተገዛበት ሙሉ ሱሌይማን ከተጠሪ ጋር በነበረበት ጊዜ የተገኘ ነው በሚል ምክንያት አመልካች ከቤቱ ድርሻ የላትም የማሉን አግባብነት ሞምሮ መወሰን አስፈላጊ ሆኖ በማገኙቱ ነው። በመሆኑም ይህንኑ ነጥብ አቤቱታ ከቀረበበት ሥሄ እና ከሕጉ ጋር አገናዝበን ሞርምረናል።

ከላይ እንደተመለከተው አከራካሪው ቤት የተሠራው በአመልካች እና በሟች ሙሉ ሱሌይማን መካከል ተመሥርቶ የነበረው ጋብቻ ፀንቶ በነበረበት ወቅት ነው። በተጋቢዎቹ መካከል የተመሠረተው ጋብቻ ፀንቶ ባለበት ወቅት የተገኘ ንብረት የተጋቢዎች የጋራ ሃብት ነው ተብሎ የሕግ ግምት

እንደሚወሰድበት በሕግ ተደንግጓል፡፡ ይህ የሕግ ግምት ቀሪ ሟርረግ የሚሾለው አንደኛዉ ተጋቢ ንብረቱ የግል ሀብቱ እንደሆነ ካስረዳ ብቻ ነው፡፡ በተያዘው ጉዳይ እንደሚታየው አከራካሪው ቤት የሟቹ የግል ንብረት ስለመሆኑ አልተረጋገጠም፡፡ ቤቱ የሟቹ የግል ንብረት መሆኑ በሕግ አግባብ ካልተረጋገጠ እና ከፍ ሰል የተጠቀሰዉን የሕግ ግምት ቀሪ የሟደርግ የተለየ ሁኔታ እስከሌለ ድረስ አሟልካች በቤቱ ላይ መቦት የላትም ለሟሊት የሟልበት ሕጋዊ ምክንያት አይኖርም፡፡ ሕጋዊ ምክንያት ሳይኖር አሟልካችን ከንብረቱ እንዳትካፈል ሟርረግ ደግሞ መሠረታዊ የሕግ ስህተት ሟጸም ነው የሚነው፡፡ ስለዚህም የሚከተለዉን ውሣኔ ሰጥተናል፡፡

ውሣኔ

1. በአሟራ ብ/ክ/መ/የሰሜን ጎንደር ዞን ከፍተኛ ፍ/ቤት በመ/ቁ. ዐ7983 ታህሣሥ 22 ቀን 1997 ዓ.ም. የሰጠው ውሣኔ እና የአሟራ ብ/ክ/መ/ጠ/ፍ/ቤት በመ/ቁ. ዐ5615 ሟጋቢት 7 ቀን 1998 ዓ.ም. የሰጠው ውሣኔ በፍ/ብ/ሥ/ሥ/ሕግ/ቁ. 348/1/ መሠረት ተሽረዋል፡፡
2. በአሟራ ብ/ክ/መ/ የደባርቅ ወረዳ ፍ/ቤት የሰጠው ውሣኔ ፀንቶአል፡፡ በሚኙም የንብረቱ ክፍፍል በዚሁ ወረዳ ፍ/ቤት ውሣኔ መሠረት ይፈጸም ብለናል፡፡

ወጪ ኪሣራ ግራ ቀኙ ወገኖች የየራሳቸው ይቻሉ፡፡

መዝገቡ ይመለስ፡፡

የሚነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

ነ/ዓ